REPORTABLE (06)

(1) RIOZIM LIMITED (2) R M ENTERPRISES (PRIVATE) LIMITED
v
(1) MARANATHA FERROCHROME (PRIVATE) LIMITED (2) JUSTICE NOVEMBER TAFUMA MTSHIYA N.O

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE JA
HARARE: 13 JUNE 2024 & 27 JANUARY 2025

T Mpofu, for the appellants

T Magwaliba for the first respondent

CHITAKUNYE JA:

This is an appeal against the whole judgment of the High Court of Zimbabwe (court *a quo*) handed down on 5 October 2022, dismissing the appellants' application for the setting aside of an arbitral award made in terms of Article 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*] ('the Arbitration Act').

FACTUAL BACKGROUND

The first appellant is a public limited company incorporated in terms of the laws of Zimbabwe. The second appellant and the first respondent are both private limited companies incorporated in terms of the laws of Zimbabwe. The second appellant is a subsidiary of the first appellant. The second respondent is cited in his official capacity as the arbitrator who presided over the dispute between the parties.

On 19 January 2010, the first appellant and the first respondent entered into a Memorandum of a Shareholders' Agreement ('Shareholders Agreement'). The terms of the Shareholders' Agreement were, *inter alia,* that the first appellant would procure a certain number of mining claims (Darwendale Mining Claims) and transfer them to the second appellant which would then own and operate the mining claims. The first appellant would ensure that 40% of the issued shares in the second appellant would be transferred without cost to the first respondent such that the shareholding between the parties in the second appellant would be 60% for the first appellant and 40% for the first respondent.

The parties agreed that both of them would, as expeditiously as possible, take all necessary steps to proceed with the implementation of the agreement but no time frame or date for performance was provided for in the Shareholders Agreement. In the event of a material breach of the terms of the Shareholders Agreement, the agreement provided that the defaulting party would be given (30) thirty days' notice to remedy the breach, failure of which the parties would proceed to arbitration in terms of clause 30 thereof.

The first respondent alleged that the appellants breached the Shareholders Agreement by failing to transfer the mining claims to the second appellant per the agreement. It alleged that the appellants further failed to procure 40% of the issued shares of the second appellant and transfer them to the first respondent. As a consequence, on 29 January 2018 the first respondent sent a letter of demand to the first appellant demanding that the appellants comply with the terms of the Shareholders Agreement within thirty days of receipt of such letter failure of which it would proceed to arbitration in terms of clause 30 of the agreement, thus putting the appellants in *mora*.

The appellants failed to comply with the demand and on 4 July 2018, the first respondent instituted arbitration proceedings against them alleging that the first appellant had breached the shareholders agreement in that it had failed to transfer mining claims to the second appellant and had also failed to procure the 40% of the issued shares of the second appellant for the first respondent. It thus sought an order for specific performance.

The appellants responded to the first respondent's claim by way of three special pleas. Firstly, the appellants contended that there was no arbitration agreement between the second appellant and the first respondent. The second appellant could therefore not be a party to the arbitration proceedings for the reason that the arbitration clause was only binding on the first appellant and the first respondent. Secondly, in view of the fact that the second appellant could not be a party to the proceedings, the appellants contended that the arbitrator had no jurisdiction to preside over the dispute. Thirdly, the appellants raised a special plea of prescription, and averred that the claim had prescribed. They contended that the cause on which the first respondent sued, arose sometime in 2010 when there was an attempt to comply with the provisions of the Shareholders Agreement by the first appellant. They thus contended that a period of more than three years had lapsed between the date of instituting the arbitration proceedings and the date the cause of action arose.

In response to the appellants' statement of defence, the first respondent averred that the arbitrator had jurisdiction over the second appellant and proffered reasons for so contending. It contended that for purposes of the present dispute, it was the second appellant that was supposed to have facilitated the transfer of the 40% shares to the first respondent. It was the second appellant that was also the intended recipient of the mining claims which were the subject of the proceedings. Excluding the second appellant from the arbitration proceedings would therefore be absurd as it formed the subject of the Shareholders Agreement.

Pertaining to the issue of prescription, the first respondent averred that in terms of *s* 16 of the Prescription Act [*Chapter 8:11*] ('the Prescription Act'), prescription begins to run on the date when the debt becomes due. The first respondent further averred that in the present matter, the cause of action arose on 14 March 2018 when the appellants were placed in *mora* after the time frame for the appellants' performance under the Shareholders' Agreement expired. The appellants failed to perform within the thirty-day period thereby breaching the terms of the Shareholders' Agreement. The first respondent therefore, contended that the arbitration proceedings were well within the prescription period as its cause of action would only expire on 13 March 2021, the proceedings having been instituted on 4 July 2018.

In their written submissions before the arbitrator, the appellants gave notice to the effect that oral evidence would be required in light of the replication to the plea of prescription. However, before the arbitrator no oral evidence was adduced, the parties choosing to proceed on the papers as filed. At the close of the hearing the second respondent directed the parties to provide him with the case authorities they had cited in their papers. In an email dated 14 June 2019, addressed to the first respondent's legal practitioners, the appellants made a request for the second respondent to consider the issue of whether placing a debtor in *mora* prescribes as noted in *Brooker* v *Mudhanda & Anor* 2018 (1) ZLR 33(S)

The second respondent proceeded to consider the preliminary points. On the first two points relating to the second respondent's jurisdiction, the second respondent held that in order to determine the applicability of the arbitration clause on the second appellant, it was necessary to first determine the intention of the parties as contained in the Shareholders Agreement. The second respondent held that the intention of the parties was to bind the second appellant by extension as clause 27 of the Shareholders Agreement categorically stated that the said company would be bound by any provisions of the agreement. On this basis the second

respondent held that it was the intention of the parties for the second appellant to be bound by the provisions of the Shareholders Agreement. In that same vein, the argument that the arbitrator had no jurisdiction over the matter could not stand.

In relation to the special plea of prescription, the second respondent held that the dispute was anchored on whether or not there were time limits stipulated for performance in the Shareholders Agreement in order to ascertain when the cause of action arose. The second respondent alluded to the fact that the Shareholders Agreement did not stipulate a date for the performance of the obligations sought to be enforced. He ruled that it was therefore necessary for the defaulting party to be put in *mora* and this had been done by the first respondent when it demanded that the appellants perform their obligations in its letter of 29 January 2018. He further held that the prescription period began to run on 14 March 2018, when the appellants failed to remedy the breach. In this regard he relied on certain authorities including *Asharia* v *Patel & Ors* 1991(2) ZLR 276 (S), wherein at 279G-280A GUBBAY CJ outlined the applicable principle where the time for performance in an agreement has not been agreed in the agreement itself as follows:

> "The general applicable rule is that where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio*, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period for performance which is not unreasonable. If unreasonable, the demand is ineffective."

The second respondent further held that the *Brooker* case (*supra*), was distinguishable from the present case in that, whilst both cases had no date for performance, in

the latter case no demand for performance was made whilst *in casu* a demand had been made. The second respondent therefore held that the claim had not prescribed.

Irked by the decision of the second respondent, the appellants applied for the setting aside of the arbitral award in the court *a quo* in terms of Article 34(2)(b)(ii) of the Arbitration Act [*Chapter 7:15*]. On 18 March 2020 in HH228/20 the court *a quo* found that the matter was not properly before it for the reason that the appellants were out of time in lodging the application.

On appeal to this Court in SC165/20 (Judgement No.SC 30/22), this Court held that the matter was indeed not properly before the court *a quo* in relation to the issue of jurisdiction and the existence and validity of the arbitral agreement between the second appellant and the first respondent. The Court partially allowed the appeal in respect of the issue of prescription. Resultantly the Court ordered a remittal of the matter for a hearing on the merits on the issue of prescription which it found to have been properly before the court *a quo*.

BEFORE THE COURT *A QUO*

In the court *a quo* the appellants alleged that the second respondent did not consider or make a determination on the issue whether the right to put a debtor in *mora* prescribes, which issue had been placed and argued before him.

They also alleged that the cause of action arose in 2010 when the first appellant attempted to transfer the mining claims which meant that by July 2013, the claim had prescribed. The appellants stated that the right to place a debtor in *mora* is itself a debt subject to prescription. They therefore averred that dismissing the special plea was wrong as

this is contrary to the conception of justice due to the fact that the arbitrator resurrected a dead claim thereby violating the provisions of the Prescription Act [*Chapter 8:11*].

The first respondent's response to the application was to the effect that the appellants in effect did not, by written submissions, motivate their preliminary points. They did not make any references to the legal or factual basis of their defence *in limine*. Instead they simply stated that they intended to lead evidence relating to the preliminary points they had raised. By the date of the hearing the appellants had not placed their arguments on the preliminary points on record thus the arguments they were now making are not on record. The first respondent further averred that the appellants' arguments do not relate to their pleadings filed on record. A simple reading of their statement of defence makes it clear that what the appellants were now raising was never raised in their pleadings or any papers placed before the arbitrator prior to and on the date of hearing

It was in these circumstances that Counsel for the first respondent submitted that the second respondent was correct in dismissing the special plea. He submitted that the onus was on the appellants to prove that a special plea existed. He further submitted that the onus was on the appellants to establish that given the circumstances that no time frame or date of performance had been set, the claim had nevertheless prescribed. To do this they needed to lay a factual and legal basis, which in this case their statement of defence did not do.

The court *a quo* held that the issue for determination was whether the second respondent's reasoning and conclusion that the claim had not prescribed was in conflict with the public policy of Zimbabwe. It also noted that the mere incorrectness or faultiness of an arbitrator's reasoning and conclusion would not be enough to justify the setting aside of the

award. The court *a quo* agreed with the first respondent's Counsel's submissions that it was imperative for the appellants to have placed oral evidence before the arbitrator given their acknowledgment that the first respondent's reply to the issue of prescription had set out a factual position which was contrary to that which they relied on, but they failed to do so. The failure to place evidence before the arbitrator meant that the factual position in the first respondent's reply remained unchallenged. In the circumstances, the special plea of prescription was not established. Resultantly, the court *a quo* dismissed the application.

Irked by the decision of the court *a quo*, the appellants noted the present appeal on the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* erred and misdirected itself in making a determination based on a matter not found in the court record and which was not the basis for the impugned award namely, that no evidence had been led by appellant in support of their special plea of prescription.
2. *A fortiori*, the court *a quo* misdirected itself in failing to relate to the matter before it on the basis upon which it had been brought.
3. The court *a quo* erred at any rate in coming to the conclusion that there was need for oral evidence to be led, the parties having agreed on the facts on which the matter fell to be determined and the inchoate attempt relied upon by the appellants having been pleaded by the first respondent.
4. The court *a quo* erred in not determining a material issue squarely placed before it to wit that the award was in violation of the public policy of Zimbabwe in that the arbitrator had not determined the question whether the right to place a party in *mora* prescribes and what effect that failure had on the award.

5. At any rate, having found that no evidence had been led, the court *a quo* misdirected itself in finding that a decision made in the absence of such evidence and in respect of which findings of fact had been made is at law valid.

The appellants seek the following relief:

RELIEF SOUGHT

1. That the appeal is allowed with costs.
2. That the judgment of the court *a quo* is set aside and in its place is substituted with the following:

   "1. The award of November Tafuma Mtshiya on the 4th of July 2019 in the matter between *Maranatha Ferrochrome (Pvt) Limited* v *Riozim Limited & R M Enterprises (Pvt) Ltd* shall be and is hereby set aside for being contrary to public policy."
3. First respondent shall bear the costs of this appeal.

SUBMISSIONS BEFORE THIS COURT

At the hearing Mr *T. Mpofu*, for the first appellant, submitted that as of July 2010, there was a complete and competent cause of action. Counsel submitted that the first respondent accepted as part of its case that an inchoate attempt to comply with the terms of the agreement had been made in 2010. Counsel further submitted that the live issue to have been dealt with was the question of the date when the right to place a debtor in *mora* arises. Counsel submitted that the arbitrator also failed to determine an issue that was placed and argued before him that the right to place a debtor in *mora* prescribes. This issue ought to have been determined. Counsel further submitted that the arbitrator acknowledged the authorities placed before him, but failed to relate to that issue. It was on this basis that the court *a quo* was approached, however, there was still no determination by the court *a quo* on this issue.

Counsel also submitted that the court *a quo* did not explain why the issue was left undealt with leaving the matter to speculation. Counsel further submitted that the right to place a debtor in *mora* clearly prescribes and, *in casu*, such right had prescribed in respect of placing the appellants in *mora*.

Per contra, Mr *T. Magwaliba*, for the first respondent, submitted that the sole issue relied upon by the appellants was a non-issue before the arbitrator. Counsel submitted that parties were given leave to place cited authorities before the arbitrator and the arbitrator dealt with the authorities in relation to the facts that were placed before him. Mr *Magwaliba* further submitted that the requirements for the setting aside of an arbitral award had not been met.

ISSUES FOR DETERMINATION

Although the appellants raised five grounds of appeal this Court holds the view that there are two issues for determination, to wit:

1. Whether or not the court *a quo* properly dealt with all the issues that had been placed before it.
2. Whether or not the court *a quo* erred in holding that the arbitrator's decision was not contrary to public policy.

THE LAW ON THE SETTING ASIDE OF ARBITRAL AWARDS

The application in the court *a quo* was for the setting aside of an arbitral award on the ground that the award was contrary to the public policy of Zimbabwe. It is trite that once parties to an agreement or transaction have chosen their preferred dispute resolution mechanism and have made it clear that the determination by that mechanism shall be final and binding, they must be held to their choice. The choice is not applicable only when either or

both parties are satisfied with the determination. In making their choice parties recognise the expeditious nature of the chosen mechanism and hence must not defeat the advantages of such mechanism by subsequently engaging in never ending quarrels once a determination has been made. *In casu*, the parties chose arbitration. They chose that the determination by the arbitrator shall be final and binding to both for as long as it is, *inter alia*, not contrary to the public policy of Zimbabwe. Such a choice must be respected and ought to bind the parties save for the odd occasions prescribed by law such as when the award is found, *inter alia*, to be contrary to the public policy of Zimbabwe.

The setting aside of an Arbitral Award is provided for in terms of Article 34 of the Arbitration Act [*Chapter 7:15*]. Paragraph (1) of Article 34 states that:

> (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.

The appellants approached the court *a quo* in terms of paragraph (2)(b)(ii) which stipulates that:

> (2) An arbitral award may be set aside by the High Court only if—
> ……..
> ……
> (b) the High Court finds, that—
> (i) …….. or
> (ii) the award is in conflict with the public policy of Zimbabwe. (own emphasis)

The above provision has been subject to judicial interpretation in a plethora of cases, providing clear guidance on the meaning and approach to be adopted in instances where the award is alleged to be in conflict with public policy. In *ZESA* v *Maposa* 1999 (2) ZLR 452(S), at 465D GUBBAY CJ stated as follows:

> "In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively

> in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated."

The Court further stated at 466E-H:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in 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 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 the conclusion in an award goes beyond mere faultiness and incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable 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." (my emphasis)

In *Alliance Insurance* v *Imperial Plastics (Pvt) Ltd & Anor* SC 30-17 p.10, this Court elaborated as follows:

> "The question that should be in the mind of a judge faced with this ground for setting aside of an arbitral award is that, in light of all the submissions and evidence adduced before the arbitrator, is it fathomable that he would have come up with such a conclusion. If the answer is in the affirmative, there is no basis to set aside the award."

On the strength of the above authorities, if a judicial officer is faced with a matter in which a party is seeking the setting aside of an arbitral award the judicial officer must consider whether the award is so wrong or incorrect and outrageous in its defiance of logic. In other words, when an award by an arbitrator is considered 'contrary to public policy' it means that the decision violates the fundamental principles and values of the legal system and society at large. If the award is found to be contrary to public policy, then in order to ensure that the award aligns with the broader interests of justice, the court has no option but to set aside that award.

Clearly, therefore, an arbitral award will only be set aside in exceptional cases. In the *Alliance Insurance case (supra)* the Court related to the remarks in the *ZESA* v *Maposa* case *(supra)* and made the following pertinent remarks at p 10:

> "The import of these remarks is that the court should not be inclined to set aside the arbitral award merely on the basis that it considers the decision of the arbitrator wrong in fact/or in law. If the courts are given the power to review the decision of the arbitrator on the ground of error of law or of fact, then it would defeat the objectives of the Act, it would make arbitration the first step in a process which would lead to a series of appeals."

It must always be borne in mind that an application for the setting aside of an arbitral award is not an appeal or review of the decision by the arbitrator.

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the court *a quo* properly dealt with all issues that were placed before it.

In determining the above issue as it affects the cardinal issue on whether the court *a quo* erred and misdirected itself in concluding that the award was not contrary to public policy the first question is whether the issue relating to the placement of a debtor in *mora* was a live issue before the second respondent and the court *a quo,* if so, whether the second respondent and the court *a quo* did not deal with the issue as placed before them.

It is the appellants' argument that the issue before the second respondent was that the right to place a debtor in *mora* is itself a debt and it prescribes. Counsel for the appellants submitted that this issue was placed and argued before the second respondent but it was not determined. Such failure was placed before the court *a quo* but the court did not pronounce on it as well.

To resolve this issue, it is pertinent to relate to the pleadings placed before the second respondent. In its statement of defence before the second respondent, there was no attempt by the appellants to raise the above-mentioned issue. The appellants' initial statement of defence in contending that the claim had prescribed was that:

> "1.8 The cause of action arose in 2010.
>
> 1.9 The claimant avers that an inchoate attempt to comply with the provisions of the agreement took place in July 2010.
>
> 2.1 Prior to and at any rate as at the date of that attempt, claimant had a full and competent cause of action which it could sue on.
>
> 2.2 At the time these proceedings were instituted, a period in excess of three years had become superimposed between that date and the date of the cause of action.
>
> 2.3 In the premises, the remedy sought to be enforced by claimant has been extinguished by extinctive prescription."

The appellants went on to amend their statement of defence to now read-

> "1.9 In terms of the agreement sued upon, performance was due on the 8th March 2010. Claimant avers that an inchoate attempt to comply with the provisions of the agreement took place sometime in July 2010.
>
> 2.1 As at 8 March 2010 and at any rate as at the date of the inchoate attempt, claimant had a full and competent cause of action which it could sue on.
>
> 2.2 At the time these proceedings were instituted, a period in excess of three years had become superimposed between that date and the date of the cause of action."

The first respondent's response to the special plea of prescription as raised above was to the effect that:

> "In terms of the agreement in particular clauses 1,15.11, and 18 of the agreement there was no time frame stipulated for the implementation of the agreement. In such a scenario performance can only become due either by express agreement between the parties or when one party places the other in *mora* upon demand. Without this, no breach of the agreement can be alleged before demand is made.

> Thus, any cause of action for breach of an agreement can only arise after an event of default and not before."

In clause 5.7 of its response it averred that:

> " From 2010, when the Agreement was signed, all the parties were in agreement that the terms of the agreement needed to be implemented, attempts were made by the first respondent to procure transfer of the mining claims, this was not completed. The parties exchanged several correspondences during that period; however, the Claimant did not make a demand for performance thereby placing the respondents in *mora* until the 29th January 2018."

In their summary of evidence, the appellants averred, *inter alia*, that evidence will also be given as to the attitudes of the parties during the 8-year period between the conclusion of the agreement and the institution of these proceedings.

The first respondent in its summary of evidence stated, *inter alia*, that its witness

> "will deny that performance was due on the date alleged in the proposed amendment to the defence. In any event he will give evidence in regard to meetings held with respondent's representatives in which they at all times accepted the liability to transfer the claims to the second respondent.
>
> He will also give evidence in regard to the dealing between the parties post the signing of the agreement forming the subject matter of the instant claim."

The appellants in their written submissions before the second respondent acknowledged that in view of the factual contentions raised by the claimant, oral evidence would be led at the hearing. In support of this contention, the appellants referred to the importance of adducing evidence in matters involving special pleas. In this regard they referred to the case of *Brooker* v *Mudhanda & Anor* (supra)2018 (1) ZLR33 (S) wherein at p 40F-H this court held that:

> "Neither of the parties led evidence. Thus, there was no evidence as to when demand for transfer was made. There was no evidence as to when the cause of action actually arose and given the fact that this was dependent on whether or not the appellants were placed in *mora*, the court was left in suspense on these

> very crucial issues. The court seems to have been alive to the fact that there was a need for a factual basis to be placed before it to facilitate a determination on the crucial issue of when prescription could be said to have started running.
>
> The remarks by the learned judge show that the court made a decision on the special pleas in the absence of evidence. By adopting such an approach, the court erred……"

And at p 42D-F that:

> "This position of the law was put beyond question by BEADLE CJ in *Edwards* v *Woodnut NO* 1968(2) RLR 293 (G); 1968 (4) SA 184(R), in which he stated the following:
>
> > 'the basic difference, however, between an exception and a plea in abatement is that in the case of a plea in abatement evidence must be led, whereas in the case of an exception the facts stated in the pleadings must be accepted.'
>
> It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea."

It is apparent that the appellants' pleadings before the second respondent did not specifically raise the issue now being fronted that the right to place a debtor in *mora* prescribes. The argument that the arbitrator did not consider or make a determination on a point specifically argued before him and which was material to the decision he had to make, needed to have factual basis premised on the facts pleaded.

What was evident from the above pleadings related to when each party alleged the cause of action arose and performance was due; the appellants alleging in the amended plea that performance was due on 8 March and, in any case, by July 2010 claimant had a full and competent cause of action on which to sue. The first respondent, on the other hand, maintained that in as far as the agreement did not provide a timeline for its implementation, the cause of action would only arise upon demand by the other party. It also contended that, in any case,

the appellants had not pleaded any facts forming the basis of that special plea contrary to the demand made in January 2018.

As alluded to above, at the close of the hearing before the second respondent, parties were given leave to provide case authorities that they had cited. In pursuance thereof on 11 June 2019, the first respondent's legal practitioners provided the second respondent with the authorities as directed and advised the appellants' legal practitioners of the same.

In an e-mail, dated 14 June 2019, addressed to the first respondent's legal practitioners, and copied to the second respondent, the appellants' legal practitioners responded to the first respondent's letter of 11 June as follows:

> "Thank you for your letter. In response I would ask whether the arbitrator may consider the *Van Brooker* judgement on the issue of *mora*. The court said:
>
> 'Going by the definition of a debt…. The right of the purchaser to place a seller in *mora* is itself a debt in favour of the purchaser which debt can prescribe.'" (my emphasis)

It is at this point that the issue is raised for the first time. It is important to note that this was after all pleadings had been placed before the second respondent and oral submissions made. After considering the need to place a party in *mora* by demand, where an agreement is silent on the date of performance as enunciated in *Asharia* v *Patel & others (supra*), the second respondent considered the appellants' reference to the *Brooker* case and stated in para 29 that:

> "In advancing their argument the respondents fleetingly refer to the case of *Van Brooker* v *Mudhanda & Anor* SC 5/18……. However, this case when read in whole, rather advances the claimant's position and not the respondents' own. It is in my view the correct position that on 8 March 2010 when the last signature was appended to the agreement, the agreement came to life as it were. Having not stipulated the date of performance, the respondents were not in *mora* until a reasonable time for performance had lapsed and the claimant had demanded performance."

The appellants had ample opportunity to properly and adequately raise this issue before the second respondent but they neglected to do so only to raise the issue at the last minute and briefly as an afterthought. The issue that had been raised before the arbitrator and for which the *Brooker* case had been cited related to the issue of the need for the leading of evidence in a special plea. The result of this was that in applying the *Brooker* case, the second respondent related it to the issue of prescription as had been pleaded and argued by the parties. Had the issue been properly pleaded, the second respondent would have had a full appreciation of the argument now being advanced by the appellants. The assertion by the appellants that the second respondent failed to appreciate their argument has no merit at all as it tends to disguise the inadequacies in their pleadings.

The need to properly plead was enunciated in *Medlog Zimbabwe (Pvt) Ltd* v *Cost Benefit Holdings (Pvt) Ltd* 2018 (1) ZLR 449(S) at 455G- 456E by GARWE JA (as he was then) as follows:

> "In general, the purpose of pleadings is to clarify the issues between the parties that require determination by a court of law. Various decisions of the courts in this country and elsewhere have stressed this important principle.'

In *Durbach* v *Fairway Hotel Ltd* 1949SR 115; 1949(3) SA 1081 (SR) the court remarked:

> 'The whole purpose of pleadings is to bring clearly to the notice of the court and the parties to an action the issues upon which reliance is to be placed.'

B A Harwood *Odgers' Principles of Pleading & Practice in Civil Actions in the High Court of Justice* (16th ed, Stevens & Sons Ltd, London, 1957) states at p 72:

> 'The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus, arrive at certain clear issues on which both parties desire a judicial decision.'

In *Kali* v *Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182, the court remarked:

> 'The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another.'

In *Courtney–Clarke* v *Bassingthwaighte* 1991 (1) SA 684 (Nm) at 698, the court remarked:

> 'In any case there is no precedent or principle allowing a court to give judgment in favour of a party on a cause of action never pleaded, alternatively there is no authority for ignoring the pleadings … and giving judgment in favour of a plaintiff on a cause of action never pleaded. In such a case the least a party can do if he requires a substitution of or amendment of his cause of action, is to apply for an amendment.'

In *Imprefed (Pty) Ltd* v *National Transport Commission* 1993 (3) SA 94(A) at 108, the court cited with approval *Robinson* v *Randfontein Estates GM Co. Ltd* 1925 AD 173 at p 198 where it was stated as follows:

> 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.'

At p 457G the Hon. Judge stated as follows regarding the above authorities:

> 'I associate myself entirely with the above remarks made by eminent jurists both in this jurisdiction and internationally. The position is therefore settled that pleadings serve the important purpose of clarifying or isolating the triable issues that separate the two litigants. It is on those issues that a defendant prepares for trial and that a court is called upon to make a determination. Therefore, a party who pays little regard to its pleadings may well find itself in the difficult position of not being able to prove its stated cause of action against an opponent.'" (own emphasis)

It is crystal clear from the above authorities that pleadings are there to facilitate the judicial officer's or tribunal's understanding of the live issues and in the decision-making process. In essence an issue has to be clear and concise in the papers before the judicial officer or tribunal. *In casu*, the second respondent was guided by that which was in the pleadings before him. The issue of whether the right to place a debtor in *mora* prescribes was an issue that was not fully canvassed by the appellant before the second respondent. The Court is inclined to agree with Mr *Magwaliba*'s submission that the second respondent considered the case authorities that had been placed before him, in the context of the facts that were presented by the parties. The second respondent considered the *Brooker* case in the lens of the dispute that had been presented to him by the parties.

Whilst it is true that there may be instances where a court can adjudicate on an issue not raised in the pleadings, this is in instances where the issue has been fully canvased at the hearing and the judicial officer or tribunal has all the materials upon which it can form an opinion and where there is no reasonable ground to think that a further examination might lead to a different conclusion. In *casu*, this would not be so as the record of proceedings does not show that the issue being fronted by the appellants was canvassed before the second respondent save for the issue being thrown in as an afterthought when all else had been done despite it not being linked to any pleadings or written submissions made before the second respondent.

It is axiomatic that the manner in which the appellants raised the issue they now seek to cling onto was most unsatisfactory. To that end, the issue cannot be said to have been live before the second respondent in the manner the appellants contended. The second respondent dealt with issues as had been presented to him in the pleadings before him. He cannot be said to have taken leave of his senses in coming to the decision he made.

In the court *a quo* the appellants alleged that the issue, that a purchaser can place a seller in *mora* is itself a debt, was not engaged by the second respondent and this rendered the award contrary to public policy. The court *a quo* in its judgment identified the overarching issue as being whether the conclusion or decision by the second respondent is in conflict with the public policy of Zimbabwe or put differently, whether by reasoning and deciding as he did the arbitrator had taken leave of his senses. The court *a quo* noted the contents of the pleadings placed before the arbitrator which pleadings included an acknowledgment of the need to lead oral evidence and the fact that such evidence was then not led as counsel for both parties only made oral submissions. Upon juxtaposing submissions by counsel for both parties the court *a quo* concluded that the first respondent's right to place the appellants in *mora* in January 2018 was not proven to have prescribed because the appellants took a risk by not placing evidence before the arbitrator. The first respondent's replication set out a factual position/conspectus which remained unchallenged by any evidence by the appellants. The court *a quo* therefore held that the special plea had not been proven.

As already noted above, the challenge with the appellants' counsel's submission that before the arbitrator, counsel for the parties agreed on relevant facts as a result of which they agreed not to lead evidence, is that no such agreed facts were made part of the record. The evidence counsel for the appellants sought to rely on is an email of 9 June 2019 by first respondent's then counsel that:

> "I do not anticipate the matter taking too long as we agreed that no evidence will be called".

In the norm, where a matter is contested and parties settle on agreed facts such facts must be made part of the record and the issues arising therefrom clearly identified. *In casu*, there are no such agreed facts or agreed issues for the arbitrator's consideration. The factual position placed and argued before the arbitrator is just on the pleadings and other papers as

filed of record. It is this same scenario that obtained in the court *a quo*. The unsatisfactory nature of the pleadings did not support the appellants' contention that the issue of the right to place the appellants in *mora* had prescribed was argued before the second respondent.

It is clear that the court *a quo* was alive to the issue regarding when the right to place the debtor in *mora* arises in instances where the contract did not provide a time frame for performance as *in casu*. This Court finds that the issue of placing a debtor in *mora* was looked at by the court *a quo* in the manner and to the extent that it had been presented and the court *a quo* found that the award of the second respondent was not contrary to public policy. It is apparent that the appellants seemed to ignore the fact that what was before the court *a quo* was not an appeal. The court *a quo* only had to consider whether the award was contrary to public policy and not the correctness of the award. This Court finds that the court *a quo* considered the issues placed before it in the context of the pleadings and submissions before the second respondent.

2. Whether or not the court *a quo* erred in holding that the arbitrator's decision was not contrary to public policy.

The appellants made an application to set aside the decision of the second respondent professing that the decision was contrary to public policy.

As alluded to above the High Court does not sit as an appellate court when considering an application for the setting aside of an arbitral award. Its task is to ascertain whether, given the pleadings and papers placed before the arbitrator, the award whether wrong or not, is contrary to public policy. In other words, as noted in *ZESA* v *Maposa* (*supra),* whether the reasoning or conclusion in the award 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 conception of justice in Zimbabwe would be intolerably hurt by the award. The award would also be held to be contrary to public policy where the arbitrator is shown to have not applied his mind to the question or to have totally misunderstood the issue and the resultant injustice reaches the point of palpable inequity to the satisfaction of the court. The mere incorrectness in fact or law or faultiness in reasoning would not be enough to have an award set aside. *In casu*, the appellants' contention is that the second respondent's findings on prescription were wrong and therefore contrary to public policy. As already noted above, the circumstances of the present matter are that the Shareholders' Agreement entered into between the parties did not stipulate a date for performance. In that regard the second respondent held that there was need to put the appellants in *mora* before they can be said to have defaulted. The second respondent held further that in the circumstances the claim had not prescribed taking into account the date on which the letter of demand was sent to the appellants. Whether this reasoning was correct or not was not for the court *a quo* to decide. The court *a quo* was not sitting as an appellate court.

In casu, the court *a quo* reasoned that, in the proceedings before the second respondent the arbitrator had properly dealt with the issue of prescription and properly held that the claim had not prescribed. The second respondent's reasoning was that the agreement did not stipulate the date of performance, but however the three-year prescription period commenced on 14 March 2018, when the first respondent had issued its letter of demand.

The law on prescription is governed by s 15 of the Prescription Act which provides as follows:

> "15 Periods of prescription of debts
>
> The period of prescription of a debt shall be
>
> (a)------

(b)------

(c)------

(d) except where any enactment provides otherwise, three years, in the case of any other debt."

Section 16 of the same Act provides as follows:

"16 When prescription begins to run

(1) Subject to subsection (2) and (3) prescription shall commence to run as soon as a debt is due.

(2) -------

(3) A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises. Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care."

From the above provision, it is clear that prescription begins to run once the cause of action arises. What is meant by 'cause of action' has been defined by this Court in a number of cases. In *Thomas Kanjere* v *Old Mutual Life Assurance* SC 31-24 at p 10 the Court held as follows:

> "What can be deduced from the Act is that unless prescription is delayed and interrupted as envisaged in ss 17, 18 and 19 of the Act, it commences and or continues to run. Once the creditor is aware of the facts from which the debt arises, prescription commences to run as soon as the debt is due. It is settled that once the entire set of facts which entitle a party to claim exists, then one should claim a due debt to avoid being affected by prescription."

The term 'cause of action' has been defined by this Court in a number of cases. In *Peebles* v *Dairiboard* (Pvt) Ltd 1999 (1) ZLR 4 at 45D-E. MALABA J (as he then was) stated:

> "The facts from which the debt arises" are terms which have been interpreted to mean all material facts from which the cause of action arises; *Drennan Maud & Partners* v *Townboard of the Township of Pennington* [1988] 2 All ER 571. A cause of action was defined by LORD ESTHER MR in *Read* v *Brown* (1888) 22 QB 131 as every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court."

Also see the case of *Brooker* v *Mudhanda & Anor* (supra) at 35G-36A wherein the court remarked that:

> "In order to determine the question of prescription the court first had to make a finding on the cause of action upon which the respondent's claim was premised and when specifically, the cause of action arose. What constitutes a cause of action was described in *Abrahams & Sons* v *SA Railway & Harbours* 1933 CPD 626 at 637 where WATERMAYER J stated:
>
> > 'The proper meaning of the expression 'cause of action' is the entire set of facts which give rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.'
>
> The need for the entire set of facts entitling one to make a claim cannot be over emphasised. It can be construed from case law that once the cause of action, which is the entire set of facts entitling one to make a claim, is established, and it is ascertained when the cause of action arose, the Court can safely determine whether or not the debt has prescribed.'"

Considering the nature of the Shareholders Agreement between the parties, the second respondent's findings on prescription cannot be said to be so outrageous and so illogical as to warrant setting aside. The agreement between the parties did not contain a timeframe or date of performance. The first respondent averred that where there is no date of performance the cause of action arises from breach. The breach can only be when the debtor is called upon to perform by virtue of a demand. The appellants in their amended plea on the other hand contended that the performance was due on 8 March 2010 when the last signature was appended hence that is when the cause of action arose and that in any case when the first appellant attempted to perform in July 2010 the cause of action was complete.

The second respondent had to make a determination of when the cause of action arose and at what point the appellants were placed in *mora*. Premised on what was placed before him he held, *inter alia*, that as the agreement did not stipulate the date of performance the appellants were not in *mora* until a reasonable period for performance had lapsed and the

first respondent had demanded performance. He therefore concluded that as performance was demanded on 29 January 2018, that was the date the cause of action arose and from which the period of prescription started to run. Whether the findings made were wrong in law or fact was not for the court *a quo* to determine. What is clear is that the second respondent considered the issue as placed before him and, in the exercise of his discretion, came to the conclusion as he did. The court *a quo* cannot be faulted in holding that the award was, in the circumstances, not contrary to public policy.

DISPOSITION

It follows from the above analysis that the court *a quo* cannot be faulted for dismissing the application as it did. The present appeal is without merit and ought to be dismissed. Regarding the issue of costs, the first respondent asked for costs on a punitive scale. The court is, however, of the view that there was no justification for costs on the punitive scale. Costs will be awarded on the ordinary scale.

Accordingly, it is ordered as follows:

"The appeal be and is hereby dismissed with costs."

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Coghlan, Welsh & Guest, appellant`s legal practitioners

Kantor & Immerman, 1st respondent`s legal practitioners