

REPORTABLE: (26)

(1) RIOZIM LIMITED (2) RM ENTERPRISES (PRIVATE)
LIMITED
v
(1) MARANATHA FERROCHROME (PRIVATE) LIMITED
(2) JUSTICE NOVEMBER TAFUMA MTSHIYA (RTD)

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA & MATHONSI JA
HARARE, 23 OCTOBER, 2020 & 24 FEBRUARY 2022**

T Mpofo and *T L Mapuranga*, for the appellants

F Girach, for the first respondents

No appearance for the second respondent

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UCHENA JA: This is an appeal against the whole judgment of the High Court dismissing the appellants' application for the setting aside of an arbitral award in terms of Article 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*] hereinafter referred to as the Act.

FACTUAL BACKGROUND

The detailed facts of the case can be summarised as follows;

The two appellants and the first respondent are Zimbabwean companies registered in terms of the law. The second respondent is an Arbitrator who is presiding over a dispute between the appellants and the first respondent.

RM Enterprises (Private) Limited (the second appellant) is a wholly owned subsidiary of Riozim Limited (the first appellant). On 19 January 2010 the first appellant and Maranatha Ferrochrome (Private) Limited (the first respondent) entered into a memorandum of Shareholders' Agreement. In terms of the agreement, the first appellant was to ensure that 40 per cent of issued shares in the second appellant would be transferred without cost to the first respondent so that the shareholding between the parties in the second appellant would be as follows, Riozim 60 per cent and Maranatha Ferrochrome 40 per cent.

On 29 January 2017, the first respondent wrote to the first appellant informing it of its breach of the terms of the shareholder agreement. It informed the first appellant that it had breached clause 1.1 of the agreement as it failed to transfer chrome claims as agreed between the parties. The first respondent gave the first appellant notice that it would, in terms of clause 30 of the agreement refer the dispute to an arbitrator if the first appellant failed to fulfil its obligations within 30 days.

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The parties agreed to refer the dispute to arbitration before the second respondent. At the commencement of arbitral proceedings the first appellant raised preliminary points objecting to the second respondent's jurisdiction, the validity of the agreement and that the first respondent's claim had prescribed. The first appellant averred that there was no arbitration agreement between the first appellant and the first respondent (the parties to the agreement) and the second appellant who was the subject of the agreement. The first appellant averred that clause 30 of the agreement sued upon by the first respondent was between it and the first appellant and did not extend to the second appellant.

The first appellant argued that the second respondent had no jurisdiction to preside over the dispute. The first appellant averred that by the joinder of the second appellant to the dispute, the first respondent accepted that the dispute could not be resolved through arbitration as the arbitrator could not exercise jurisdiction over the second appellant. The last point raised by the first appellant was to the effect that the first respondent's claim had prescribed as the cause on which the first respondent sued had arisen in 2010 and as such 3 years had lapsed. The first respondent opposed the preliminary points.

In determining the preliminary points, the second respondent ruled that he had jurisdiction to preside over the matter as there was a valid shareholder's agreement which the first appellant accepted to be valid. He further found that an interpretation of the shareholders' agreement proved that clause 27 was placed in the agreement so as to bind the second appellant impliedly and expressly to the provisions of the agreement. The second respondent also ruled that the second appellant being a wholly owned subsidiary of the first appellant and the subject of the agreement, was bound by the provisions of the agreement. For these reasons the second respondent dismissed the preliminary objections on jurisdiction and the validity of the shareholder's agreement.

On the issue of prescription, the second respondent held that the dispute between the parties was on whether or not there were stipulated time limits for performance in the shareholder's agreement to indicate when the cause of action would arise and make the debt due. The second respondent held that as the shareholder's agreement was silent on the date of performance the appellants could not be in *mora* until a reasonable time for performance had lapsed after the first respondent had made demand for performance. He further found that demand for performance was made by the first respondent on

30 January 2018 and as such the debt had not prescribed. In the result, the second respondent made an order dismissing the points *in limine* raised by the appellants in proceedings before him. He ruled that he had jurisdiction to preside over the dispute between the parties and held that the first respondent's cause of action had not prescribed.

Aggrieved by the second respondent's decisions, the appellants applied to the High Court (the court *a quo*) in terms of Article 34 (2) (b) (ii) of the Model Law for an order setting aside the second respondent's interim award. The first respondent opposed the application and raised two preliminary points to the effect that the appellants could not seek the setting aside of an interim award after a period of 30 days. It was argued on its behalf that in terms of Article 16 (3) of the Model Law, a party requesting the High Court to determine a matter of jurisdiction had 30 days within which to apply for a determination on the Arbitrator's ruling. It was further submitted that in this case the appellants applied to the court *a quo* out of time, as the interim award was granted on 10 June 2019. Therefore the appellants had up to 23 July 2019 to approach the High Court to determine the matter in terms of Article 16 (3).

The court *a quo* upheld the preliminary points and dismissed the appellants' application on that basis. It held that Article 34 of the Model Law was a procedure for the setting aside of a final award and not an interim award. It further held that the award made by the second respondent was an interim award dismissing the first appellant's special pleas and that such an award could not be set aside as it had not terminated the arbitral proceedings.

It reasoned that the appellants having failed to make their application in terms of Article 16 (3) of the Model Law realised that they were out of time and sought to resurrect

their right to approach the court by relying on Article 34 (3) of the Model Law. The court held that the appellants' conduct was dishonest and an abuse of court process as they sought to approach the court out of time under the guise of a wrong procedure. In the result, the court *a quo* upheld the first respondent's preliminary points and dismissed the appellant's application. On the issue of costs it ordered that the appellants (who were the applicants in the court *a quo*) to jointly and severally, the one paying the other to be absolved, pay the first respondent's costs of suit.

Aggrieved by the decision of the court *a quo*, the appellants noted an appeal to this Court on the following grounds:

GROUND OF APPEAL

1. "The learned Judge erred in law and fact in finding that the Appellants' application under case number HC 8150/19 should have been brought in accordance with the provisions of Article 16 to the First Schedule to the Arbitration Act [Chapter 7: 15]."
2. The learned Judge erred and misdirected himself in failing to find as he should have, that the Appellants' application was brought before the Second Respondent went beyond a preliminary enquiry into the arbitrator's jurisdiction. Consequently the Appellant could approach the High Court in terms of Article 34 to the Arbitration Act [Chapter 7: 15].
3. The learned Judge erred in law and fact in failing to find as he should have, that an arbitration award once handed down, becomes final on all issues canvassed therein and consequently such issues are rendered *res judicata* in future proceedings.
4. The learned Judge consequently erred in law and fact in finding as he did that he had no jurisdiction over the Appellant's application in case number HC 8150/19.
5. As regards the Second Appellant, the learned Judge erred in failing to find as he should have, that Second Appellant, as a third party who was not privy to the arbitration agreement between First Respondent and First Appellant, was improperly joined before the Second Respondent."

SUBMISSIONS MADE BY THE PARTIES

In urging the court to exercise its discretion in the appellant's favour, Mr *Mpofu* counsel for the appellants, submitted that the court *a quo* erred in dismissing the appellant's application. He argued that the interim award made by the arbitrator could be challenged on

the basis of Article 34 of the Model Law as the award was final on the determination of the preliminary points raised by the appellants. Counsel for the appellants further argued that international case law cited in the appellants' heads of argument establishes that an interim award can be challenged under Article 34 of the Model Law. Counsel also argued that the appellants could not challenge the interim award in two applications, one under Article 16 on the point of jurisdiction and another under Article 34 on the point of prescription. He contended that the correct procedure was to bring one application under Article 34 to challenge both points and question whether or not the award was contrary to public policy.

Per contra, Mr Girach counsel for the first respondent argued that the judgment of the court *a quo* was correct. He argued that the international authorities cited by the appellants cannot be applied to the present matter as the Arbitration Acts of India and Indonesia provide a definition for an award to include interim awards. Counsel for the first respondent also argued that the wording of Article 34 of the Zimbabwean Arbitration Act does not extend to interim awards. Counsel further argued that the appellant ought to have challenged the preliminary points under the procedure provided for in Article 16 (3) within 30 days and that when the appellants failed to do so they sought to have a second bite of the cherry by employing the wrong procedure under Article 34 of the Act.

ISSUE FOR DETERMINATION

The only issue to be determined in this appeal is, whether or not the court *a quo* erred in dismissing the appellants' application to set aside an arbitral award in terms of Article 34 of the Model Law of the First Schedule of the Arbitration Act on the basis that the application had not been properly placed before it.

THE LAW

Section 2 (3), **SCHEDULE (Section 2) MODEL LAW**, Articles 16, 31(7), 32(1), 33 and 34 of the Arbitration Act are relevant to the determination of this appeal.

Section 2 (3) of the Act provides for the interpretation of the Act as follows:

“2 Interpretation

(3) The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law, that is to say the *travaux préparatoires* to the Model Law, **and, in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.** (emphasis added)

Courts should therefore always be conscious of the need to achieve international uniformity when interpreting provisions of the Model Law. This means the Model Law’s interpretation by other jurisdictions should be taken into consideration subject to the exclusion of irrelevant interpretation of modifications by those jurisdictions. It must be stated that relevant interpretations of modifications by other jurisdictions which bring out the correct interpretation of the Model Law can be taken into consideration. In the case of *Courtesy Connection (Pvt) Ltd and Another v Mupamhadzi* 2006 (1) ZLR 479 (H) at 483 B-C Makarau J (as she then was) commenting on the international pedigree of the Model Law said:

“I am further persuaded to hold as I do by the fact that the Act is of international pedigree and certainty and finality of legal proceedings were paramount in its formulation. It would destroy both features if courts of the different countries adopting the Model Law were to be allowed to extend the period within which an award is to be set aside. Section 2 of the Act specifically provides that **in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.**

On the basis of the application of the above two principles, I would hold that the right to have set aside an arbitral award under article 34 is irrevocably lost if it is not brought within 3 months of the date of receipt by the party intending to have it set aside.” (emphasis added)

See also *Mtetwa and Anor v Mupamhadzi* 2007 (1) ZLR 253 (S).

SCHEDULE (Section 2) of the MODEL LAW provides for the identification of modifications of the Model Law by our Legislature. It provides as follows:

“SCHEDULE (Section 2) MODEL LAW
*[This Schedule contains the United Nations Commission on International Trade Law (UNCITRAL) Model Law, with modifications. **The modifications appear in italics.**]*”
(emphasis added)

Modifications to the Model Law by our Legislature are italicised. Their interpretation is guided by local precedents as they are not internationally applicable. In interpreting the Model Law courts should therefore bear in mind the distinction between provisions which are of international application and local modifications which are only applicable within our jurisdiction.

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Article 16 which is not italicised except for the words “High Court” and a Latin term, and is therefore internationally applicable provides as follows:

“ARTICLE 16
Competence of arbitral tribunal to rule on its jurisdiction

- (1) The arbitral tribunal **may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.** For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
- (3) The arbitral tribunal **may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the**

merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the High Court to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.” (emphasis added)

Article 16 (1) provides that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. A ruling on jurisdiction can therefore include that of any objections with respect to the existence or validity of the arbitration agreement. A reading of Article 16 (1), (2) and (3) establishes that issues of the existence or validity of an arbitral agreement can be included in a ruling on the Arbitrator’s jurisdiction.

It must be noted that article 16 (3) consistently refers to the arbitrator’s preliminary decision on jurisdiction as a ruling and it at the end, distinguishes it from a decision made at the termination of the proceedings which it refers to as an award. A party aggrieved by the arbitral tribunal’s ruling can within thirty days ask the High Court to decide the matter if the arbitral tribunal rules on such a plea as a preliminary question. The arbitral tribunal can opt to determine the issue of its jurisdiction as a preliminary issue or when it gives its award on the merits. The article does not provide for a request to be made to the High Court to decide the matter if the ruling is made in the award on the merits. It is apparent from the wording of article 16 (3) that what the High Court can decide the matter on is whether or not the arbitral tribunal has jurisdiction and the existence or validity of the arbitral agreement. The Article does not authorise it to go beyond those issues. The decision of the High Court on the ruling is final as it cannot be appealed against. The article makes a distinction between a ruling and an award by pointing out that the arbitral tribunal can make the ruling to the preliminary question or make such a ruling in its award on the merits. It is

therefore clear that the ruling is not an award as it can be made in the award on the merits and that while the issue of the ruling is pending in the High Court the Arbitrator can continue with the proceedings and make an award. A ruling on jurisdiction is therefore distinct and different from an award.

Article 31 (7) provides for other types of awards as follows;

“(7) Unless otherwise agreed by the parties, an arbitral tribunal shall have the power to make an interim,interlocutory or partial award”.

Article 31 (7) is by virtue of its being italicised a local modification. It is however law in Zimbabwe and has to be taken into consideration in determining the dispute between the parties in this case. In terms of this article an arbitrator has power to make an interim, interlocutory or partial award. These are types of awards which must be accorded their appropriate status. It must be noted that the modification does not alter the distinction between rulings and awards.

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Article 32 (1) provides that arbitral proceedings are terminated by a final award. It reads as follows:

*“(1) The arbitral proceedings **are terminated by the final award** or by an order of the arbitral tribunal in accordance with paragraph (2) of this article”.
(emphasis added)*

It is clear from a reading of article 32 (1) that a final award terminates arbitral proceedings. This means reference to an award in Article 34 is generic and does not only refer to the setting aside of final awards.If the intention was to exclude other types of awards the framers of the Model Law would have used the words “final award” instead of “award”.

Article 33 provides for additional, corrected or interpreted awards. It reads as follows:

“ARTICLE 33

Correction and interpretation of award; additional award

- (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties—
 - (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
 - (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.
- (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the date of the award.
- (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an **additional award** as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.
- (4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article”.

The reference to corrected, interpreted and additional awards in this Article introduces other types of awards provided for in the Model Law. These awards should be accorded their appropriate status when interpreting Article 34’s reference to an award.

Article 34 provides as follows:

“ARTICLE 34

Application for setting aside as exclusive recourse against arbitral award

- (1) **Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.**
- (2) An arbitral **award** may be set aside by the *High Court* only if—
 - (a) the party making the application furnishes proof that—

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of *Zimbabwe*; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) **the award** deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, **only that part of the award** which contains decisions on matters not submitted to arbitration may be set aside; or [Subparagraph amended by Act 14/2002]
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law;

or

[Subparagraph amended by Act 14/2002]

(b) the *High Court* finds, that—

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of *Zimbabwe*; or
 - (ii) **the award** is in conflict with the public policy of *Zimbabwe*.
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received **the award** or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The *High Court*, **when asked to set aside an award**, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.
- (5) *For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, 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.*

A reading of Article 34 establishes that it provides for the setting aside of awards. It does not provide for the setting aside of rulings by arbitral tribunals. It therefore seems to me clear that a party who fails to request the High Court to decide on a preliminary

ruling on jurisdiction and the existence and validity of the arbitral agreement, within thirty days cannot thereafter seek to set aside the ruling in terms of Article 34. It also seems to me clear that the word “award”, having been used in its generic sense accommodates the setting aside of all awards specified in the Act.

Article 34 provides for the setting aside of an award for specified reasons. Its scope is clearly wider than that of article 16 (3). The word “award” is in this article used in its generic sense. The Article does not use the words “final award” used in Article 32 (1) which would have restricted it to terminated arbitral proceedings.

A reading of Articles 16 (3), 31 (7), 32 (1), 33, and 34 establishes that rulings on the arbitral tribunal’s jurisdiction and the existence and validity of arbitral agreements are not awards. This is because several Articles refer to various types of awards but none of them was used to describe what the Model Law calls a ruling in Article 16 (3). This means a ruling falls in its own class for which a separate and distinct procedure is provided for challenging it.

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APPLICATION OF THE LAW TO THE FACTS

It is common cause that the appellants seek to challenge a ruling by the arbitral tribunal on jurisdiction, the existence and validity of an arbitral agreement and its decision/award on prescription.

In challenging a ruling, the aggrieved party is entitled to approach the High Court in terms of Article 16 (3) within a period of thirty (30) days. Failure to do so within the stipulated period leaves the party aggrieved by the ruling without any other recourse to the

courts as Article 34 does not provide for the setting aside of the arbitrator's rulings on jurisdiction. The legislature in crafting the Model Law used the term "ruling". It cannot be argued that it meant an award as it went further to specify that such a ruling can even be made in an award on the merits. A statute should be interpreted in a manner which gives the whole statute and every part, section or word in it a meaning. The word ruling was persistently used in contradistinction with the word "award" in circumstances where the framers of the Model Law as demonstrated by Articles 31 (7), 32 (1) and 33, were aware of other types of awards but chose to refer to it as a ruling and provided a separate procedure for challenging it.

I am aware that Counsel for both parties referred to it as an interim award, but that does not change the correct identity given to it by the framers of the Model Law. The function of the court is to interpret a statute according to the words used by the legislature and to call and interpret a thing by the name given to it by the legislature. In the case of *Keyter v Minister of Agriculture* 1908 NLR 522 at p 523 it was said:

"It is the duty of the court to give effect to every word which is used in a statute unless necessity or absolute intractability of the language employed compels the Court to treat the words as not written."

In interpreting statutes courts are bound to interpret and give effect to what the legislature actually said. In the case of *R v Kirk* 1914 CPD 564 at page 567 *Kotze J* said:

" We cannot import words into the section not to be found therein, so as to arrive at what we think or assume is the intention of the Act. **The Court must interpret and give effect to what the legislature actually said, and not what it may have intended to say but did not say. We cannot insert words not used by the legislature** to meet what we may conceive was its real intention". (emphasis added)

In *The Queen v Bishop of Oxford* 4 QBD 261 it was held that a statute, “should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.”

It is therefore my view that the word “ruling” was intentionally used to bring out the distinction between it and an award. What was issued by the Arbitrator in respect of his jurisdiction is not an award and cannot be challenged in terms of Article 34. It should have been challenged in terms of Article 16 (3). That opportunity was irrevocably lost and cannot be substituted by a challenge in terms of Article 34.

In my view, the court *a quo* did not err in finding that there was no proper application before it in respect of the second respondent’s jurisdiction and the existence and validity of the arbitral agreement, as the appellants could not rely on Article 34 to set aside the interim ruling when the legislature had in terms of Article 16 (3) of the Model Law clearly provided the procedure to be followed. The appellant’s appeal against the court *a quo*’s decision on this issue cannot succeed.

The position is however different in respect of the issue of prescription which is not provided for by Article 16.

The appellant also challenged the court *a quo*’s decision on the dismissal of its application challenging the arbitrator’s finding that the 1st respondent’s claim had not prescribed.

Mr *Mpofu* for the appellant relying on several cases from international jurisdictions such as India, Indonesia, United States of America and Singapore submitted that an interim award can be set aside in terms of Article 34. I agree. On the other hand Mr *Girach* for the first respondent submitted that cases from Indonesia and Indian referred to by Mr *Mpofu* should not be followed because the decisions are based on modified Model Laws of those jurisdictions. While caution should be exercised in following decisions made on the basis of modified Model Laws, a court should first consider the modifications made by those jurisdictions. In this case Mr *Girach*'s concern is that these jurisdictions have added to their Model Laws a definition of an award which includes interim awards. That in my view is not of critical importance. The real issue should be are the definitions contrary to the contextual interpretation of the word "award" as it is used in Article 34 of the Model Law. I have already found that the use of the word "award" in Article 34 is generic and accommodates all types of awards. The framers of the Model Law could have used the words "final award" which they were aware of as they used them in Article 32 (1) of the Model Law. The choice of the word "award" in Article 34 which is repeated in various parts of the article instead of the restrictive words "final award" means the intention was to allow applications for the setting aside of other types of awards in terms of Article 34.

The court *a quo* therefore erred when it held that only final awards can be set aside in terms of Article 34. It also erred when it dismissed the whole application for that reason as the application for the setting aside of the arbitrator's award on prescription was properly before it. It is clear that the arbitrator's decision/award on prescription could not be challenged in terms of Article 16 (3) which only applies to the arbitrator's jurisdiction and the existence and validity of arbitral agreements.

I am satisfied that the finding of the arbitrator on prescription can be classified as an interlocutory, interim or partial award as provided by Article 31 (7).

The appellants' reliance on Article 34 (2) (b) (ii) of the Act in respect of the second respondent's decision on prescription is in my view permissible because Article 16 (3) does not provide a procedure applicable to an arbitrator's decision other than that on jurisdiction and the existence and validity of an arbitral agreement.

I am satisfied that the appellants are entitled to be heard in respect of their application challenging the arbitral award on prescription.

DISPOSITION

In view of the findings already made, I am of the view that the appeal should partially succeed in respect of the issue of prescription and be struck off the roll in respect of the issue of jurisdiction and the existence and validity of the arbitral agreement. As both parties partially succeeded each party shall bear its own costs.

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It is therefore ordered as follows:

1. The appeal partially succeeds in respect of the Arbitrator's decision on prescription, but is struck off the roll in respect of the Arbitrator's jurisdiction and the existence and validity of the arbitral agreement, with each party bearing its own costs.
2. The judgment of the court *a quo* is set aside and is substituted by the following:

- 2.1 “The application for the setting aside of the arbitrator’s ruling on jurisdiction and the existence and validity of the arbitral agreement is a nullity and is struck off the roll.
- 2.2 The application for the setting aside of the arbitrator’s interlocutory award on prescription shall proceed to a hearing on the merits” .
3. The case is remitted to the court *a quo* for it to hear and determine the application for the setting aside of the arbitrator’s interlocutory award on prescription on the merits.

MAVANGIRA JA:

I AGREE

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MATHONSI JA :

I AGREE

Coghlan, Welsh & Guest, appellants legal practitioners

Kantor & Immerman, first respondent’s legal practitioners