

REPORTABLE (69)

ZESA HOLDINGS (PRIVATE) LIMITED
v
1) CLOVEGATE ELEVATOR COMPANY (PRIVATE) LIMITED
2) JUSTICE L.G SMITH NO

SUPREME COURT OF ZIMBABWE
MATHONSI JA, KUDYA JA & MWAYERA JA
HARARE: 12 MAY 2022 & 14 JULY 2023



M. M. Phiri and *Ms B. Mahuni*, for the appellant

S. M. Hashiti and *Ms A. Dzingirai*, for the first respondent

No appearance for the second respondent

KUDYA JA: The appellant appeals against the whole judgment of the High Court (the court *a quo*) dated 17 November 2021. The court *a quo* found that the arbitral award by second respondent (the arbitrator), dated 2 December 2020, was not in conflict with the public policy of Zimbabwe. On 2 December 2020, the arbitrator held that he had the jurisdiction to determine the quantification of damages in *lieu* of his earlier arbitral award against the appellant for specific performance that had been registered by the High Court on 10 June 2020. Consequent upon assuming jurisdiction, the arbitrator further directed the appellant to file further affidavits and submissions in response to the respondent's replication on the quantification of damages.

THE BACKGROUND

The salient facts relevant to the dispute between the parties are as follows. The

parties concluded a contract on 30 September 2013. The first respondent undertook to supply, fix and maintain 4 elevators by 14 August 2015, at the appellant's Electricity Centre in Harare. It only managed to supply and fix a single elevator by the due date. The appellant, consequently cancelled the contract on 25 October 2015 and re-tendered the outstanding works a year later.

Irrked by the cancellation, the first respondent referred the dispute to arbitration in terms of clause 10 of the contract. The clause mandated the parties to refer to arbitration any disputes arising from or in connection with the contract. The provisions of the Arbitration Act [*Chapter 7:15*] would apply. The arbitrator, whose decision would be final, would be appointed by the Commercial Arbitration Centre in Harare at the request of the aggrieved party.

The arbitrator was appointed in terms of clause 10. On 25 July 2017, the arbitrator issued an award in which he found the cancellation to be unlawful, reversed it and reinstated the contract. Even though the first respondent had, in the alternative to specific performance, claimed for damages, the arbitrator did not relate to the alternative claim. Firstly, because the first respondent did not motivate the alternative claim. Secondly, because specific performance could be performed.

Dissatisfied, the appellant sought the setting aside of the award by the High Court. The first respondent also applied to the same court for the registration of the award. The two applications were consolidated. On 10 June 2020, the High Court dismissed the appellant's application and granted the first respondent's application.

When the first respondent sought compliance from the appellant, it was advised by letter dated 20 June 2020, that the outstanding works had been completed by a third party.

Thereafter, the parties failed to agree on the extent of the appellant's liability and the consequential damages for breaching the award for specific performance.

The failure to agree prompted the first respondent to file an application to the arbitrator entitled: "Application for Quantification of Registered Arbitral Award", on 31 July 2020. It sought the payment of contractual damages and damages for loss of the maintenance business in the aggregate sum of US\$1 910 318.12, arbitration fees and legal costs on the higher scale.

The appellant opposed the application. It raised four preliminary points relating to jurisdiction, *functus officio*, finality in litigation and incompetence of the relief sought. After hearing argument on these points, the arbitrator issued a written award on 2 December 2020. He dismissed all the preliminary points and directed the appellant to make a rejoinder to the replication within a prescribed period, failing which he would proceed to determine the application on the merits.

The appellant was aggrieved by the award and direction. On 17 March 2021, the appellant applied to the court *a quo* for the setting aside of the interim award on the sole ground that it was contrary to the public policy of Zimbabwe. It premised its application on article 34 (1) (b) (ii) of the Model Law to the Arbitration Act. During the pendency of the hearing *a quo*, the appellant also sought and obtained, in a separate urgent chamber application, an interim interdict against the continuation of the quantification pending the determination of its application for the vacation of the interim award. The interim interdict prompted the arbitrator, on 20 April 2021, to file *a quo* a "Withdrawal of Award", which he copied to the two protagonists. It was common cause between them that the tenor of the document strongly

suggested that it related to the registered arbitral award for specific performance. In the document, the arbitrator pertinently remarked that:

“It is the responsibility of the arbitrator to make an award that can be implemented. Accordingly, I have made an interim award that the second respondent could make a claim for damages. A final award will be made when the applicant responds to the request I made. Accordingly, I withdraw the arbitral award that I handed down.”

THE CONTENTIONS IN THE COURT A QUO

The appellant argued that as the arbitral award on specific performance was final and definitive, the arbitrator having exhausted his jurisdiction, became *functus officio*. It contended that the admission recorded in the interim award by the arbitrator that he had reopened what the appellant termed a “completed process” further confirmed that the arbitrator had fully and finally exercised his jurisdiction over the earlier arbitral award. It further argued that the application for quantification of damages constituted an amendment or correction of the earlier arbitral award, which could only have been invoked within the period prescribed in article 33 of the Model Law. The appellant also argued it was improper for the arbitrator to direct it to file a rejoinder refuting the evidence on *quantum* that was belatedly attached to the first respondent’s replication.

The first respondent made the contrary submissions that the interim award was an interim procedural order that was incapable of impeachment before the conclusion of the quantification proceedings. It contended that such an award was not dispositive of the quantification proceedings and could not therefore be set aside under the provisions of art 34 (1) (b) (ii) of the Model Law. It further argued that the arbitrator had the jurisdiction to entertain and complete the quantification process under clause 10 of the arbitral agreement. The first respondent also contended that the failure to claim and prove an alternative in damages during the earlier arbitral proceedings constituted an error of law which would not make it

contrary to public policy. It also contended that quantification was an independent process that did not fall within the ambit of an amendment or correction envisaged by art 33. This was, so the argument went, because damages could be awarded in tandem with an order for specific performance, but could, in terms of *Mandiringa & Ors v NSSA* 2005 (2) ZLR 239 (S), be quantified subsequent to the order for specific performance. It also contended that the appellant could not be permitted to benefit from its perverse conduct of deliberately subverting the specific performance award by turning it into a *brutum fulmen*. The first respondent strongly argued that the revival of jurisdiction by the arbitrator was the only avenue by which an injustice occasioned by the appellant could be effectively corrected. It also contended that the interests of justice pertaining to the expeditious and inexpensive resolution of the quantification dispute could best be served by an arbitrator who was familiar with the dispute.

Regarding the direction, the first respondent contended that it was not in conflict with the public policy of Zimbabwe as it affirmed the appellant's fundamental right to be heard in compliance with the rules of natural justice.

THE FINDINGS OF THE COURT A QUO

The court *a quo*, basically made three findings. The first was that clause 10.1 of the arbitration agreement conferred jurisdiction on the arbitrator to complete the specific performance award by quantifying it. It however regarded quantification proceedings to be "another arbitration" incurred by the appellant's failure to comply with the first arbitral award. The second was that the arbitrator's finding, that he had jurisdiction and was therefore not *functus officio* to determine the quantification application, was an interim award with final effect on the question of jurisdiction, which could be and was properly challenged under art 34 (2) (b) (ii) of the Model Law. The third was that the direction constituted a mere procedural order that was interlocutory in nature and not be dispositive of the quantification dispute, and

which did not constitute either an interim or a final order. It could not thus be impeached under art 34. The court *a quo*, therefore, held that the requisite public policy threshold for impugning the interim award, which has been pronounced in a plethora of cases by our superior courts, had not been breached. It accordingly dismissed the appellant's application and discharged the provisional order.

THE GROUNDS OF APPEAL

The appellant was aggrieved by these findings. It appealed to this Court on the following grounds:

1. The court *a quo* erred at law in dismissing the application for setting aside the arbitral award on the basis that it was not contrary to public policy.
2. The court *a quo* erred in finding that the appellant had failed to satisfy the requirements for setting aside an arbitral award on the basis of public policy.
3. The court *a quo* erred at law in not finding that the second respondent had no jurisdiction to hear the matter and that he was *functus officio*.
4. The court *a quo* erred at law in finding that the withdrawal of the arbitral award by the second respondent was of no consequence.
5. The court *a quo* erred at law in failing to find that the arbitral award by the second respondent had the effect of re-opening the hearing.
6. The court *a quo* erred in law in splitting the arbitral award into two, and erroneously finding that as an interim award it is susceptible to challenge at this stage but on the other hand it is a procedural award and not susceptible to challenge, when in actual fact it was dealing with one arbitral award issued on 2 December 2020.
7. The court *a quo* erred at law in discharging the provisional order and not finding that public policy had been affronted to the appellant's prejudice.

The relief sought is:

1. The appeal succeeds with costs.
2. The judgment *a quo* is set aside and, in its place, substituted with the following:
 - “a. The arbitral award issued by the second respondent on the 2nd of December 2020 in the arbitration proceedings between the applicant and the first respondent, be and is hereby set aside as being against public policy.
 - b. The arbitral proceedings before the 2nd respondent between the applicant and 1st respondent be and is (*sic*) hereby set aside.
 - c. The 1st respondent pays costs of this application on a legal practitioner and client scale.”

THE ISSUES

The first 5 grounds of appeal speak to one issue. It is whether the court *a quo* was correct in holding that the reopening by the arbitrator of completed arbitral proceedings was not contrary to the public policy of Zimbabwe. The second issue raised by the sixth ground of appeal is whether the court *a quo* was correct in splitting the interim award into, firstly, an interim award on jurisdiction that could properly be challenged and secondly, an interlocutory procedural direction that was not open to challenge before the completion of the impugned arbitral proceedings. The third and last issue emanating from the seventh ground of appeal is whether the court *a quo* ought to have confirmed rather than discharged the provisional order.

THE CONTENTIONS BEFORE THIS COURT

Mr *Phiri* for the appellant submitted that the impugned interim award was contrary to public policy. He contended that the repeated assertions in the interim award by the arbitrator that he was “re-opening” his earlier award confirmed that he had revived his jurisdiction. He argued that, having issued a final and definitive award on specific performance, which had been registered for enforcement by the High Court, the arbitrator became *functus officio* as he

had completed his mandate. In the circumstances, he could not re-open the completed proceedings and revive the jurisdiction that the parties had previously conferred on him. He therefore contended that the twin principles of *functus officio* and finality to litigation militated against the resumption of his earlier jurisdiction, which by operation of law, had been exhausted. He strongly argued that the resumption of jurisdiction in these circumstances was repugnant to the public policy of Zimbabwe. He also submitted that it was erroneous for the court *a quo* to split the unitary interim award into two. He, however, failed to demonstrate how the split affronted the public policy of Zimbabwe. While he conceded that clause 10 of the contract allowed the first respondent to commence fresh arbitral proceedings premised on the unenforceable arbitral order for specific performance, he was adamant that it could not seek the revival of the arbitrator's exhausted jurisdiction. He further argued that the arbitrator could not also *mero motu* revive the jurisdiction he had fully exercised. He also contended that, while the withdrawal of the completed specific performance award was a nullity, it constituted a belated realization by the arbitrator that he could not revive jurisdiction in completed proceedings. He finally submitted that the court *a quo* ought to have confirmed and not discharged the provisional order. He moved for the success of the appeal with costs on the ordinary scale.

Per contra, Mr Hashiti, for the first respondent submitted that the interim award was not in conflict with the public policy of Zimbabwe. He contended that as the arbitral award for specific performance was derailed by the wrongful conduct of the appellant, the arbitrator's jurisdiction to further determine the quantification of the first respondent's damages arising from such conduct was not only extant but was automatically reactivated by such conduct. He further contended that the continuing power of the arbitrator in these circumstances was also prescribed by s 24 (1) and (2) of the Interpretation Act [Chapter 1:01], as applied in *Zesa v*

Utah SC 32/18 and *Mhlanga v Mtenengari & Anor* 1992 (2) ZLR 431 (S) and obliquely recognized by this Court in *OK Zimbabwe Ltd v ArdMbare Properties (Pvt) Ltd* SC 55/17. He also argued that the above cited case authorities held that an arbitrator who determined a previous matter between the same parties ought to decide any other aspects of the same matter that may arise in future. He vehemently disputed that the quantification matter constituted an amendment or correction of the award for specific performance. He, therefore, maintained that the arbitrator was not *functus officio* and that his jurisdiction had not been exhausted. He moved for the dismissal of the appeal with costs on the higher scale.

ANALYSIS

The law on the setting aside of arbitral awards is settled in this jurisdiction. An arbitral award, whether interim or final may be set aside if it is contrary to the public policy of Zimbabwe. See *Wallen Holdings (Pvt) Ltd v Lloyd & Anor* 1996 (2) ZLR 383 (H) at 398F-G where CHINHEGO J correctly stated that:

“A party is in a proper case entitled to bring to this court an application in which an arbitrator's interim award is challenged and the court has the jurisdiction to entertain and determine the application. An interim award is final and binding in respect of those matters referred to the arbitrator and which are agreed shall be the subject of such an award (see Butler & Finsen [*Arbitration in South Africa: Law and Practice*] *op cit* p 262). This position may however be altered by the parties if they agree that neither of them may institute review proceedings before the arbitration proceedings were completed.” (My underlining for emphasis)

The passage in *Butler and Finsen* that CHINHONGO J relied upon states that:

“The award must be final; in the sense that it must deal with all the matters submitted to the arbitrator and leave no matter unsettled. It must therefore be complete. There is a partial exception in the case of an interim award. While an interim award does not deal with all the matters referred to the arbitrator, it must deal with all the matters which the parties have agreed shall be the subject of the interim award, and is final and binding in respect of those matters.” (my underlining for emphasis)

The above view accords with that of Redfern and Butler in *The Law and Practice of International Commercial Arbitration* 2nd ed at p 273 that:

“In a sense all awards may be said to be “final” in that (subject to the possibility of challenge in the courts) they dispose of one or more of the issues in dispute between the parties. For instance, an interim (or preliminary) award by an arbitral tribunal in an arbitration under the UNCITRAL Rules, to the effect that it does have jurisdiction to determine the dispute before it, is a *final* decision on the issue of jurisdiction, subject to any appeal to the competent court.”

The concept of public policy in this regard is restrictively construed in order to uphold the sanctity of contracts of the parties and bring a dispute to finality in an inexpensive and expeditious manner. In *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) 452 (S) at 466E-G GUBBAY CJ said:

“An arbitral 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 conclusion in an award goes beyond mere faultiness or correctness 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 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.”

The import of the above remarks was clarified by MALABA DCJ, as he then was, in *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Anor* SC 30/17 at p 11 thus:

“The question that should be in the mind of a Judge who is faced with this ground for setting aside 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 upon which to set aside the award. The appellant’s submissions should be considered in the light of these remarks.”

In *OK Zimbabwe Ltd v ArdMbare Properties (Pvt) Ltd* SC 55/17 at pp 12-13

PATEL JA, as he then was, further explained the meaning in the *Maposa* case *supra* in the following way:

“The reviewing court does not exercise an appeal power by having regard to what it considers should have been the correct decision. It will only intervene to set aside an award on the ground of public policy where the reasoning or conclusion in the awardconstitutes a palpable inequity, gross irrationality, moral turpitude or resultant grave injustice, either in the procedure adopted by the arbitrator or in his substantive findings on the merits of the matter, so as to warrant the setting aside of the impugned award. In the absence of any perverse conduct or outlandish aberration on the part of the arbitrator or in the affirmation of his award by the High Court, the appellant is not entitled to the relief that it craves”.

See also *Ropa v Rosemart Investments (Pvt) Ltd & Anor* 2006 (2) ZLR 283 (S) 286B-D; *Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZLR 81 (S) at 85 B-E and *Peruke Investments (Pvt) Ltd v Willoughby's Investments (Pvt) Ltd & Anor* 2015 (1) ZLR 491 (S).

The real question for determination in this appeal is whether the arbitrator's reasoning or conclusion on jurisdiction goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in 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 impugned interim award.

In our law, jurisdiction denotes the power or competence of a court to hear and determine an issue brought before it. *Herbstein and van Winsen: The Civil Practice of the High Courts of South Africa* 5th ed at p 3 opine that:

“A court of law will not entertain legal proceedings unless it is satisfied that it is competent (in other words, has jurisdiction) to do so, that the proceedings have been instituted in the proper form, and that they are being conducted in the proper manner.”

While it is settled that an arbitral tribunal is not a court of law, the above principle applies with equal force to it. An arbitrator cannot act without jurisdiction. If he does so, the arbitral proceedings that ensue will be a nullity. The exercise of jurisdiction where none exists would intolerably and mortally hurt the very concept of justice in Zimbabwe and thus be contrary to the public policy of Zimbabwe. Similarly, the revival or resumption of jurisdiction on a finalized matter in which the judicial officer or arbitrator has fully and finally exhausted his jurisdiction would injure the public policy concept of finality to litigation. See *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (S) at 289; *Bheka v Disability Benefits Board* 1994 (1) ZLR 353 (S) at 35 and *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290C. In the latter case this Court held that:

“It is the policy of the law that there should be finality in litigation.”

To similar effect is *Herbstein & Van Winsen, supra* at p 926:

“The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.”

The importance for an arbitrator to act with jurisdiction is indeed underscored by the nature and scope of articles 16 and 17 of the Model Law, which *inter alia* imbue an arbitral tribunal with the power to dispose of the question of whether or not it has jurisdiction as a preliminary point before considering the merits of the arbitration. An arbitrator is consequently permitted to make an interim award on the question of jurisdiction, which, in any event, constitutes a final and definitive award.

The *functus officio* concept is an aspect of jurisdiction. It is a concept which expresses the termination of the jurisdiction of any person or body charged with the duty and responsibility of exercising a statutory or common law power or authority. The jurisdiction conferred on an arbitrator by the parties in their arbitration agreement terminates when the arbitrator has completed his or her mandate. The academic writers posit that such termination takes place after the happening of either of the following events. The first is at the stage when the arbitrator publishes his award to the parties. The second is when he or she corrects any errors in computation, syntax or errors of a similar nature or makes an additional award in the manner and within the timeframe envisaged in art 33 of the Model Law. The third concerns a determination subsequent to a remittal by a superior court of competent jurisdiction under art 34 (4) of the Model Law.

In *Arbitration in South Africa: Law and Practice: Butler & Finsen* (Juta 1993) at p 103, the learned authors underscore the point that the completion of the mandate terminates the jurisdiction of an arbitrator. The learned authors write that:

“An arbitrator derives his powers from his acceptance of a reference from the parties to an arbitration agreement. He thereby undertakes to hear their dispute and to make an award. When he has completely discharged his duty to them and made an award which is complete in all respects and disposes of all the matters in dispute, his powers automatically desert him and he is said to be *functus officio*. This termination of his powers is so complete that, if he finds he has made a mistake in his award, he has no power to correct it. *Voet* 4.8.23 and *Table Bay Harbour Board v Metropolitan and Suburban Railway Company* (1892) 9 SC 437 at 438.”

They further observe at p. 295 that:

“The effect of setting aside of the award is that everything that has happened since the arbitrator entered into the reference is nullified. His jurisdiction ceased on the publication of his award and is not revived by its setting aside. But the arbitration agreement itself is not affected and its provisions remain binding on the parties, unless by mutual agreement or by order of court it is terminated or set aside. The dispute must on the application of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court. But where the pleadings and discovery for the first arbitration have not been tainted by the circumstances that led to the setting aside of the award, the parties could

agree, or in the absence of agreement, the new arbitrator could direct that the pleadings should be reused in the new reference and that discovery need not be repeated.”

The revival of jurisdiction in *casu* is almost analogous to that of the arbitrator in *Re Stringer and Riley Bros* [1901] 1 QB 105 who omitted to deal with certain issues and delivered an award on others. He was thereafter alerted of his error and proceeded to *mero motu* vacate the award before issuing a fresh one. The court therein held that having made the first award, he became *functus officio* and his second award was invalid. The court, however, acted in terms of s 30 of the English Arbitration Act 42 of 1965 to set aside the second award and remit the matter to him to consider the omitted issues.

In *Russell on Arbitration* 20th ed (1982), *Walton & Victoria* observe that:

“The arbitrator is not *functus officio* until he has made an award. Until then either party can make any application to him, and the arbitrator still having jurisdiction, must deal with such application. Though the case has been formally closed, it is in the discretion of the arbitrator whether he will re-open it and receive further evidence.”

To the same effect is Jacobs’ *The Law of Arbitration in South Africa* Juta 1977 at p. 115:

“Once an award has been made, the arbitrator is *functus officio*. However, prior to making an award the arbitrator has the power to entertain an application for leave to reopen and receive further evidence. It is submitted that the same principles that would apply to a reopening before judgment in a court of law are applicable to an arbitration.”

In *The Law of Arbitration South African and International Arbitration* Juta 2009 at p 168, Ramsden cautions that:

“An award requires finality to be achieved. A situation where the arbitrator’s award directs that further works are to be executed under the supervision of a third party, cannot constitute an award in the sense required. It is not final in any sense of the word. The arbitrator’s status is one of *functus officio* (has discharged his office) after his delivery of the award, yet the determination of the issues is not complete.”

Lastly, Redfern and Hunter, *supra* at p 273 confirm the above position in the following manner:

“However, the term “final award” is customarily reserved for an award which completes the mission of the arbitral tribunal. Subject to certain exceptions, the issue of a final award renders the arbitrators *functus officio*. They cease to have any further jurisdiction over the dispute; and the special relationship that exists between the arbitral tribunal and the parties during the currency of the arbitration ceases.”

In our law, art 32 (1) and (3) clearly state that “the arbitral proceedings are terminated by the final award” and “the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).” Art. 33 prescribes the arbitral tribunal’s power to correct its award *mero motu* or on request on 30 days’ notice or any agreed period of extension after the delivery or publication of the award but within the prescribed period of 60 days or any extended period set by such a tribunal. And, art. 34 (4) vests in the High Court the power to stay an application for the vacation of an arbitral award at the request of a party to the arbitration for a specified time determined by the High Court “to give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as in the tribunal’s opinion will eliminate the grounds for setting aside.”

In *casu*, the factors envisaged by articles 33 and 34 (4) are absent. The arbitrator granted a final award for specific performance on 25 July 2017. The appellant sought the vacation of that award while the respondent, conversely, prayed for its registration. In a consolidated judgment dated 10 June 2020, the High Court dismissed the application by the appellant and registered that arbitral award. The attempted appeal by the appellant against that order was not pursued; hence the registered arbitral order constituted the final award granted by the arbitrator.

The academic writers, such as Walton & Victoria, *supra*, at p 311 of their above cited work rely on the old English case of *Simmons v Swaine* (1809) 1 Taunt 549 to posit, correctly in our view, that:

“An award in the alternative may be sufficiently certain and final. If an award directs one of two things to be done and one of them is uncertain or impossible, the award is nevertheless sufficiently certain and final if the second alternative is certain and possible; and it will be incumbent on the party to perform the second alternative.”

On the same page the learned authors make the further point that:

“An arbitrator cannot in his award reserve either to himself or delegate to another the power of performing in future any act of a judicial nature respecting the submitted matters. His duty is to make a final and complete determination respecting them by his award, and it is in breach of that duty to leave anything to be determined hereafter,”

An exception to this rule is enunciated in *Cogstad v Newsum* [1921] AC 528 where it was held that an arbitrator is permitted to make an interim award on liability leaving the reference of the question of *quantum* open to him, if the parties fail to agree thereon. This is what happened in the *ArdMbare Properties* case, *supra*, with the exception that the parties vested the arbitrator, after determining the question of liability, with the power to determine *quantum* if the parties subsequently failed to agree on the measure thereof. Again, in *Mathews v Craster International (Pvt) Ltd* HH 497/17 at p 3 (per CHATUKUTA J, as she then was) and *Muchenje & Ors v Stuttaffords Removals (Pvt) Ltd* HH 374/13 at p 4 (per TSANGA J), the High Court held that quantification was not the same as an amendment or a correction. The High Court further upheld the quantification subsequent to an earlier award on the discernible *ratio* that the earlier award was merely a partial award which the same arbitrator could reopen.

In the present matter the arbitrator reasoned that he was not *functus officio* because:

“The award I made cannot be effected and therefore the award has to be amended in order to enable the claimant to quantify the damages it has sustained. Because the award cannot be complied with, it must be amended. I have to deal with that issue so I am not *functus officio*. No one else can make the award effective.” (my emphasis)

The considerations that are spelt out in the *ArdMbare* and *Cogstad* cases, *supra*, contrary to Mr *Hashiti's* submissions, do not apply to the award of 25 July 2017 for two reasons. Firstly, while the respondent sought specific performance of the contract from the appellant and the alternative relief of damages, the arbitrator only granted the main relief sought. It was competent of him to do so. According to Visser *et al* in Gibson's *South African Mercantile and Company Law*, 8th ed (Juta) at p 88, it would have been competent, however, for the arbitrator to award both the main relief of specific performance together with the alternative relief of damages. The learned authors state that:

“A party to a contract who is in breach may be compelled to perform the obligation in the manner required by the terms of the contract. The necessary court order may be enforced by contempt of court proceedings if specific performance has been decreed absolutely. But very often the court orders specific performance with an alternative in damages, if this relief is claimed. (The magistrates' court has no jurisdiction to order specific performance unless it is coupled with an alternative order for damages, except in respect of the rendering of an account or the delivery of property (s 46 of the Magistrates Courts Act 32 of 1944))”

Secondly, the specific performance award was neither an interim award nor a partial award. It was a final one. It is common cause, notwithstanding the prevarication of the first respondent on the point, that the present award on jurisdiction was an interim award. The issue of jurisdiction cannot be revisited by the same arbitrator when he eventually determines the merits of the substantive issue of damages. The interim award was therefore properly challenged *a quo*.

The most important legal consequence of a valid award that is underscored by Butler and Finsen, *supra* at p 271, was approved by this Court in *Ropa v Rosemart Investments (Pvt) Ltd & Anor*, *supra*. The learned authors state that:

“The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award, unless their

arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become *res judicata* and neither party may reopen those issues in a fresh arbitration or court action. The effect of a valid award by an arbitrator will usually be to create new rights and obligations between the parties and it will dissolve existing rights or bring an end to a dispute as to whether certain rights existed or not”

It seems to us that the arbitral award on specific performance granted on 25 July 2017 was a final award. It brought the arbitrator’s jurisdiction to an end. However, it created new rights and obligations between the parties under which the first respondent could invoke the arbitration clause in the contract between the parties. See *The Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* CCZ 8/17 at p 7. The respondent could not, without the appellant’s consent, properly seek to revive the arbitrator’s jurisdiction nor could the arbitrator revive his own jurisdiction, which had been exhausted at the time the arbitrator published the award for specific performance. The provisions of s 24 (1) and (2) of the Interpretation Act, which vests a person or authority with the continuing power, jurisdiction, right or duty to exercise such power, jurisdiction, right or duty from time to time as the occasion requires applies during the pendency of such a person or authority’s mandate. It does not apply to a person or authority who is *functus officio*.

In the circumstances, the first five grounds of appeal are meritorious and ought to succeed. The arbitrator did not have jurisdiction to reopen the case. He could only do so either with the appellant’s consent or after the first respondent had invoked the arbitral process prescribed in clause 10 of the contract between the parties. The exercise of jurisdiction by the arbitrator in the circumstances of this case was therefore contrary to the public policy of Zimbabwe. The contrary finding by the court *a quo* was incorrect. We, accordingly, agree with Mr *Phiri*’s submissions that it should be set aside.

In view of this finding, it is not necessary to relate to the second issue raised in the sixth ground of appeal.

Regarding the third issue, which relates to the seventh ground of appeal, the determination of the application for vacating the interim order, whether in favour of the appellant or against it would result in the discharge of the provisional order. This is because the fate of the interim award could only be determined under art 34 (4) the Model Law and not under the common law. The interim interdict having served its purpose cannot at the behest of the court *a quo* nor in the substitutionary order of this court be confirmed. It falls to be discharged. The court *a quo* therefore correctly discharged the provisional order in question.

COSTS

In view of the conduct of the appellant, which necessitated the erroneous reopening of the earlier arbitral award, it is appropriate that each party bears its own costs.

DISPOSITION

The arbitrator could not revive his jurisdiction nor amend his earlier order as he purported to do as he had fully and finally exhausted his jurisdiction. He could only do so with the appellant's consent, which as is apparent from the proceedings, was never given. The arbitrator should have upheld the appellant's preliminary point on jurisdiction. The court *a quo*, in turn, should have found the finding of the arbitrator to have been in breach of the public policy of Zimbabwe.

In the circumstances, the following order will ensue.

1. The appeal succeeds in part.
2. Para (i) of the order of the court *a quo* is set aside and substituted with the following:

“i. The application in HC 722/21 be and is hereby granted.”

3. Each party shall bear its own costs.

MATHONSI JA:

I agree

MWAYERA JA:

I agree

Muvingi and Mugadza, appellant’s legal practitioners.

Chivore Dzingirai Group of Lawyers, 1st respondent’s legal practitioners.

