

**REPORTABLE** (50)

**ZIMBABWE MANPOWER DEVELOPMENT FUND**  
v  
**(1) ZIMBABWE JIANGSU INTERNATIONAL COMPANY (PRIVATE)**  
**LIMITED**  
**(2) CLASSIQUE PROJECT MANAGEMENT (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**MAVANGIRA JA, MAKONI JA & CHIWESHE JA**  
**HARARE: 1 FEBRUARY 2024 & 31 MAY 2024**

*E. Mubaiwa* for the appellant

*T. Mpofo* for the first respondent

No appearance for the second respondent

**MAVANGIRA JA:**

1. This is an appeal against the whole composite judgment of the High Court of Zimbabwe dated 31 October 2023 in which the court *a quo* dismissed an application for the setting aside of an arbitral award, under HCHC328/23 and granted an application for the registration of the same award, under HCHC 188/23.

**THE PARTIES**

2. The appellant is a Fund established in terms of the Manpower Planning and Development Act, [Chapter 28:02]. It is administered by the Zimbabwe Manpower Development Board which is also established by the same Act. In terms of the said Act, the Minister of Higher Education

may issue policy directions with regard to the functions of the Board in its administration of the Fund.

3. The first respondent is a company duly incorporated in terms of the laws of Zimbabwe.
4. The second respondent is also a company duly incorporated in terms of the laws of Zimbabwe. It acted as project manager in the contract between the appellant and the first respondent. No order was sought or granted against it.

### **FACTUAL BACKGROUND**

5. The appellant engaged the first respondent through a tender process, to construct a nine-storey building in Harare, being the appellant's head office. The tender was awarded to the first respondent on 1 November 2000 under TBR 1452 of 04/10/2000 by the State Procurement Board in the sum of ZW \$497,318,100.00. The project was scheduled to be completed on 31 August 2002 but was suspended on 29 April 2005 as the appellant failed to make payments in time. This was due to the country experiencing hyperinflation which incapacitated the first respondent from continuing with the project to its completion.
6. Between 2005 and 2009, the country went through four re-denominations of its currency. The depreciation of the Zimbabwe Dollar eventually led to the introduction of the multi-currency system in 2009. Subsequent to the introduction of the multi-currency system, the appellant and the first respondent sought to re-price the outstanding works in United States Dollars. Approval for the repricing of the works was obtained under PBR 0661 of 14/06/2012 as amendment to TBR 1452 of 04/10/2000, in the approved sum of US \$19,550,560.14.

7. On or about 2 July 2012, the appellant and the first respondent entered into an “Agreement and Schedule of Conditions of Building Contract” (the Building Contract”) in terms of which the first respondent agreed to complete the outstanding works on the appellant’s headquarters. The first respondent was obliged to complete the works within (36) thirty six weeks. The building contract provided that the appellant would pay to the first respondent the sum of US\$19,550.560.14 for completion of the outstanding works. The first respondent was further entitled to obtain payment for re-measurement of work done, increased cost, variations and any other legitimate claim by it.
8. A firm of architects was appointed in terms of the Building Contract. The bills of quantities were also agreed to be prepared by a specified firm of Quantity Surveyors. The second respondent was appointed to be the project managers. A clause in the Building Contract also provided that for payment of the interim certificates, stated in the appendix, interim valuations would be prepared by the quantity surveyors and the architect would prepare the payment certificates based on the valuations. The first respondent was entitled to request for a payment certificate in terms of the valuation and the architect was obliged to issue the payment certificate within (7) seven days of receipt of the application by the first respondent.
9. The parties also agreed that there would be a Retention Fund which would be equivalent to 10 percent of the total amount due to the first respondent. The funds were to be deposited into a joint bank account to be held in the name of the first respondent and the appellant. The first respondent was entitled to receive a payment of one half of the retention fund including the interest accumulated upon completion of the works. The other half of the Retention Fund and

accrued interest was to be paid to the first respondent upon issuance of the Architect's final certificate. Allegedly, the appellant delayed in opening the Retention Fund.

10. Clause 25 of the Building Contract provided that in the event of a dispute between the first respondent and the appellant, such dispute would be determined by the architect. If either of the parties was not happy with the architect's decision, they were entitled to refer the dispute to arbitration.

11. In August 2014, a dispute arose between the appellant and the architect. Thereafter, the second respondent took over the role of the architect with regards to the issue of payment certificates, while the quantity surveyors continued to issue the valuations.

12. Disputes concerning the payment of certain sums of money arose between the parties. Between January 2016 and January 2022, the parties were engaged in discussions and mediation in an attempt to resolve the dispute. The mediation process was presided over by the second respondent. One of the disputes related to the rate of conversion of the amount due to the first respondent. The appellant insisted that it was entitled to pay the amount due in Zimbabwe dollars converted from the United States dollar at a rate of 1 is to 1. The first respondent's position, on the other hand, was that the certificate was raised in 2021 and was unaffected by the provisions of Statutory Instrument 33 of 2019.

13. The mediation not having yielded a resolution, the dispute was placed before an arbitrator who captured the parties' respective positions as follows:

“8. We will shortly be studying and analyzing both the claims made by the Claimant and the respondent’s Statements of Defence and Reconviction (Counterclaim) but a summary of the issues follows. The Claimant is alleging that the respondent has failed to pay the Claimant interest on due payments, failed to pay amounts due on Interim Payment Certificates and the respondent has failed to pay interest accruing from the Retention Fund and also interest on late payments as a result of the respondent opening the Retention Fund late. The respondent is counterclaiming by stating that Interim Payment Certificate No. 20 in ZWL is a legal Nullity. The respondent goes on to state that Interim Payment Certificate be set aside in terms of US Dollars and that the Respondent be directed to pay Interim Payment Certificate No. 20 in ZWL as provided by Statutory Instruments.” (*sic*)

14. It was the appellant’s contention that Interim Payment Certificate No. 20, in ZWL, was issued by the second respondent on 13 December 2021 in United States Dollars in violation of Statutory Instrument 142 of 2019 which came into effect on 24 June 2019, declaring that with effect from that date the United States Dollar would cease to be legal tender alongside the Zimbabwe Dollar, for any transaction in Zimbabwe. It further prescribed the Zimbabwe Dollar as the sole legal tender for all transactions in Zimbabwe.

15. The arbitrator made an award in favour of the first respondent for the payment of most but not all of the money claimed by it. The arbitrator’s award stated that the awarded amount was to be paid in US Dollars or ZWL Dollars at the prevailing interbank rate, without interest. The first respondent applied to the High Court (the court *a quo*) under HCHC 188/23 for the registration of the arbitral award. On its part, the appellant applied under HCHC 328/23 for the setting aside of the said award in terms of Article 34 of the Arbitration Act [*Chapter 7:15*] (the Arbitration Act).

16. The appellant raised four grounds, all pleaded in the alternative, to justify why the award had to be set aside. Firstly, the appellant averred that it lacked capacity to contract, thereby rendering the contract invalid. Secondly, that the arbitral process was not in accordance with the agreement of the parties. Thirdly, that the award dealt with a dispute not contemplated by the parties. Finally, that the arbitral award conflicted with public policy.
17. The first respondent opposed the application on the basis that it lacked merit on all the grounds raised. On the first ground, it contended that the appellant had departed from its stance before the arbitrator where it did not raise the issue of its alleged incapacity. On the second ground, it argued that the appellant not only participated in the arbitration proceedings, but also filed a counterclaim in which it was partially successful. Regarding the third ground, it was submitted that in the understanding of the parties this was never an issue as the agreement was followed to the letter and its spirit was observed. With regards to the fourth ground, the first respondent's position was that the suggestion that the currency of the award renders it in conflict with public policy is wrong as an order or award may be made in foreign currency and when so made, can be satisfied in such currency or in local currency at the prevailing market rate.
18. The two applications were consolidated before the court *a quo* resulting in the composite judgment now appealed against. The court *a quo* held that the appellant could not raise before it, for the first time, the issue of its alleged lack of contractual capacity without having first raised it before the arbitrator. It further held that the appellant could not pick and choose instances when it lacked capacity and instances when it was not so incapacitated. It observed that the appellant had contracted with the first respondent, made some payments to the first

respondent and even varied the terms of the agreement due to inflation. Regarding the issue of the challenge to the arbitrator's jurisdiction, the court *a quo* held that as it was not brought up before the arbitrator, the court could not deal with it. On whether the arbitral award was contrary to public policy, it held that it was not because the arbitrator had stated that the awarded amount was payable in Zimbabwe Dollars.

19. The court *a quo* accordingly dismissed the application under HCHC 328/23 for the setting aside of the arbitral award and granted the application under HCHC 188/23 for the registration of the award.

20. Aggrieved, the appellant filed this appeal premised on the following grounds.

1. The court *a quo* grossly misdirected itself in not considering or determining live issues that were placed before it, namely:
  - (a) Whether the arbitrator determined an issue not contemplated or submitted to him by the parties;
  - (b) The issue of when liability allegedly arose and, as a consequence thereof, the currency for its settlement; and
  - (c) Whether the ultimate award granted is in violation of the *in duplum* rule and consequently constitutes a palpable inequity which renders it contrary to the public policy of Zimbabwe.
2. The court *a quo* erred in coming to the conclusion that the failure to protest the arbitrator's jurisdiction during arbitration bars the raising of that issue in an application brought in terms of s 34(2) of the Arbitration Act, and so further erred in effectively finding that the arbitrator had jurisdiction.
3. The court *a quo* erred in coming to the conclusion, contrary to provisions of statute, that appellant had legal capacity to contract and further erred in not finding that the award was for that reason invalid in that it enforces a non-existent bargain.

21. The appellant seeks the following relief.

**“RELIEF SOUGHT**

TAKE FURTHER NOTICE THAT in the main, appellant seeks the following relief:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo*, being judgment number HH 594-23, be and is hereby set aside.
3. The matter is remitted to the court *a quo* for hearing *de novo* before a different judge.

TAKE FURTHER NOTICE THAT in the alternative, appellant seeks the following relief:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo*, being judgment number HH 594-23, be and is hereby set aside and substituted with the following:

*‘1 The arbitral award entered in favour of Zimbabwe Jiangsu International (Private) Limited against the Zimbabwe Manpower Development Fund by Mr James McComish on the 11<sup>th</sup> of June 2023 be and is hereby set aside.*

*2 The application in HCHC 188/23 for the registration of the above award as an order of the High Court of Zimbabwe is dismissed.*

*3 Each party shall bear its own costs.’”*

**ISSUES FOR DETERMINATION**

22. From the grounds of appeal raised, the following issues arise for determination:

1. Whether or not the court *a quo* considered the issues that were placed before it.
2. Whether or not the court *a quo* erred in concluding that the failure to protest the arbitrator’s jurisdiction barred the raising of the issue in an application brought in terms of s 34 (2) of the Arbitration Act.



3. Whether or not the court *a quo* erred in concluding that the appellant had legal capacity to contract.

### **THE APPELLANT'S SUBMISSIONS BEFORE THIS COURT**

23. Mr *Mubaiwa*, for the appellant made submissions to the following effect:

- (a) It was an irregularity for the court *a quo* not to consider or determine issues that were placed before it. The appellant's application before the court *a quo* for the setting aside of the award, prayed for such relief on four grounds which were pleaded in the alternative. It was necessary for the court *a quo* to make a pronouncement on each ground. However, if the court found in favour of the appellant on one issue, it would not need to determine the rest.
- (b) The arbitrator had dealt with a dispute not contemplated by the parties. This issue arose from the fact that there was no architect who could have created the required final Certificate. Both parties dealt with the issue in their respective papers but the court *a quo* did not deal with it in its judgment. Both parties also made submissions on the issue of the applicability or otherwise of Statutory Instrument 33 of 2019 but the court *a quo* did not engage the issue in its judgment. It was the appellant's contention that the payment certificates covered dates that precede 2019, there being a 2015 liability and a 2019 liability. The court ought to have made a determination, but did not.
- (c) The appellant also contended that the figure ultimately awarded in favour of the first respondent is in violation of the *in duplum* rule. The issue was pleaded and motivated, although not as extensively as would have been desired. The issues raised in the

appellant's grounds remained live issues before the court *a quo* and it had an obligation to determine them especially because they were all pleaded in the alternative.

- (d) The next two issues relate to the alternative prayer sought by the appellant. The first one is the appellant's contention that it has no legal capacity and existence because the statute, the Manpower Planning and Development Act, in s 47, does not create the appellant as a body corporate but as a fund. The judgment of the court *a quo* is therefore contrary to s 47 and has the effect of enforcing an agreement that does not exist by reason of the non-existence of a party. Secondly, the court *a quo* held that the question of the jurisdiction of the arbitrator could not be raised before it as it had not been raised with the arbitrator. This position adopted by the court *a quo* is contrary to the authorities of this Court in a number of cases, including *TN Harlequin Luxaire Ltd & Anor v Quest Motors Manufacturing (Pvt) Ltd*, SC 30/18 *Zimasco (Pvt) Ltd v Marikano* 2014 (1) ZLR 1 (S). The authorities say that such a point, being a point of law, can be raised at any time and could be raised for the first time before the court *a quo*. There is no provision in the Arbitration Act that prohibits such challenge at the High Court level.
- (e) This Court ought to find in favour of the appellant and the appeal should succeed with costs. The matter should then be remitted to the court *a quo* for the determination of the issues that were not determined.

### **THE FIRST RESPONDENT'S SUBMISSIONS BEFORE THIS COURT**

24. Mr *Mpofu*, for the first respondent, submitted to the following effect:

- (a) It is significant that the parties opted for arbitration. What was before the court *a quo* was an Article 34 challenge and it can only be sustained on the basis of relevant statutory provisions. It is in fact the appellant's application to the court *a quo* that is contrary to public policy. The appellant has a nine-storey building and it refuses to pay from funds that are available; its attitude being that it can get a nine-storey building for free.
- (b) The ground or objection raised that the arbitrator dealt with issues not contemplated by the parties is false. This is because the court *a quo* stated in its judgment, at p 217 of the record that the parties laid out the issues that they wanted the arbitrator to decide on and it found nothing amiss in what the arbitrator did.
- (c) Furthermore, the argument that there was supposed to be an architect to prepare payment certificates was contrary to the appellant's stance before the arbitrator where it did not dispute liability but took the position that it was only liable at the rate of 1 as to 1 between the Zimbabwe Dollar and the United States Dollar. The appellant stated that there were two payment certificates. However, both certificates were issued after February 2019. The appellant's argument was that the certificates related to work done before that date and that liability only crystallizes after the issuance of a certificate by the architect. It is not correct that the court *a quo* did not determine the issues before it. It did, but the question might be whether it was correct or not in its determination. The court *a quo* effectively said the appellant was taking a second bite of the cherry and cited the pertinent authorities. The court *a quo* was effectively saying that the appellant had no plausible complaint to bring before it because it had a nine-storey building and it must pay for it. That is how it determined the issue.

- (d) On the issue of the currency of the award, the court *a quo*, at p 218, stated that if the appellant was correct in its contention, then the arbitrator was wrong. However, that was not a proper basis for approaching the court.
- (e) As for the *in duplum* rule, it was not argued *a quo* and neither was it addressed in heads of argument. The court *a quo* had no obligation to deal with the issue because the parties did not address it.
- (f) The question of the appellant's legal existence or capacity to contract is a plain red herring and should not detain the court. In *Williams & Ors v Msipa NO & Ors*, 2010 (1) ZLR 552 (S), it was stated that the court does not consider only the direct dictates of an order but also its effects; in *casu*, the appellant has a nine-storey building. The premise for the third ground of appeal is, in any event, false because the court *a quo* did not make the finding attributed to it. The appellant stated in its founding affidavit that the third ground of appeal arises in terms of Article 34 (2)(a)(i) of the Schedule to the Arbitration Act. However, in terms of that Article, one must show that one lacks the capacity to contract and not that one contracted under a wrong name. It is not correct that the issue arose at all. It did not. After all, the party claiming to lack contractual capacity, that is the appellant, had a counterclaim before the arbitrator and thereafter, it approached the court *a quo* and has also now approached this Court.
- (g) Regarding the jurisdiction of the arbitrator, the appellant did not query his appointment. Pertinently, the appellant had waived its own agreement and proceeded with the construction of the building in the absence of an architect. There are authorities by this Court which state that one may not cite a non-existent party but there are instances when what will have happened is merely a mis-description of a party. Authorities also say that

at contractual stage, it does not matter if a party contracts using a nickname. Furthermore, one may not benefit from one's own misdeed.

### **THE APPELLANT'S REPLY TO THE FIRST RESPONDENT'S SUBMISSIONS**

25. Mr *Mubaiwa*, in his reply, submitted to the following effect:

- (a) The respondent is relying on the moral code, hence the repeated reference to the nine-storey building. The claim before the arbitrator was not for payment of the value of putting up the building but for 10 percent retention withheld during the Zimbabwe Dollar phase, being the first stage. The question is whether the arbitrator dealt with issues not contemplated by the parties. A reading of the passage at p 217, referred to by Mr *Mpofu*, does not show which issue the court *a quo* was dealing with. Authorities from the court are clear that a failure to consider live disputes in the context of arbitration disputes is a serious issue, an irregularity fatal to the proceedings of a lower court.
- (b) The question of the appellant's legal capacity arises at contractual level. If a party does not exist, a contract does not exist. Whether the appellant exists is a question that is resolved by law, in particular, section 47 of the Manpower Development Act. The Fund (Zimbabwe Development Fund) is a trust and cannot be transacted with. Transactions are carried out with the trustees
- (c) The court *a quo* did not address the nature or currency of the appellant's liability. The question that the court had to decide was the determination of when the debt arose. At p 219, the court merely made reference to *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private Limited & Anor* SC 3/20. The court did not engage the issue in the manner in which it was pleaded or argued. It made no finding as to when the debt

arose. The *in duplum* issue was argued extensively, orally, before the court *a quo*. It is a public policy issue. Public funds cannot be used to pay what public policy does not allow or what it prohibits; the issue was live before the court.

- (d) The fact that the appellant filed a counterclaim to the respondent's claim does not alter the question of the appellant's capacity; there was before the arbitrator a non-existent party.

### **ANALYSIS**

#### **Whether or not the court *a quo* considered the issues that were placed before it.**

26. In the first ground of appeal, the appellant contends that the court *a quo* grossly misdirected itself in not considering or determining live issues that were placed before it. It lists the following as the issues that were not addressed by the court:

- (a) Whether the arbitrator determined an issue not contemplated or submitted to him by the parties;
- (b) The issue of when liability arose and, as a consequence thereof, the currency for its settlement; and
- (c) Whether the ultimate award granted is in violation of the *in duplum* rule and consequently constitutes a palpable inequity which renders it contrary to the public policy of Zimbabwe.

27. The listed issues were all raised by the appellant in its founding affidavit in the application before the court *a quo*. The appellant went to great lengths, in paras 30.1 to 30.11 of the founding affidavit, which paras fall under the heading "Dispute not Contemplated by or not

falling within the Terms of Submission to Arbitration.” In addressing this issue the court only considered the submission by the first respondent that the parties had laid out the issues that they wanted the arbitrator to decide on and there was nothing amiss in what the arbitrator did. The court *a quo* did not determine whether the arbitration procedure had been followed in terms of the parties’ agreement. It merely stated as follows in its judgment, at p 217 of the record:

“The parties as submitted by the first respondent laid out the issues that it (sic) wanted the arbitrator to decide on. They filed statements and in my reading of the award, there is nothing amiss in what the arbitrator did. He was guided by the agreed issues.”

28. The issue relating to when the liability arose was raised by the appellant in paras 32.10 to 32.19. The appellant averred that the valuation for works done was done before 2 February 2019 and that the payment had therefore to be done in RTGS dollars at a 1 is to 1 conversion rate. The first respondent, on the other hand, alleged that the certificate for payment was made after 22 February, 2019. A perusal of the court *a quo*’s judgment does not show anywhere that the court *a quo* considered, let alone determined, the issue of when liability arose. The court was silent on that issue. It was important and necessary for this issue to be dealt with as that would impact on whether the award was contrary to public policy or not.

29. On whether or not the ultimate award granted was in violation of the *in duplum* rule, the appellant contended that the interest awarded by the arbitrator offended against the said rule. Further, that such an award, particularly considering the public policy underpinnings of the *in duplum* rule, offended against the public policy of Zimbabwe. The appellant further demonstrated how the interest awarded violated the said rule and argued that it should result in the setting aside of the arbitral award. Again, the court *a quo* did not deal with this issue but only made a pronouncement on whether payment was to be in United States Dollars or not.

30. In *Toro v Vodage Investments (Pvt) Ltd & Ors* SC 15/17 at p7, the court held that:

“The purpose of litigation is for the court to determine disputes placed before it by the parties. The court must therefore give reasons stating how it resolved all the disputes placed before it, unless the determination of one or some of the issues clearly renders the determination of one or other issues unnecessary.”

31. In *Gwaradzimba N.O. v CJ Petron & Co (Pty) Ltd*, 2016 (1) ZLR 28 (S) this Court emphasized the importance of a court determining all issues that are raised before it. It held at 32A-C:

“The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, ‘unless the issue so determined can put the whole matter to rest’ – see *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors* 2008 (1) ZLR 198 (S) 203D.

The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial - see *Kazingizi v Dzinoruma* 2006 (2) ZLR 217 (H); *Muchapondwa v Madake & Ors* 2006 (1) ZLR 196 (H) 196D-G, 201A; *GMB v Muchero* 2008 (1) ZLR 216 (S) 221C-D.” (The underlining is added)

32. Another instructive case is that of *Mutanga v Mutanga* SC 85/22 where this Court explained the role of an appellate court as follows, at p 7:

“The duty of an appellate court is to determine whether a trial court came to the correct conclusion of the case that was before it. In this respect see the cases of *Goto v Goto* 2001 (2) ZLR 519 (S) and *Cole v Government of the Union of South Africa* 1910 ad 263. A court is enjoined to determine all issues placed before it unless the issue that it determines to the exclusion of other issues is dispositive of the issues before it. See the case of *Longman Zimbabwe (Pvt) Ltd v Midzi and Others* 2008 (1) ZLR 198 (S). According to the decision in *Arafas Mtausi Gwaradzimba v C.J. Petron and Company (Proprietary) Limited* SC 12-16 failure by a court to consider an issue placed before it amounts to gross irregularity. Therefore the failure by the court *a quo* to determine whether the trustees should have been joined to the proceedings amounts to gross irregularity.” (The underlining is added)

33. Guidance on the importance and necessity of the resolution of disputes by the courts has been given in a number of judgments of this Court. In giving that guidance in the various authorities,



the court has, in a way, effectively summarized the core business or the reason for the existence of courts of law. The guidance should be heeded in the resolution of any matter where the litigants before the court are engaged in a dispute on one or more issues. Outside the specific issues that a court is called upon to resolve in any matter, the principles enunciated in these authorities should forever be revered by judicial officers and be always kept in mind. It is a clear position of the law that a court which fails to consider and determine the issues submitted for decision by the parties commits a grave error which vitiates the validity of its decision.

34. Proceedings before the court *a quo* were instituted by way of application procedure. It was incumbent upon the court to address all issues raised in the papers filed before it. It has already been observed earlier, that *in casu*, the court *a quo* did not determine the issues that were live before it, these having been pleaded or raised by the appellant and ventilated by the parties. In failing to do so, the court erred. It committed an irregularity of the nature discussed in the authorities cited in paras 30, 31 and 32 above. The failure vitiates the order given by the court *a quo*. This Court does not assume the role of the court *a quo*. This Court's role and duty is as stated in the *Mutanga* case (*supra*). The judgment of the court *a quo* cannot stand. The matter must be remitted to the lower court for the determination of the issues that remained unresolved.

35. Having made these observations in relation to the appellant's first ground of appeal, this determination on it is such as to render unnecessary the consideration of the other grounds. The appeal has merit. The judgment of the court *a quo* stands to be set aside. The matter will be remitted to the court *a quo* for a fresh hearing before a different Judge. Costs will follow the cause.

36. In the result, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo*, being judgment number HH 594-23, be and is hereby set aside.
3. The matter is remitted to the court *a quo* for hearing *de novo* before a different Judge.

**MAKONI JA** : I agree

**CHIWESHE JA** : I agree

*Nyika Kanengoni & Partners*, appellant's legal practitioners

*Gill, Godlonton & Gerrans*, 1<sup>st</sup> respondent's legal practitioners