

PIONEER TRANSPORT (PRIVATE) LIMITED
versus
DELTA CORPORATION LIMITED
and
DAVID LESLIE CRUTTEDEN

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 18 October and 1 January 2012

Opposed Court Application

A Moyo, for the applicant
K Ncube, for the first respondent
No appearance for the second respondent

GOWORA J: On 1 January 2003 the applicant and the first respondent executed an agreement for the “supply of primary beverage transport services.” In terms of clause 8 of the agreement the first respondent, Delta, appointed the services of the applicant, Pioneer, to distribute and deliver products on its behalf to various destinations. In order to perform its obligations under the agreement Pioneer undertook to supply vehicles to Delta for use in the distribution aforesaid. To that end Pioneer had to make available to Delta twelve mechanical horses which would be used to draw thirty four trailers, these being supplied by Delta. The agreement also provided for the supply of additional horses by Pioneer on an ad hoc basis as the exigencies of the situation would have demanded. As sometimes happens, the parties had a falling out. The agreement, in terms of clause 18 thereof, provided for the settlement of disputes through an arbitration process. In due course the second respondent was appointed as arbitrator to the dispute and the matter referred to him. The parties were called before him and on 16 January 2010 he issued an award. The applicant has through these proceedings brought an application to have the award set aside by this court in terms of Chapter VII Article 34 of the First Schedule to the Arbitration Act [*Cap 7:15*]. The applicant also seeks costs against the first respondent.

The founding affidavit has been deposed to by a John Groves. He states that he is employed as a managing director by the applicant and that he is authorised to depose to the affidavit. He states therein that the application was being brought to court in accordance with the provisions of s 2 of Article 34. The dispute is centred around the effect to be given to clause 9 (f) of the agreement, in terms of which, upon termination of the agreement, Pioneer was supposed to return the trailers to Delta, and such return to be in “good working condition” and order fair wear and tear excepted.

The deponent states that on 26 September Delta commenced arbitration proceedings in terms of a statement of claim filed of record. Pioneer opposed the claim and the matter was set down for hearing before the arbitrator. Both parties adduced *viva voce* evidence. According to the deponent to the affidavit the crystal issue before the arbitrator was the duration of the agreement. The arbitrator found that the claim by Delta had not prescribed at the time that it submitted the dispute to arbitration. The deponent contends therefore that the arbitrator acted outside the enabling provisions of the agreement. He contends further that the finding by the arbitrator that the agreement between the parties terminated on 30 November 2005 was not rationally linked to either the evidence adduced by the parties or submissions made by the same on the papers or during the hearing. He contends further that in finding as he did that the agreement terminated on 30 November instead of 31 December as provided for in clause 2 of their agreement, the arbitrator had created a new contract for them.

In addition to the above, the applicant contended that the mandate of the arbitrator was limited to the duration of the agreement, and that consequently he was supposed to ascertain the obligations of the parties as at the date of termination of the agreement. However, contends the applicant, the arbitrator seemed to have extended the applicant’s obligations under the contract beyond the lifespan of the agreement. It is further contended that the applicant’s liabilities ought to have been ascertained as at the date. According to the applicant the award is not limited to the termination date as found by the arbitrator, that is 30 November 2005, but goes beyond that. Therefore, the applicant contends, even on his own version, the arbitrator has acted outside the provisions of the contract. This, he suggests is contrary to the Zimbabwean substantive law on the privity of contracts and therefore contrary to public policy. The deponent also avers that by awarding specific performance in favour of a party who had in terms of the contract bilateral

obligations which it had itself not performed and was not in a position to perform the arbitrator had unjustly enriched one of the parties at the expense of the other contrary to the positive law in Zimbabwe regarding bilateral obligations and further that this was contrary to public policy. In the event, the applicant prayed for the setting aside of the arbitral award.

The first respondent has opposed the application. It has raised a number of points in *limine*. Firstly, the first respondent contends that the applicant has approached the court with dirty hands and ought not to be accorded a hearing by this court until such time as it would have purged its default. The first respondent contends that the filing of an application for review has not suspended the operation of the award by the arbitrator but that the applicant has not complied with the award. A letter was addressed to the applicant's legal practitioners by the respondent's legal practitioners putting them on terms to abide by the arbitration award by a specified date. To date there has been no compliance and the respondent is of the view that the applicant has approached the court with dirty hands and should not, as a consequence be heard by the court.

Effectively therefore, this court must find that the applicant has dirty hands and should as a consequence refuse to hear the applicant until such time as it would have complied with the award. The first respondent argued that the decision of the Supreme Court in *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 is apposite herein. This is what CHIDYAUSIKU CJ had to say:

“... That case does not seek to define the extent of that principle. It certainly is not an authority for the proposition that denial of relief will be confined only to those litigants whose conduct lacks probity or honesty or is tainted with moral obliquity. In *S v Nial*¹ and *S v Nkosi*² the court refused to hear appeals of the appellants who had absconded or failed to comply with bail conditions. Defiance of a court order does not involve dishonesty or moral obliquity, yet litigants in defiance of court orders, more often than not, are denied relief by the court until they have purged their contempt. In my view, there is no difference in principle between a litigant who is defiance of a court order and a litigant who is in defiance of the law. The court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged.”

The applicant on the other hand, denies that it has dirty hands as contended by the first respondent, and suggests that the contention by the first respondent that it, the applicant, should

¹1982 (1) ZLR 142 (H)

²1963 (4) SA 87 (T)

have first complied with the award before instituting these proceedings is ill-conceived. It disputes the application of the dirty hands principle to this dispute and to the refusal by itself to first comply with the award before applying for the award to be set aside. It contends that to deny the applicant audience and opportunity to be heard would defeat the very basis of Article 34 of the Model Law upon which the applicant seeks recourse. It contends further that if the applicant were requested by the court to comply with the arbitral award first and then seek an order for its setting aside any court order granted to it thereafter would be of academic interest especially in circumstances such as this where the first respondent had sought and obtained an award for specific performance.

The application has been brought under Article 34 of the Model Law which has been incorporated in our Arbitration Act. I am in agreement with the contention by the applicant that the right of an aggrieved party under Article 34 is not qualified except for the provision that a party is not entitled to bring an application there under after the lapse of three months after the award has been made. The Act bestows upon a party the right to apply for the setting aside of an award on the grounds set out therein. To require a party to comply with the award before launching an application under the Article would be tantamount, in my view, to denying such party the right to have recourse in terms of the Article. In the circumstances of this case the award against the applicant was one for specific performance.

I am also of the view that the first respondent is taking a simplistic and narrow view of the dicta in *Associated Newspapers of Zimbabwe v The Minister of State for Information and Publicity & Ors (supra)*. In that case what was at issue was whether a party could be heard by a court whilst refusing to comply with a statutory provision of the Act which required that media houses be registered. There was in that case an open and clear defiance to comply with a statutory provision applicable to the litigant to permit it to operate as a media house. The applicant was despite the requirement operating without a licence or permit as required under the enabling Act. So too was the situation in *Commercial Farmers Union & Ors v Minister of Lands and Rural Resettlement and Ors* SC 31/10. CHIDYAUSSIKU CJ had this to say at p 26 of the cyclostyled judgment:

“Apart from this there is the principle that a litigant who is acting in open defiance of the law cannot approach a court for assistance. See *Associated Newspapers of Zimbabwe*

(Private) Limited v *The Minister of State for Information and Publicity and Ors* SC110/04. Indeed, if this point had been raised as a preliminary point, the probabilities are that this application would have been dismissed on that point alone. A former owner who is in occupation of acquired land in open defiance of the law cannot approach the courts for assistance.”

Again as in the case of *ANZ v Minister of State for Information and Publicity & Ors* (*supra*) the issue before the court was the clear and open defiance by the applicant in complying with a statutory provision of an Act of Parliament. In *casu*, the applicant has taken on review an arbitral award in terms of a right accorded under an Act which does not require compliance with the award before approaching the court for redress. The situation of the applicant herein is distinguishable from the authorities referred to above. Therefore, in the circumstances of this case I am not persuaded to find that the applicant has dirty hands and that it is not entitled to be heard.

In relation to the second point *in limine* the first respondent contends that clause 18 of the agreement provides that the parties irrevocably agreed that the decision of the arbitrator in any arbitration proceedings brought under the agreement would be binding upon each of them and that this was in respect of any dispute arising out of or in connection with the agreement including any dispute regarding its existence, validity or termination. Accordingly, the first respondent contends, the parties are bound by the provisions of clause 18 of the agreement and consequently, the applicant cannot have recourse against the award by virtue of these proceedings.

The first respondent contends further, that, assuming that the parties do have recourse against the award notwithstanding the provisions of clause 18, the application filed in *casu* does not disclose a cause of action as contemplated in Chapter 7 Article 34 of the First Schedule to the Arbitration Act as modified by S I 208/1996. The first respondent contends that in terms of ARTICLE 34(5) it is only if the award was induced or effected by fraud that it can be said to have been contrary to public policy. However, so the argument goes, the applicant has made no such allegation. Accordingly, so contends the first respondent, there is no cause of action exhibited on the papers.

A party to an agreement which provides for relief by way of an award by an arbitrator has a right to have the award set aside as provided for in Article 34. It has been given legislative

imprimatur under the Act, and the respondent has not pointed out any authority which allows parties to an agreement to override provisions that have been spelt out in an Act of Parliament. In this connection I would want to quote from comments I made in *Recoy Investments (Pvt) Ltd v Tarcon (Pvt) Ltd* HH 159/11 to the following effect:

“In my view, the respondent has a misapprehension of the law. The court has the jurisdiction to hear the matter where none of the parties has applied for a stay of the proceedings and a consequential referral to arbitration. Article 8 is clear and admits of no ambiguity. I am bolstered in this view by dicta from CLOETE JA in *PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd* 2009(4) SA 68 at 71G-72C to the following effect:

‘The mere fact that parties have agreed that disputes between them shall be decided by arbitration does not mean that court proceedings are incompetent. If a party institutes proceedings in a court despite such an agreement, the other party has two options:-

- (i) It may apply for a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965; or
- (ii) It may in a special plea (which is in the nature of dilatory plea) pray for a stay of proceedings pending the final determination of the dispute by arbitration.’

The definitive statement of the law in this regard is to be found in *Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 370-371 where WESSELS ACJ said:

‘All that s 6(1) lays down is that you cannot adopt the cheaper and speedier procedure therein provided when once you have delivered pleadings or taken any other step in the proceedings. If you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the court to stay proceedings but you must file your pleadings in the ordinary way. In pleading however, you can raise the defence that the case ought to be decided by arbitration, this can be done by a special preliminary plea’”.

The High Court, being a superior court of jurisdiction has the power to hear any matter and any party unless its jurisdiction has been specifically ousted by statute. In addition Article 8 of the Arbitration Act permits the parties who have submitted a dispute for arbitration and which process has now been brought before this court for the setting aside of any award resulting from

such process to apply to the court for a stay of those proceedings. The powers granted to the court under such application are as follows:

Arbitration agreement and substantive claim before court

- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where proceedings referred to in para (1) of this article have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

A reading of Article 8 above makes it clear that the court must stay proceedings upon the application of a party who wishes that the matter proceed to arbitration for resolution on the dispute. That in my view appears to be the only reason for the court's jurisdiction to be temporarily suspended. Once the parties have referred the dispute to arbitration and an award has been made the jurisdiction of the court to decide on the award is unfettered. This court is however seized with an application for the setting aside of an arbitral award. I therefore hold that this court has the jurisdiction to determine this matter on its merits.

Article 34 of the First Schedule to the Arbitration Act [*Cap 7:15*] allows for the setting aside of an arbitral award by this court in very restricted circumstances. In *casu*, the applicant contends that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or that it contains decisions or matters beyond the scope of the submission to arbitration and that the award itself is contrary to the public policy of Zimbabwe. Clause 18.1 of the service contract made a provision for the reference of any dispute there under to arbitration and that such arbitration proceedings would be final and binding upon the parties herein.

The exercise of power by the High Court under Article 34 has already been discussed in the case of *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) where GUBBAY CJ said the following:

“Under Article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above.

Although no moral turpitude whatsoever attached to the conduct of the arbitrator, I am satisfied that his award bears the adverse characteristics I have referred to. It is my belief that, in the circumstances pertaining, the award made results in so palpable and substantial an injustice to ZESA that for this court to uphold it would be to sanction a conflict with the public policy of Zimbabwe.”³

The principle enunciated in this judgment was confirmed in *Delta Operations (Pvt) Ltd v Origen Corporation* SC 86/06. It is therefore trite that under the law the court is empowered to set aside an arbitral award if the applicant who wishes to have it set aside can establish that the award is in conflict with the public policy of Zimbabwe. The applicant has attacked the award on three prongs; firstly that the arbitrator acted outside the provisions of the enabling agreement, that the claim was prescribed and that the order for specific performance was contrary to the public policy of Zimbabwe regarding bilateral and reciprocal obligations and the principle of unjust enrichment.

According to the applicant the award should therefore be set aside on the following grounds:

1. That the arbitrator acted outside the provisions of the enabling agreement;
2. That the claim was prescribed in terms of s 14 of the Prescription Act; and

³At 466F-467A

3. That the order for specific performance in the circumstances of this case was contrary to the public policy of Zimbabwe regarding bi-lateral reciprocal obligations and the principles of unjust enrichment.

In relation to the first issue the applicant contended that the arbitrator had acted outside the provisions of the enabling agreement. It is contended that the first respondent had an *onus* to establish the duration of the agreement between the parties. Contrary to the provisions of the contract, so the applicant contends, the arbitrator placed the *onus* on the applicant to disprove the contentions of the claimant. The applicant contends that before the arbitrator it put up the case that the agreement commenced on 1 January 2003 and terminated on 31 December 2004 and that the respondent, had contrary to that assertion, contended that the agreement had not terminated up to the time that it instituted proceedings. The applicant contends that the arbitrator disagreed with the versions that both parties placed before the arbitrator and that in approaching the matter as he did he created a new contract between the parties based on what he termed practical considerations. The applicant contends in this regard that the arbitrator unilaterally extended the duration of the contract where he held the date of termination as 30 November 2005. The applicant contends therefore that the award is liable to set aside on the grounds that it is in conflict with the public policy of Zimbabwe. The applicant suggests that there was ambiguity in the contract and that in fact the arbitrator did confirm that the contract was ambiguous and that therefore he should have invoked the *contra proferentem* rule in favour of the applicant and this error on his part constituted a gross error on his part which further rendered the award unenforceable. He suggests that the arbitrator must have found that clause 8 (d) was ambiguous and contrary to the clear provisions of clauses 1 and 2 of the agreement which stated the commencement and termination dates. He suggests that the contract was prepared by the Delta and as it was ambiguous in relation to clause 8 (d) the arbitrator should have been guided by the *contra proferentem* rule and find that the contract had terminated as provided for in clause 2. He stated that the arbitrator failed to apply the clear and positive principles of Zimbabwean law in resolving the dispute and that in the circumstances the award was contrary to the public policy of Zimbabwe.

The first respondent has contended that it is not for this court to decide whether or not the arbitrator was correct to find that the agreement would have terminated on the date that the

arbitrator said it terminated. It was suggested by the respondent that what this court must ask itself is whether the conclusions reached by the arbitrator offends the public policy of Zimbabwe in the sense of being so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider the conception of justice in Zimbabwe would be intolerably hurt by the award. See *ZESA v Maposa(supra)*.

The critical issue for determination before the arbitrator was the duration of the contract. It is trite that the original UNCITRAL Model did not define the concept of public policy. It is accepted however that the concept covers fundamental principles of law and justice in substantive as well as procedural law. In *casu*, the standard set in the *Maposa* case has not been met. The applicant has chosen not to place the record of proceedings before for the court resulting in the court being unable to judge for itself whether or not the conclusions of the arbitrator are so outrageous in defiance of logic and accepted moral standards as to lead a fair minded person to believe that justice in Zimbabwe would be intolerably hurt by the award in favour of the first respondent. The applicant has not, in the affidavit on which the application is premised, even alleged that the conclusions reached by the arbitrator defied logic to such unacceptable standards. Instead, the applicant has sought to deal with the matter as if it were an appeal or application for review. In *ZESA v Maposa (supra)* the court stated:

“An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or law. In such a situation the court would not be justified in setting the award aside. Under Article 34 or 36 the court does not exercise an appeal power and either uphold or decline to recognise an award having regard to what it considers should have been the correct decision.”

Whether or not the arbitrator arrived at the wrong decision is not an issue that this court is empowered in terms of Article 34 to decide. What the applicant should have established is that the decision and conclusions reached, based on the standard set in the *Maposa* case was so outrageous in its defiance of logic and reasoning that any fair minded person would have a conception that justice in Zimbabwe would be hurt by that award. This is not the case of the applicant. There is no suggestion anywhere in the heads of argument pointing me to an aspect of the award that breached the rules of natural justice. In any event, there is no principle that says that an arbitrator can have his award set aside on the basis that he erred or was wrong. If it is

there i have not been made aware of it. In *Telcordia Technologies Inc v Telkom SA 2007 (3) SA 266 HARMS JA* stated:

“...An arbitrator “has the right to be wrong” on the merits of the case, and it is a perversion of the language to label mistakes of this kind as a misconception of the nature of the inquiry—they may be misconceptions about meaning, law or the admissibility of evidence but that is far cry from saying that they constitute a misconception of the nature of the inquiry. To adopt the quoted words of HOEXTER JA; it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left for him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by the court.”

The next point to consider is whether or not the claim before the arbitrator had prescribed and that the award by the arbitrator therefore in the circumstances was contrary to the public policy of Zimbabwe. The deponent to the founding affidavit contends that the agreement terminated on 31 December 2004. Prescription then started running on 1 January 2005 and completed its course on 31 December 2008. The claim was instituted on 26 September well after it had become prescribed. He states that the date of termination of the agreement cannot be in doubt as the first respondent sought a renewal in a letter dated 12 September 2005. It is further contended by the applicant that the new contract, save for alterations to the dates for commencement and termination, is in exactly the same terms as that concluded on 1 January 2003. The applicant has argued that the arbitrator correctly identified the critical issue for determination as being the duration of the agreement and that once this had been established the issue of liability would be settled. It was in the view of the applicant, up to the claimant to establish the duration of the agreement but that surprisingly the *onus* appeared to have been placed on the applicant.

The applicant further contends that it is against the public policy of Zimbabwe to enforce obligations which have become extinguished through prescription. Therefore, the applicant contends, the relief granted to the first respondent was contrary to the provisions of ss 14 and 15 of the Prescription Act [*Cap 8:11*].

Further to this, the applicant is alleged to have admitted liability in terms of two documents admitted as exhibits before the arbitrator. These documents, according to the first

respondent, served to interrupt any alleged prescription as claimed by the applicant. In addition to this, the first respondent contended that despite the protestations by the applicant, the parties had not executed a subsequent agreement and yet they continued to deal with each leading to the conclusion that the contract did not terminate on 31 December 2004 as alleged by the applicant but continued beyond the stipulated date as found by the second respondent. The respondent denied that the second respondent had sought refuge in clause 8 (d) of the contract and it denies further that this clause contradicts clauses 1 and 2 of the same. In the premises, the first respondent denied that there had been a contravention of ss 14 and 15 of the Prescription Act.

Clauses 1 and 2 of the agreement provide for a commencement as well as a termination date. However, clause 8 (d) also speaks of the duration of the agreement notwithstanding the provisions of the two clauses referred to above. This is what it provides:

“Notwithstanding the date of signature of this agreement, this agreement shall be deemed to have commenced on the commencement date and shall be relevant after two years. After this review period, the agreement shall continue indefinitely save that either party may withdraw from this agreement on giving three months notice in writing to the other.”

In addition the evidence adduced before the arbitrator seemed to suggest that the parties continued trading with each other long after the agreement would have been terminated.

If indeed the arbitrator came to the conclusion that the matter had not prescribed when in fact it had, such a finding is not in my view a breach of s 14 of the Prescription Act. The Act does not create a criminal offence in the event that a debt that has prescribed is found by a court or tribunal not to have prescribed. As to the alleged date of termination of the agreement, the first respondent denies that the agreement terminated on 31 December 2004 and contends that the finding by the second respondent cannot be faulted. The first respondent contends that the allegations by the applicant in regard to this aspect amount to an appeal. It also contends that the evidence adduced before the arbitrator confirmed that the agreement continued beyond 31 December as the applicant did not return any of the trailers by that date. The first respondent makes reference to evidence given by one Dawson of the applicant who stated that the parties carried on dealing with each other until mid 2007. This witness is alleged to have confirmed under cross examination that no trailers were handed back to the first respondent on 31 December 2004. Despite an allegation in the opposing papers over this issue the applicant did not

find it necessary to adduce evidence by way of affidavit to contradict the averment. One Kevin Motsi of the applicant is also alleged to have given evidence that he had been employed by the applicant in 2005 and that at the time the applicant was towing the first respondent's trailers. The relationship according to him, had continued until 2007.

The applicant states that the claim presented to the arbitrator was for specific performance and that is what the first respondent got in the award from the arbitrator. However, argues the applicant the agreement relied upon imposes bi-lateral and reciprocal obligations on the parties. Specific reference is made to clause 14 in this regard. Specifically the applicant contends that the maintenance of the trailers was a recoverable cost from Delta and that this would depend upon the mileage covered on a monthly basis. The applicant suggests that the arbitrator must have found that due to the deteriorating economic situation in Zimbabwe the parties were unable to perform on the contract as from 2005. The applicant contends further that the maintenance of the trailers was intrinsically linked to the first respondent's ability to provide the stipulated monthly mileage in respect of each horse in accordance with the provisions of clause 14 of the agreement for the applicant to recover the full maintenance costs for the availed trailers in accordance with the costing module. The applicant contends that it had furnished to the arbitrator schedules which showed that from December 2004 the parties had operated on an ad hoc basis as opposed to the strict terms of the agreement and that in view of that evidence the arbitrator had found that the first respondent was not providing the requisite mileage post 31 December 2004.

Therefore, contends the applicant, in ordering specific performance retrospectively as he did, the arbitrator acted outside the positive law of Zimbabwe regarding the enforcement of bi-lateral obligations between the parties. Put differently, the applicant contends that it is against the law of contract of Zimbabwe to direct a party to specifically perform on a contract where the other party thereto was unable and remained unable to perform in terms of that contract.

In addition, it is contended that the order for specific performance amounts to unjustified enrichment in that the first respondent was now unjustly enriched retrospectively in respect of a contract which itself did not specifically perform. This was due to the fact that in order to comply with the award the applicant would have to incur pecuniary loss in multi-currency as opposed to the Zimbabwe dollar which was the currency for performance and payment under the agreement.

Accordingly, the order for specific performance would again be contrary to the public policy of Zimbabwe and the relief should not have been granted to the first respondent in the first place.

The first respondent contended that the applicant had been expected to return the trailers in good working order, fair wear and tear excepted. The tyres were however required to have, upon the return of the trailers, the same amount of rubber as at the date of take over by the applicant. Further it is denied that the second respondent ordered specific performance retrospectively. It is averred that all the second respondent did was to give effect to the contract and determine the obligations of the applicant in terms of clause 9 (f) of the service contract. It is consequently denied that the order for specific performance was contrary to public policy as the applicant did not allege undue influence, fraud or a breach of the rules of natural justice. It is averred that there were no bilateral obligations as at the date of termination of the contract as the applicant had the obligation to restore the trailers in good working condition and order. The first respondent's obligation had been defined in clause 9 (c) to ensure that all the trailers were validated by a certificate of fitness. By providing the certificates the first respondent contends that it had complied with its obligations under the contract.

In so far as the jurisdiction of the second respondent is concerned the first respondent contends that it was wide and was not limited to ascertain the obligations of the parties as at the date of the termination of the agreement but included any questions regarding the existence, validity or termination of the same. The first respondent accepts that the claim it filed with the arbitrator was for specific performance and that this was in terms of the agreement between the parties. The respondent is of the view that the applicant is raising issues that are specifically dealing with an appeal which issues should not be entertained by this court. The point is also made that the applicant had not filed a counter application before the arbitrator to the effect that the first respondent had not performed its obligations in terms of the contract. The court is being urged as a result not to have regard to any suggestion that the maintenance of the trailers was a recoverable cost in terms of the contract as that was not one of the factors for consideration under Article 34. It is contended that the applicant's real grievance is that the second respondent came to a wrong conclusion on the facts and the law. It is denied that the award unjustly enriched the first respondent at the expense of the applicant.

The nature of a contract is that two or more parties thereto reciprocally promise or one of them promises to the other or others to give some particular thing or to do or refrain from doing some particular act. There is consequently, a presumption that in every bilateral or synallagmatic contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. The parties to this dispute entered into a contract in terms of which each of them assumed obligations to the other and in return also acquired rights flowing from the assumption of such obligations. In terms of clause 8 (d) of the contract herein, Pioneer was to assume the responsibility for the maintenance, licensing and annual certificates of fitness in relation to the trailers supplied to it by Delta. In the event that Pioneer incurred any additional expenses in relation to this obligation arising from the structural defects from the trailers then Delta would consider meeting part of a particular expense. On termination of the agreement, the clause in (f) provided that Pioneer would return the trailers in good working condition, fair wear and tear excepted.

I am somewhat hampered by not having been provided with the record of the proceedings. The first respondent has however availed copies of two letters which had been placed before the arbitrator and specifically dealt with the issue of prescription. The first is an e-mail written by Kelvin Motsi of the applicant on 24 October 2007 and is addressed to the first respondent. The pertinent part of the e-mail reads as follows:

“As per last mail below and discussion with Delta yesterday we are still working on your trailers and all efforts are being made to make such trailers available. Trailers T6554 and T6555 went to VID this weekend and did not pass the inspection, the issues raised have been rectified now and the trailers(sic) due for inspection again today.

T6244 and T6245 are also getting ready for VID. As per our discussion once back from VID and passed (sic) we will advise your (Delta) workshops for a handover.

I fully understand the pressure you are going through to supply the country. We at Pioneer are putting in 100% to try and get these trailers ready under the difficult conditions of getting in the spares and other items required to bring them up to spec. if you have other ideas on how best we can source these items then we are open to discuss.

I however also do not take lightly the comments raised against myself on this issue, the reasons for the delays are not known by me alone. May I propose we sit round a table and air out all issue involved and identify responsibility to both parties in the smooth handover of such trailers and relations going forward.”

The second is a letter dated 27 March 2008 addressed to a Mr M Sekerani of Delta by Mark Dawson from Pioneer. It is appropriate to quote the full text of the letter.

“With great embarrassment I write to you yet again apologising (sic) for the delay in the return of your trailers to you. We wish to state that we are not in any way trying to ignore or escape our obligation to you and are fully aware that we are testing your patience and leniency on this issue. We are still trying to recover from a huge hole that was left by previous employees as well as a huge skills gap that has emerged due to a skills flight of artisans.

We however intend to be delivering on trailer per week to you as from this week, whereas previously we had committed to two per month.

To achieve this we have employed two coach builders from Deven Engineering who will start on our payroll on 1 April. We have imported a sand blaster from South Africa. We are also importing paint from South Africa.

We thank you for the loan of the paint and will return what we have borrowed next week. We thank you for your leniency so far and look forward to making good our obligation to you.”

I am persuaded that from the tenor of the two letters that were submitted to the arbitrator by the first respondent it was never in doubt that the applicant was aware of its obligations under the contract and that it had expressed every intention to fulfil those obligations. The e-mail from Motsi and the letter from Dawson both clearly spelt out the acceptance by the applicant of returning the trailers to the first respondent in good working condition. If the applicant had not accepted the obligation or had misunderstood the obligation, it would not have taken upon itself the expense of hiring coach builders and a sand blaster to work on the trailers. It had also ensured that each of the trailers prior to delivery to Delta had to pass a fitness test with VID. This, in my view, was clearly in accordance with the requirement in the contract that the trailers be returned to Delta in good working condition, fair wear and tear excepted.

I do not understand the applicant to suggest that the trailers should not have been returned. The argument is that the second respondent should not have required that the applicant be made to perform in terms of the contract when the first respondent had itself not performed its own part of the contract. The obligation of the first respondent was to provide the applicant with trailers to enable the latter to utilise them in the distribution of products on behalf of Delta. The

parties' reciprocal obligations during the life of the contract are not in dispute. Once the agreement is terminated, the status *quo ante* had of necessity to be restored. This necessitated the return by the applicant of the first respondent's trailers in good working condition, fair wear and tear excepted. I am of the view that the reasoning by the arbitrator in requiring the applicant to comply with this contractual obligation cannot be faulted. I am unable to accept as cogent the argument by the applicant that the agreement had envisaged bilateral obligations on the parties and that in awarding specific performance in the first respondent's favour the arbitrator had imposed an obligation upon one party when the other party to the contract was clearly not in a position to perform its own part of the obligation.

I accept that during the currency of the agreement the first respondent was obliged to allocate trailers for the facilitation of the transportation of its goods by the applicant. Charges raised by the applicant for this service would permit the applicant to ensure that its horses and the first respondent's trailers would be maintained in a roadworthy condition and be certified fit by VID. Upon termination of the agreement however it was the responsibility of the applicant to return the first respondent's trailer in good working condition, fair wear and tear excepted. I cannot see how by giving effect to the letter of the agreement regarding the obligation imposed upon the applicant to return the trailers in good and working condition it can be suggested that the arbitrator imposed an obligation upon one party to the agreement.

The first respondent contends further that it has been advised by its legal representatives that no appeal lies against an arbitral award. It contends that the applicant wants the award set aside on the premise that the arbitrator came to a wrong conclusion on the facts and on the law. The applicant is however camouflaging these proceedings to have the aspect of a review when what the applicant seeks is an appeal. There is not a single ground for review on the papers. Accordingly, the first respondent prays that the application be dismissed on that ground alone, specifically that the applicant does not have a cause of action.

Finally, the first respondent avers that the applicant has embarked on vexatious and frivolous litigation and that in order for the court to show its displeasure, it is only proper that the applicant be mulcted with an appropriate order of costs on a punitive scale.

The record of proceedings of the arbitration process was not before the court. The submission from the applicant's counsel was that it was understood that it was the responsibility

of the second respondent, the arbitrator, to furnish the record to the registrar of this court. As matters stand the arbitrator did not appear or file any documents. The arbitration process is completely separate from the court system and without any effort expended by the applicant to secure the provision of the record of proceedings by the arbitrator I am not aware how else this was to be achieved. The applicant has failed to establish that the award given in favour of the first respondent was contrary to public policy in any of the respects alleged. I am therefore not persuaded that there is any merit in the application.

As for the costs, the first respondent prayed for a punitive order of costs. I have not been addressed on the reasons why the first respondent considers the application frivolous and meriting an award of costs on the higher scale. The mere fact that a party has decided to take on review a decision it is not happy with does not reflect in my view a frivolous attitude. The first respondent needed to show that the applicant did not have faith in its litigation and had instituted such litigation mala fide with an intention other than a desire to have the award properly set aside. There is no abuse of court process alleged on the papers and in the event I persuaded that an order of costs on the higher scale is warranted.

The application is dismissed with costs on an ordinary scale.

Kantor & Immerman, legal practitioners for the applicant
Gill, Godlonton & Gerrans, legal practitioners for the first respondent