

ZESA HOLDINGS PRIVATE LIMITED
versus
CLOVGATE ELEVATOR COMPANY (PVT) LIMITED
and
JUSTICE L.G SMITH (RTD) N.O.

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 2 December 2019 & 10 June 2020

Opposed Application

Ms V N Dzingirai, for the applicant
T Zhuwarara, for the respondent

MANGOTA J: On 18 October 2018, Clovegate Elevator Company (Pvt) Ltd [“the applicant”] applied for registration of the arbitral award which was entered in its favour on 25 July, 2017. It attached to the same certified copies of:

- (i) the arbitral award – and
- (ii) the arbitration agreement.

It moved that the award, being extant, should be registered.

ZESA Holdings (Private) Limited [“the respondent”] opposed the application. It chronicled its reasons for the same. The reasons, in essence, were to the effect that the arbitral award was/is contrary to the public policy of Zimbabwe. It stated that it had already applied for the setting aside of the award. It moved that the same be set aside.

HC 9229/17 and HC 8688/17, which is the respondent’s application for setting aside the application for registration of the award, are two separate applications. They, however, relate to the same subject matter namely the arbitral award. The parties to the two applications are the same. The difference between them is that each party looks at the award from its own perspective.

The applicant is of the view that the award is valid and should be registered. The respondent has a contrary view. It states that the award is invalid and should not be registered.

For purposes of convenience and the desire to reach finality, the two applications were consolidated into one case. The consolidation was effected under HC 9581/18. I heard both applications on the same day and I reserved judgment.

Before I delve into the merits of the case, it is pertinent for me to state, in brief, the history of the parties' dispute. The same is grounded in the law of contract. The applicant and the respondent concluded the same on 14 August, 2013.

The contract was to endure for a two-year period which stretched from 14 August, 2013 to 14 August, 2015. It was for the supply, delivery, installation and maintenance of three passenger elevators and one goods elevator at the respondent's building which is in Harare.

The applicant failed to complete the project within the time-frames which were stipulated in the contract. It attributed its failure to *vis majeure*. It stated what that entailed.

The respondent was unhappy with the applicant's performance of contract. It addressed a letter to the applicant on 8 October, 2015. It gave the applicant two weeks within which the latter was to rectify what it saw as a breach of contract. The applicant did nothing other than to request for more money. It wrote its second letter on 23 October, 2015 giving the applicant extra days to rectify the perceived breach after which cancellation would be effected without further notice to it. It eventually cancelled the contract and, on 23 November, 2015 it notified the State Procurement Board of the cancellation. It re-tendered in 2016.

The respondent's cancellation of the contract gave birth to a dispute between the applicant and it. The two of them referred the same to arbitration. Clause 10 of the contract which they signed gave them the leeway to do so. It read, in the relevant part, as follows:

"10. DISPUTE AND ARBITRATION

10.1 Any disputes or differences arising out of this contract or in connection therewith which cannot be amicably settled between ZESA and the supplier shall be referred to arbitration in accordance with the Arbitration Act [Chapter 7:15] of the laws of Zimbabwe".

The arbitrator heard the parties' dispute. He found, as a fact, that the plea of *vis majeure* which the applicant pleaded in its papers was not without merit. He, accordingly entered judgment for the applicant. His award reads as follows:

- “1. The claimant (i.e., applicant) be re-instated as the service provider to supply, fit and maintain three personnel elevators in accordance with the provisions of the contract;
2. The respondent pays the suppliers of the equipment ordered by the claimant (i.e. applicant) as soon as possible and also pays the freight charges for the equipment to be brought to Harare and any tax charges;
3. If there is any balance of the contract price that has not been paid by the respondent, it shall be paid to the claimant (i.e. applicant) within fourteen days after the completion of the contract;
4. The respondent shall reimburse the claimant (i.e. applicant) for the fees it has paid to the Arbitrator and shall pay the legal fees incurred by the claimant (i.e. applicant)”.

Following the issuance of the award, the applicant addressed a letter to the Arbitrator. The letter is dated 21 September, 2017. It served the same on the respondent on the mentioned date. It requested the Arbitrator to correct the award on the following:

1. The correction of a typographical error on pages 25 and 26 and anywhere else in the award where the supplier Motion Control Engineering has been mentioned as Miscrosoft.
2. The interpretation of the rate at which the legal fees incurred by the claimant (i.e. applicant) is being awarded.

The Arbitrator clarified the rate at which legal fees which the applicant incurred was being awarded. Clause 4 of the amended award speaks to the same. It states that the respondent would pay the legal fees which the applicant incurred on a legal practitioner and client scale.

The arbitral award, as amended, constitutes the respondent’s cause of action. It alleges that the same is contrary to the public policy of Zimbabwe. It states the following as its reasons for the same:

- (i) it upheld a claim which failed to establish a cause of action;
- (ii) it reinstated a cancelled contract without setting aside the *ex nunc* cancellation that had been effected by a party to the contract;
- (iii) the Arbitrator proceeded on the basis of considerations *ex aequo et bono* under circumstances where he was not given the right to so proceed and consequently only had the jurisdiction to apply the positive law of the land;
- (iv) the award is so palpably faulty and cannot constitute a basis upon which a matter could be said to have been finally and definitively dealt with and determined. In that regard, it offends the conception of justice in the minds of all reasonable people in the republic.

Before I deal with the merits or otherwise of the above mentioned four matters, it is

important for me to make one or two observations which relate to the two applications which I am called upon to determine. The first is that the respondent filed HC 8688/17 on 19 September, 2017. It served the same on the applicant which filed its notice of opposition on 2 October, 2017.

The applicant was aware, as far back as the beginning of October, 2017, that the respondent was challenging the arbitral award. Its application for registration of the award which it knew was under challenge is misplaced. It filed the same on 18 October, 2018. It does not proffer any reason which prompted it to file, let alone persist with, the registration of the award under the stated set of circumstances. Nothing appeared to have prevented it from waiting for HC 8688/17 to be concluded before it filed for registration of the award. The chronology of events should have persuaded it to await finalisation of HC 8688/17 and, if the decision went in its favour, to proceed to file HC 9229/17. Its conduct is frowned upon. There was no hurry on its part to act as it did.

It is clear, from the foregoing, that the determination of HC 9229/17 is dependent upon the outcome of HC 8688/17. Registration of the arbitral award, it stands to reason, can only occur where HC 8688/17 has been decided against the challenge which the respondent mounted. Where the opposite of the stated proposition rules the day, the application for registration of the award will be favourably considered.

Given the fact that the outcome of HC 9227/17 depended on the outcome of HC 8688/17, I directed the parties to make submissions in respect of the latter case as a starting point. The respondent states correctly that its application is in terms of Article 34 (1) (b) (ii) of the Arbitration Act [*Chapter 7:15*] (“the Act”). The Article speaks to recourse against an award. It reads, in the relevant part, as follows:

- “(1)
- (2) An arbitral award may be set aside by the High Court only if –
 - (a) (i); or
 - (ii); or
 - (iii); or
 - (v)or
 - (b) the High Court finds that –
 - (i); or
 - (ii) the award is in conflict with the public policy of Zimbabwe”.

The Act does not define the phrase public policy. It leaves the same open to debate. However, Oxford Dictionaries refer to public policy as the principles, often unwritten, on which social laws are based. The freedictionary.com/public & policy defines the phrase as a

principle that no person or government official can legally perform an act that tends to injure the public. Public policy, it states, manifests the common sense and the common conscience of the citizens as a whole that extends throughout the State and is applied to matters of health, safety and welfare. Answers.search.yahoo.com says of the phrase trying to get a concise answer that everyone agrees to is impossible. Public policy, it states, is an abstract concept and it depends on what your point of view is when trying to define it. The [freedictionary.com/public & policy](http://freedictionary.com/public_%20policy) defines the phrase public policy to mean the public interest or the public good as expressed in principles that guide the interpretation and enforcement of laws.

It is evident, from a reading of the foregoing, that there does not appear to be a clear definition of the phrase. What can, however, be gleaned from the same is that the concept, though elusive, is capable of being understood. My understanding of the phrase is that public policy is the norm which a given society accepts as measured against what that society frowns upon.

The definition which I have attempted of the phrase does, in my view, resonate well with sub-article (5) of Article 34 of the Act especially in relation to matters which fall in the discipline of law. It reads:

- “(5) For the avoidance of doubt,; it is declared that an award is in conflict with the public policy of Zimbabwe if –
- (a) the making of the award was induced or effected by fraud or corruption; or
 - (b) a breach of the rules of natural justice occurred in connection with the making of the award”.

What the cited part of the Article states, in simple terms, is that society frowns upon an award which is born out of a fraudulent act or one which is issued to a party as against another on the basis of corruption or a breach of the rules of natural justice. It is, in short, injudicious for a judicial officer to make an award in favour of a party who has acted fraudulently or corruptly. It is also injudicious for him to fail to observe the rules of natural justice when he hears and determines a matter which has been placed before him.

The norm which society accepts is that justice must not only be done. It must be seen to be done to the satisfaction of those who bring their cases to the judicial officer for adjudication. It accepts, further, a judicial officer who conducts himself in a manner which is above reproach.

Where bias is feared on the part of the judicial officer, the best option for him is to recuse himself from the case. Where corruption is feared on his part, his only avenue is to

leave his office on a permanent basis. That should be so because society frowns upon such a dispenser of injustice instead of justice. It accepts one who chooses to remain untainted or untarnished. He remains suitable for the office which he holds because he is always accountable to the people whom he swore to serve.

The above analysed matters do, in my view, constitute the context in which the respondent's application should be viewed. Its complaint refers to the award which the arbitrator issued. It alleges that the same is contrary to, or in conflict with, the public policy of Zimbabwe.

Four matters constitute the substance of its complaint. The first is that the Arbitrator upheld a claim which failed to establish a cause of action.

Cause of action, as I understand it, is the driving force behind a suit. It is the reason which compels the plaintiff or the applicant to sue the defendant or the respondent. It is grounded in a particular branch of the law like delict, insurance or, as *in casu*, contract. It is a set of allegations which, when taken together, build up a claim for the plaintiff or the applicant who is enjoined to prove the same on a balance of probabilities. It more often than not seeks a relief or a remedy for him.

Given the above-stated position of the matter, it stands to reason that all action or motion proceedings do, as of necessity, have a basis for the suit. No suit can, therefore, stand the test of any proceedings if the cause of action is not present in it. It is the presence of the set of allegations which pends proof which is a *sine qua non* aspect of all proceedings.

The applicant defined its cause of action in a clear and unambiguous manner. Its complaint was or is that, by cancelling contract, the respondent breached the terms of the same. It insists that the cancellation was unlawful.

The above-stated matter was, indeed, the reason which compelled the applicant to invoke clause 10 of the contract and refer its case to arbitration. The cancellation of the contract, in its view, created a dispute between the respondent and it. Its intention, it would appear, was to have the same determined in one way or the other by the arbitrator.

The respondent made every effort to justify its cancellation of the contract. It insisted that the cancellation was lawful. It based the same on the allegation that the applicant failed to perform within the agreed time-frames.

The arbitrator heard the parties' respective cases. He identified the applicant's cause of action. He stated at p 29 of the record that the issue which he was called upon to determine centred on whether or not the respondent's cancellation of the contract was lawful. He, in the

same, remained alive to the allegation of *vis majeure* having visited the applicant as an issue which would assist him in his determination of the case which was before him. He heard the parties, considered all the evidence – *viva voce* and documentary – which they submitted. He agreed with the applicant and disagreed with the respondent. He, in short, accepted the existence of *vis-majeure* as having weighed against the performance of the contract by the applicant. He, in conclusion, ruled that the respondent's cancellation of the contract, in the presence of the *vis majeure* which operated against the applicant's performance of the contract was unlawful. His identification of the cause of action, as it existed in the case which was before him, cannot be faulted.

It is on the basis of the foregoing matters that the respondent cannot persuade me to believe that the applicant and it appeared before the arbitrator to argue a case in which no cause of action was in existence. *A fortiori* when both parties were ably legally represented during the arbitration process. It is also not having me believe that the arbitrator who is a retired judge of this court decided, and continued to hear, a case which had no cause of action.

The fallacy of the respondent's claim is evident from its own conduct. If there was no cause of action in the proceedings, as it seems to suggest, the respondent would have raised that issue at the initial stages of the arbitration. It would have excepted to the hearing on the ground that the applicant's claim did not have a cause of action. The fact that it went all the way from the commencement of the arbitration to the stage of the arbitral award which it now seeks to set impugne speaks volumes of its acceptance of the existence of the cause of action in the case. Its statement which is to the effect that the arbitrator upheld a claim which failed to establish a cause of action is misplaced. It is, in fact, devoid of merit.

The respondent's second reason for mounting HC 8688/17 was that the arbitrator reinstated a cancelled contract without setting aside the cancellation which it had effected on the same. It argued that the conduct of the arbitrator was in conflict with the public policy of Zimbabwe to the stated extent. It insisted that, in order for the award reinstating the contract to be rendered, there should have been a vacation of the cancellation. There should, according to it, have been an order which set aside the cancellation as invalid. The order, it alleged, must have appeared in the operative part of the award.

The applicant's statement on the abovementioned matter was to the contrary. It stated that there was no cancellation which was to be set aside before the reinstatement. It insisted that the purported cancellation was set aside by virtue of the order of reinstatement. It

submitted that, by reinstating the contract, the cancellation of the contract was automatically cancelled.

The arbitrator's finding was that the respondent's cancellation of the contract was unlawful. The long and short of the stated matter is that the cancellation was a nullity. It was a unilateral cancellation which, in terms of the arbitrator's finding, was a nothing. There was, therefore, no requirement on the part of the arbitrator to set aside a nothing.

The respondent did not refer me to any rule, regulation or law which states that a unilaterally cancelled contract which cancellation is found to be unlawful should be vacated before reinstatement of the contract is ordered to take effect. Case authorities which it cited in support of its argument on the matter, it seems to me, refer to a lawfully cancelled contract as opposed to one which has been unlawfully cancelled. The doctrine of the sanctity of contracts which it was very pleased to refer to relates to lawful, as opposed to unlawful, contracts.

The applicant's statement, with which I agree on the point in issue, is that its reinstatement cancelled the unlawfully cancelled contract. Cancellation was not cancellation in the true sense of the word. It was a purported cancellation which did not require to be set aside. The arbitrator's conduct in the mentioned regard is, once again, above reproach.

The respondent's third reason for applying to set aside the award was that the arbitrator went outside the remit of his powers. The parties, it stated, did not give him the power to determine the issues which they placed before him on the basis of considerations *ex acquo et bono*. The award, it insisted, turns on equity and not law. It submitted that the arbitrator rewarded a party which breached the contract.

The applicant denied that the arbitrator used principles of equity and good conscience in his determination of the case. It stated that he used the terms of reference which the respondent and it submitted to him together with provisions of the contract which the two of them signed. It insisted that he abided by the law of contract. He interpreted provisions of the contract which was before him, according to it.

The respondent's above-mentioned reason is more relevant to its application than the first two reasons. It speaks to the contract which the applicant and it signed. It, therefore, lies at the centre of the parties' dispute. It, in other words, calls upon me to assess the manner in which the arbitrator went about the arbitration process.

It is at this stage more than at any other that the arbitrator's conduct should receive serious scrutiny. Excerpts of decided case authorities provide a useful guide in the intended

scrutiny. These define the manner in which a court which is faced with an application of the present nature should go about in its onerous task of assessing the work of the arbitrator.

The following excerpts immediately come to the fore: An application under Article 34 of the Act is neither an appeal nor a review. The court, in such an application, does not 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 [*Zimbabwe Electricity Supply Authority v Maposa*, 1999 (2) ZLR 452 (S)]. The court will only interfere with the award where the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness which constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the arbitrator dispensed injustice instead of justice (*Zimbabwe Electricity Supply Authority* (supra)). Even where the arbitrator made a finding that was erroneous or unreasonable, the court should not interfere. It can only interfere if the decision was attended by a gross irregularity or it resulted in a failure of justice [*Catering Employers Association of Zimbabwe v The Deputy Chairman Labour Relations Tribunal and Another* HH 206/2000]. Where the award is hopelessly wrong, the court may say that it could only have been arrived at by reference to improper considerations or by failure on the part of the arbitrator to refer to proper considerations. Under such circumstances, the court will state that the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency [*Affretair (Pvt) Ltd & Anor v M.K. Airlines (Pvt) Ltd*, 1996 (2) ZLR 15 (S)].

It follows from the excerpts that, in order for me to interfere with the award, the respondent must satisfy me, on a balance of probabilities, that:

- (a) the award is hopelessly wrong; and/or
- (b) the arbitrator dispensed injustice instead of justice; and / or
- (c) the reasoning or conclusion of the arbitrator goes beyond mere faultiness or incorrectness which constitutes a palpable inequity of a far reaching magnitude which is outrageous in its defiance of logic or accepted moral standards, and / or
- (d) the award resulted in a failure of justice.

The question which begs the answer is whether or not the conduct of the arbitrator fits into any of the above-mentioned four statements. If it does, the award will not unnaturally be set aside. If it does not, the award will remain undisturbed.

The matters which would immediately have weighed in the respondent's favour on the issue which is under consideration appears in sub-article (5) of Article 34 of the Act. The

court repeated them in the *locus classicus* case of *Zimbabwe Electricity Supply Authority* (supra). It is in that case more than in any other that the meaning and import of an award which is in conflict with the public policy of Zimbabwe was aptly defined. The relevant part of the case reads:

“In order to ascertain the meaning of this elusive concept, in the context of the Model Law, regard is to be had to the structure of Articles 34 (5) and 36 (3) which deal with two concepts. These are that the making of the award was induced or effected by:

- (a) fraud or corruption; or
- (b) a breach of the rules of natural justice”.

The respondent, it is evident, did not ever plead, in its papers, that the arbitrator acted in a corrupt manner or that he breached the rules of natural justice when he heard and determined the case of the parties. It made an attempt to suggest that the applicant defrauded it of its money. It, however, did not show how the fraud is alleged to have occurred, if it did. The allegations which it made were nowhere near the elements of fraud. It attempted at showing that the applicant stole its money. But even that allegation did not stand the test. It did not satisfy the requirements of the crime of theft.

Given that money changed hands between the applicant and it in fulfilment of the parties’ contract, theft of whatever form or nature could not stand. It made assumptions which it failed to prove on a balance of probabilities.

The arbitrator was quick to observe the complaint of the respondent in the above-mentioned regard. He correctly remained of the view that the complaint was not based on proved facts but on assumptions. He dismissed it with little, if any, difficulty. His reasoning on that aspect of the case is well in order. It cannot, in all fairness, be criticised let alone interfered with.

There is no doubt that the arbitrator gave an unqualified ear to the case of the applicant and the respondent who called upon him to determine their dispute. He even allowed the respondent, at its instance, to call a witness whom it thought would add weight to its case. He allowed the witness to testify after all the witnesses which the parties said they would call had given their evidence. He did not display any semblance of corruption. He abided by the rules of natural justice. Nor did he make an award which was born out of fraud or theft as the respondent seemed to insinuate against the applicant.

The arbitrator remained alive to the fact that what the parties placed before him was a dispute which was grounded in the law of contract. He, in my view, read the contract which the parties signed between them. The stated fact is gleaned from his application of the parties’

evidence to the terms of the contract. He focused his attention on two very important clauses of the same – namely clauses 5 and 9.

The arbitrator, in my assessment, heard the parties' evidence and applied the same to clause 9 of the contract. He realised that the clause contained terms which exonerated the applicant where its no-performance was as a result of *vis-majeure*. The clause gave a leeway to the applicant to have the period of the contract extended for the duration of the existence of the *vis-majeure*. He made findings which were to the effect that :

- (i) the respondent's necessary exercise of due diligence on Metropolitan Bank played a significant role in the applicant's non-timeous performance of the contract - and
- (ii) the difficulty which the applicant experienced in accessing money from Metropolitan Bank for payment by it to suppliers of the equipment which it required for installation of the elevators at the respondent's premises constituted *vis majeure* which prevented the applicant from fulfilling its part of the contract.

He placed reliance on the mentioned clause when he reinstated the applicant to continue to perform the contract. His analysis of clause 9 of the contract is above reproach.

Although the arbitrator gave an apparently abridged version of his interpretation of clause 9 of the contract, he appeared to have been substantially influenced by the contents of the clause. He, it would appear, kept at the back of his mind the following matters:

- (a) that the *vis majeure* resulted from acts of persons who were beyond the reasonable control of the applicant;
- (b) that the event of *vis majeure* was not caused by the negligence of the applicant, it being a fact that the respondent had, through the diligence investigation it conducted, confirmed the suitability of the guarantee from the Metropolitan Bank- and
- (c) that the *vis majeure* did not arise from an industrial dispute which involved the applicant's employees.

The statement which the arbitrator made in respect of clause 5 showed the extent to which he went in his effort to analyse the terms of the contract vis-à-vis the evidence which the parties placed before him. He said of the clause:

“clause 5 of the Agreement, provided that if the claimant failed to supply and install the elevators within the period specified in the Agreement the Respondent shall give notice to the claimant to comply within two weeks and, if the claimant fails to comply

within the specified period the tender may be cancelled, subject to whatever rights the claimant may have at law. In terms of clause 4 of the Agreement, the start-time of the installation of the escalators was 14 August, 2013 and the finish time was 28 July 2014. The Respondent did not exercise its rights in terms of clause 5 within a month or two of 28 July 2014. It was only on 8 October 2015 that it sent a letter to the claimant giving it two weeks to rectify the breach. The claimant responded on 19 October demanding more money. Clearly clause 5, of the Agreement envisaged the Respondent sending a letter within a few weeks or possibly a month after the finalisation, which was about September 2014.

A letter more than a year later in October 2015 could hardly be regarded as being in compliance with cause 5 of the Agreement..... I consider that the letter from the respondent on 8 October 2015 was not an exercise of the respondent's rights in terms of clause 5" [emphasis is added].

The arbitrator's above-mentioned statement went to the root of the parties' terms of contract. By not exercising its rights as it should have, the respondent waived the same according to the arbitrator. What he was stating, in short, was that the respondent could not be allowed to approbate and reprobate. It could not, in other words, be heard to have waived its rights which were contained in the contract and at the same time insist on the point that the applicant failed to perform in terms of the contract which, by its own conduct, it had decided not to strictly abide by.

A number of case authorities set out the nature of the doctrine of election. Election, in general terms, involves a waiver. One right is waived by choosing to exercise another right which is inconsistent with the former.

The case of *Palmer v Poulter*, 1983 (4) SA II (T) at 20 C-D elucidates the meaning and import of the doctrine. It stated that:

"If the appellant, with full knowledge of the facts, has so conducted herself that a reasonable person would conclude that she had waived her accrued right to cancel the agreement or had affirmed the agreement, a mental reservation to the contrary will not avail her".

In stating as it did in the *Palmer* case, the court was only traversing the path which WAKERMEYER J.A pronounced on the subject-matter in *Segal v Mazzur*, 1920 CPD 634 when he remarked at 644-645 in the following words:

"...when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election, he is bound by that election and cannot afterwards change his mind. Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If, with the full knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way".

The Supreme Court's *dictum* on the same doctrine is relevant. It stated in *Guardian Security (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 2002 (1) ZLR 1 (15) that:

“If, following a breach of contract, the innocent party, with full knowledge of his rights, performs an unequivocal act from which it can be reasonably inferred that he has elected to abide by the contract his intention in performing the act is to be tested objectively. He is not at liberty to say that his conduct was not motivated by an intention to waive his right to terminate the contract”.

It is evident, from the foregoing case authorities, that the law does not concern itself with the working of the minds of parties to a contract. It concerns itself with the external manifestations of their mind.

In *casu*, the conduct of the respondent evinced the position that it waived its rights and elected not to insist upon the applicant's strict adherence to the terms of the contract. The arbitrator put it succinctly when he stated that the respondent was well aware of the cash flow challenges which the applicant was having. He stated, in the award, that it was because of its knowledge of the challenges that it agreed to assist by making payment for the equipment which related to the elevator which the applicant air-freighted to Harare for installation.

It cannot, by any stretch of imagination, be suggested that the arbitrator did not apply his mind to the terms of the contract. Nor can it be suggested, as the respondent would persuade me to believe, that he applied the law of equity in his determination of the parties' issues. He, at all material times, paid due regard to the contract, its provisions which were relevant to what was before him, in particular. His application of the evidence to the terms of the contract was above reproach. He adhered to the defined law in the strict sense of the word. This observed matter renders the respondent's third reason devoid of merit.

I must confess that I experienced considerable difficulty in trying to appreciate the respondent's fourth reason for applying to set aside the award. All it said on the matter was that the award was palpably faulty to the extent that it could not constitute a basis upon which the arbitration process could be said to have been finally and definitively dealt with and determined. It insisted that the award offended the conception of justice in the minds of all reasonable people in Zimbabwe.

The respondent did not state the manner in which the award was palpably faulty. Nor did it describe the offensive part of the award to enable me to understand what its complaint was.

Because the respondent stated the reason in vague terms, the applicant was placed in a very invidious situation. It had no choice but to make a bare denial. All it could say, in

response, was that the award captured the matter correctly and it brought the same to finality whatever that meant.

It was only when I read para (d) of the respondent's abridged version of its complaint together with para 3.4 (d) of its expanded version of the same that it dawned to me that it sought to impugn the arbitrator for having accepted the evidence of Mr Wolstord. The evidence, it argued, showed that some of the elevator parts which the applicant delivered to it were stolen from a local company. They were not, it insisted, taken from foreign suppliers. It stated that the applicant sought, and the arbitrator allowed it, to defraud it.

The Supreme Court resolved the issue of the alleged theft of elevator equipment which belonged to Southview Holdings (Pvt) Limited. It did so on 6 February, 2018 and under SC 629/17. Its order was, in fact, with the consent of the respondent.

The magistrates' court also resolved the same matter when it acquitted one Collin Mapepa Jeche who was/is the chairperson and managing director of the applicant. He had been arraigned before the court on a charge of fraud as defined in s 136 of the Criminal Law [Codification and Reform] Act.

The decision of the magistrates' court of 20 August, 2018 the charge of which had been filed under CRB number 806/17 as read with that of the Supreme Court put to rest the alleged theft of Southview Holdings (Pvt) Limited's equipment by the applicant. The respondent could not, therefore, place any reliance upon it to impugn the award. The arbitrator, on his part, ruled out the allegation of theft by the applicant. Court decisions which were issued in respect of that matter showed that his assessment of the evidence of the parties on the same was correct. This analysed set of matters renders the respondent's fourth reason not to be with merit.

The above are the four reasons which the respondent advanced in its application to set aside the award. All of them are devoid of merit. None of them carries any weight.

The respondent, as the applicant correctly observed, made an effort to sneak into its case a fifth ground/reason for its application to set aside the award. The issue related to the amendment of the award. It raised the same in its answering affidavit. This appears at p 674 of the record.

It is trite that a cause of action must be set out in the founding affidavit. It is, in short, improper for an applicant to raise new matters in an answering affidavit [*Mangwiza v Ziumbe*, 2000 (2) ZLR 489 (5)].

GARDNER J P lamented the practice which the respondent stands guilty of in *casu*. The learned Judge President discussed the matter which relates to the unwarranted practice in *Coffee, Ten and Chocolate Co. Ltd v Cape Trading Company*, 1930 CPD 81 at 82 wherein he remarked that:

“A very bad practice, and one by no means uncommon, is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying”.

He refused to admit into evidence affidavits which the applicant filed after the respondent filed its notice of opposition. I am persuaded by his refusal to refuse to entertain the new matter which the respondent raised *in casu* after the applicant had filed its opposing papers. Equally, I shall not accept into evidence the supporting affidavit which its legal representative filed on the same matter. Accepting those into evidence would constitute a violation of the public policy of Zimbabwe. *A fortiori* when the applicant does not have the opportunity to reply to the new allegation. At any rate, the commonly accepted principle is that an applicant stands or falls by his founding affidavit.

The respondent was ably legally represented when it raised the new matter in its answering affidavit. Its legal practitioner should have properly advised it of the undesirability of the course of action which it had taken.

I have considered all the circumstances of the respondent’s case. I am satisfied that it failed to prove its application on a balance of probabilities. The application is, accordingly, dismissed with costs.

Having disposed of HC 8688/17, what remains for me is to consider the merits and de-merits of HC 9229/17. The applicant states, and I agree, that the registration of the award is in terms of Article 35 (1) and (2) as read with r 226 (1) (b) and (2) (c) of the rules of court. The application satisfies the legal requirements for an application of the present nature. It is in writing. It is accompanied by certified copies of:

- (i) the arbitral award - and
- (ii) the arbitration agreement.

The relief which the applicant seeks is procedural in nature. The net effect of that is that, once the above-mentioned requirements are present, the court will register the award.

The respondent sought to set aside the award. The grounds which it advanced in its notice of opposition to the application for registration were replicated by it in substance in HC 8688/17. I considered those reasons and found them to have had no merit. It is on the

basis of the finding which I made in HC 8668/17 that I grant the applicant's prayer in terms of its draft order. HC 9229/17 is, accordingly, granted as prayed.

Chivore Dzingirai group of lawyers, applicant's legal practitioners
Shumba and Partners, respondent's legal practitioners