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IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 112/2017
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

IN THE MATTER OF: AN APPLICATION TO PARTIALLY SET ASIDE AN ARBITRAL AWARD

AND

IN THE MATTER OF: SECTION 17 OF THE ARBITRATION ACT NO. 19 OF 2000

AND

IN THE MATTER OF: RULE 23 OF THE ARBITRATION (COURT PROCEEDINGS) RULES STATUTORY INSTRUMENT NO. 75 OF 2001

AND

IN THE MATTER OF: AN ARBITRAL AWARD DATED 14TH JULY, 2016

BETWEEN:

FRATELLI LOCI SRI ESTRAZION MINERARIE **APPELLANT**

AND

ROAD DEVELOPMENT AGENCY **RESPONDENT**

Coram: Makungu, Kondolo and Majula J.J.A
On 23rd January, 2018 and 4th July, 2018

For the Appellant: Mr. H.M. Haimbe of Malambo & Company
For the Respondent: Mr. R. Ngulube of Tembo Ngulube and Associates

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JUDGMENT

Makungu, JA delivered the Judgment of the court.

Legislation referred to:

1. *The Arbitration Act, 2000 – Section 17 (2) (a) (b) (ii) and (iv)*
2. *The Court of Appeal Act, 2016 – Section 24 (i) (a)*

Cases referred to:

1. *ZRA v. Tiger Limited and Zambia Development Agency, selected Judgment No. 11 of 2016.*
2. *The Minister of Home Affairs and Another v. Lee Habasonda (suing on his own behalf and on behalf of the Southern African Center for the Constructive Resolution of Disputes) (2007) Z.R. 207*
3. *David Chiyengele and 5 others v. Scaw Limited, Appeal No. 177 of 2015, selected judgment No. 2 of 2017*
4. *Miyanda v. Handahu (1993 – 1994) Z.R. 187*
5. *Konkola Coppermines v. Copperfields (2010) ZR Vol 3 156*
6. *J.Z Car Hire Limited v. Chala scirocco and Enterprises Limited – SCZ Judgment no. 20 of 2002*
7. *Y.B and F. Transport v. Supersonic Motors Limited (1982) ZE 22*
8. *Wilson Masauso Zulu v. Avondale Housing project Limited (1982) ZR. 178*

In this Judgment we shall refer to the Appellant as the Applicant and the Respondent as such as they were in the court below. This is an appeal against the High Court decision delivered on 30th June, 2017. The appellant had, in the court below, filed an Originating Summons on 3rd October, 2016 claiming that part of the Arbitral award dated 8th August, 2016 relating to the refusal to award the

respondent damages for breach of contract be set aside on the following grounds:

1. *That the procedure adopted by the Arbitral Tribunal in arriving at its decision to disallow the plaintiff's claim for damages was not in accordance with the agreement of the parties and/or with the Arbitration Act No. 19 of 2000 ('the Act') and/or with Zambian law and that it was therefore in contravention of Section 17 (2) (a) (iv) of the Act; and*
2. *That the Arbitral Tribunal's decision to disallow the plaintiff's claim for damages was not consistent with its finding that the agreements subject of the dispute in the arbitration were wrongfully terminated; consequently, that decision was in conflict with public policy and is amenable to being set aside pursuant to Section 17 (2) (b) (ii) of the Act.*

The application was opposed on the main ground that the applicant did not lead evidence relating to damages. The brief facts of the matter were as follows. The parties herein entered into three separate contracts as follows:

Contract number RDA/CE/004/11 and RDA/SP/005 ('Contract A') which was to be undertaken as a joint venture between the claimant and HHO Africa Infrastructure Engineers (HHO Africa)

dated 5th August, 2011 under which the claimant undertook to carry out upgrading of 70 kilometers of the pedicle road located in the Democratic Republic of Congo including the construction of one reinforced concrete bridge at Lubemba, along the road at the contractual sum of ZMK 313,887,290,717.78 (Zambian Kwacha Three Hundred and Thirteen Billion Eighty Hundred and Eighty Seven Million Two Hundred and Ninety Thousand Seven Hundred and Seventeen Kwacha Seventy Eight Ngwee) (before rebasing of Zambian Kwacha).

Contract number RDA/CE/014/011 ('Contract B') which was to be undertaken as a joint venture between the claimant and Zulu Burrow Development Consultants (Zulu Burrow) dated 14th May, 2011 under which the claimant overtook to carry out the rehabilitation, upgrading of urban roads in various towns in Lusaka, Central province and Copperbelt Provinces described as Lot 2,26.47 Kilometers of roads in Mufulira at the contractual sum of ZMK50,770,394,746.18 (Zambian Kwacha Fifty Billion Seven Hundred and Seventy Million Three Hundred and Ninety Four Thousand Seven Hundred and Forty Six Kwacha and Eighteen Ngwee (before rebasing of Zambian Kwacha).

Contract number RDA/CE/017/011 ('Contract C') which was to be undertaken as a joint venture between the claimant and Bicon Zambia Limited (Bicon) dated 14th May, 2011 under which the claimant undertook to carry out the rehabilitation, upgrading works of urban roads in various towns in Lusaka, Central Province and Copperbelt provinces of Lot number 5 Ndola City roads, 33.282 Kilometers at the contractual sum of ZMK91,849,611,033.85 (Zambian Kwacha Ninety One Billion Eighty Hundred and Forty Nine Million Six Hundred and Eleven Thousand and Thirty Three Kwacha Eighty Five Ngwee) (before rebasing of Zambian Kwacha).

It is noteworthy that HHO Africa, Zulu Burrow and Bicon were all not parties to this Arbitration.

The dispute which was submitted to Arbitration arose from the termination of the contracts by the respondent by separate letters dated 18th September, 2012. Upon hearing the parties concerned, the arbitral tribunal composed of three arbitrators rendered its final award on 14th July, 2016 appearing on pages 35-79 of the record of appeal. Page 43 of the award i.e. page 78 of the record of appeal

shows the full and final settlement of all claims in the arbitration as follows:

- *The claimant is partially successful to the extent that the sum of ZMK28,058,387,365.00 is due to it on the basis of the claims that have been allowed after adjusting total amounts due to it against the respondent's counterclaim.*
- *The claimant is entitled to return of equipment on site.*
- *Interest will be payable on the amount due to the respondent from the date of commencement of the arbitration up to the date of the award at the commercial bank average short term deposit rate. From the date of the award, interest shall be due and accrue in accordance with the provisions of Section 2 of the Judgment Act. For this purpose, we determine that this rate shall be equivalent to the prevailing Bank of Zambia Monetary Policy rate.*
- *The costs of the Arbitral Tribunal including disbursements be borne in equal proportions by the parties.*
- *As both claims have been partially successful, each party will bear their own costs.*

To put the case in perspective, we reiterate that the application before the lower court arose from the arbitral tribunal's refusal to award general damages for breach of contract.

In determining the matter, the lower court considered the affidavits in support and in opposition to the application, skeleton arguments, lists of authorities and other written submissions. In determining whether there was procedural impropriety committed by the arbitral tribunal, the court looked at Article 19 of the Model Law on International Arbitration which gives guidelines on arbitration procedure and examined the arbitration agreement executed by the parties. The lower court found that the Arbitration agreement merely provided for the appointment of an arbitral tribunal and gave the parties liberty to call witnesses. The learned Judge found no other document relating to agreed procedure. The court also considered ***Section 17(2) (a) (iv) of the Arbitration Act*** *(1)* which provides that:

"17(2) An Arbitral award may be set aside by the court only if

(a) The party making the application furnishes proof that

(iv) the composition of the arbitral tribunal on the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with this Act or the law of the country where the arbitration took place."

The court found further that the applicant did not challenge the arbitral procedure stipulated in the agreement. That no specific procedural impropriety was referred to but substantive issues regarding the arbitral tribunal's refusal to award damages. As a result, she refused to partially set aside the award for procedural impropriety.

On the issue whether the part of the award sought to be set aside is contrary to public policy as provided under ***Section 17(2) (b) (ii) of the Arbitration Act,*** [1] the Court considered the said Section which provides that:

17(2) "An Arbitral award may be set aside by the court

(b) If the court finds that

(ii) the award is in conflict with public policy...."

The lower court relied on the case of ***ZRA v. Tiger Limited and Zambia Development Agency*** [1] where the Supreme Court adopted the Zimbabwean case of ***Electricity Supply Authority v. Maposa*** in which the court made the following pronouncement on public policy considerations in arbitral matters:

"Where, however the reasons or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes an inequity that is so far reaching and outrageous in its defiance of logic or accepted standards that a sensible and fair minded person would consider that the concept of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."

The court found that in paragraphs 154.1 to 161 of the Arbitral Award, the arbitral tribunal expressly analyzed the applicant's claim for damages. That in paragraph 156 in particular, the tribunal stated thus:

"As we have pointed out, it is a recognized principle of law in Zambian jurisprudence that each party bears the burden of proving the facts relied on to support a claim or defence. During the hearing, no evidence was led to prove the claims that have been particularized in paragraph 16 of the statement of claim with respect to general damages. Evidence which has not been tested through cross examination cannot be introduced in the form of workings calculated by a party and included as a schedule to its submissions as the claimant has attempted to do. We therefore find that there is no basis for the claims that have been particularized in paragraph 16 of the statement of claim with respect to contracts A, B and C."

The court therefore found that the Arbitral Tribunal exposed the applicant's own lapses in the prosecution of its claim. That therefore the claim that the tribunal did not address their minds to the issue of damages lacked merit. The lower court found no proof that the refusal to award damages was against public policy as defined in the ***Tiger Transport*** [(1)] case.

The Appellants have raised five grounds of appeal couched as follows:

1. *The court below erred in law and in fact when it held that there was no tangible contention or evidence relating to want of procedural aptness on the part of arbitral tribunal and that the applicant had misconceived Section 17 (2) (a) (iv) of the Act leading to a failure to satisfy the threshold of adducing proof of procedural impropriety.*
2. *The court below misdirected itself when it refused to partially set aside the arbitral award in issue without having due regard to the fact that there was a requirement for the arbitral tribunal to first determine the question of liability before determining the question of quantum and that this requirement was a procedural one imposed upon the arbitral tribunal by law whereby the arbitral tribunal had to satisfy the said requirement in order for it to properly discharge its mandate to resolve all the matters in dispute in the arbitration.*

3. *The court below erred in law and in fact when it held that no evidence had been furnished to it to show that the award in issue created an inequity that was so far reaching and outrageous that it defied logic or accepted standards so as to lead a sensible or fair minded person to consider that the concept of justice in Zambia had been in tolerably hurt by the said award.*
4. *The court below fell into grave error when it held that there was no basis upon which it could make a finding that the award in issue offended public policy.*
5. *The learned trial Judge erred in law and in fact when she dismissed the application to partially set aside the arbitral award in issue with costs to the respondent.*

Grounds 1 and 2 were argued together and so were grounds 3 and 4, while ground 5 was argued separately.

In support of ground 1 and 2 counsel contended that the trial Judge disregarded the evidence before her when she held that the appellants did not satisfy the threshold that was set out under ***Section 17 (2) (a) (iv) of the Act*** [1] in order to prove procedural impropriety. On this premise, it was argued that the learned trial Judge ignored the fact that the arbitral tribunal's decision making process was an integral part of the arbitral procedure. Counsel

referred us to portions of the submissions made in the lower court to the effect that the arbitral tribunal improperly handled the matter when it failed to make pronouncements on the question of liability before determining whether there was proof of damages.

Further that, the learned Judge did not address any of the contentions that were made by the applicant. That the Judgment of the lower court does not conform to the meaning of a judgment as espoused in the case of the ***The Minister of Home Affairs and Another v. Lee Habasonda*** [3] wherein it was held *inter alia* that there is need for the trial Judge to discuss all the specific issues that are raised by the parties in arriving at the Judgment. Counsel stated that the lower court avoided dealing with the issues put forward for consideration on the basis that it would have ended up reviewing the award. However, the court did not explain how that would have been the outcome. Counsel urged us to invoke ***Section 24 (1) (a) of the Court of Appeal Act.*** [2] which provides that:

"The court may on the hearing of an appeal in civil matters (a) confirm, vary amend, or set aside the judgment appealed against or give judgment as the case may require."

In support of grounds three and four, Mr. Haimbe submitted that the trial court omitted to take into account the appellant's argument on the issue of public policy. That contrary to the trial court's conclusion that it was the applicant's assertion that the arbitral tribunal did not address the issue of damages, the applicant contends that the manner in which the arbitral tribunal allowed the respondent that was found guilty of wrong doing to simply walk away without sanction, conflicted with the public policy tenable in Zambia. That the concept of justice in Zambia would be deeply injured if such an award were to stand as that would send a message that wrong doers can go scot free. He further contended that it was outrageous and defiant of logic that a successful party in a commercial arbitration could be denied any relief whatsoever (including nominal or declaratory relief) on the pretext of lack of evidence to support its claim even in the face of progressive decisions of the Supreme Court. In aid of this, he placed reliance on the case of ***David Chiyengele and 5 others v. Scaw Limited*** [4] where it was established that an injured party should not go without redress for injury or wrong occasioned to him. That the

portion of the award complained of is against public policy and should be set aside.

Mr. Haimbe submitted under ground five that the entire judgment of the lower court is erroneous and that it should be set aside with costs to the appellant. Consequently the case should be remitted to a different arbitral tribunal for rehearing of the issue of damages for breach of contract.

In response, the gist of Mr. Ngulube's arguments on grounds 1 and 2 is that there is need to apply the literal rule in interpreting Section 17 (2)(a)(iv) of the Arbitration Act. [1] In aid of this, he relied on the case of ***Miyanda v. Handahu*** [5] where it was held as follows:

> ***"...when the language is plain and there is nothing to suggest that any words are used in technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers, and the like."***

He stated that Black's Law Dictionary defines 'procedure' to mean a specific method or course of action and the judicial rule or manner for carrying on a civil lawsuit or criminal prosecution also termed rules of procedure. That there was no specific procedure agreed upon by the parties on the issues of liability for damages and quantum of damages. There was no evidence to show that the arbitral tribunal had contravened the arbitral procedure. Further that, the part of the award that the appellant is seeking to set aside is not procedural in nature and character but substantive. That the law does not provide the procedure on how an arbitral tribunal should determine the issue of liability and the quantum of damages as alleged by the appellant. The tribunal did not address the issue of liability for damages because there was no evidence that was led to prove such a claim. Counsel referred to Article 19 (1), (2) of the Schedule of the Act (1) i.e. the modified model law which provide:

ARTICLE 19

Determination of rules of procedures

"(1) Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

"(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

From the above, counsel submitted that the tribunal had the power to decide on the admissibility of evidence. That the tribunal rightly declined to admit the evidence of the appellant in the form of the workings included as a schedule to its submissions and which evidence was never subjected to cross- examination. To buttress this, he referred to ***Section 15 (c) of the Act*** [1] which provides:

15 "Unless otherwise agreed by the parties, if, without showing sufficient cause

(c) any party fails to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."

Mr. Ngulube further submitted that the substantive issues of liability and quantum of damages cannot be brought pursuant to Section 17(2) (a) (iv) of the Act. [1] He added that the appeal therefore

lacks merit as the tribunal arrived at its decision on the basis of established principles and in support of this position he referred to a number of cases including ***J.Z Car Hire Limited v. Chala Scirocco & Enterprises Limited*** [6] where the Supreme Court held that:

> ***"This court has said in a number of cases such as Zulu v. Avondale Housing Project and Mhango v. Ngulube and 7 others that it is for the party claiming the damages to prove the damage, never mind the opponent's case."***

He therefore argued that there was need for the appellant to prove the alleged loss. In the absence of proof, the tribunal was on firm ground when it declined to award the appellant damages. That the appellant is in essence attacking the merits of the award rather than discharging the onus of proving that it has met the threshold set by Section 17(2) (a) (iv) of the Act. [1] In the case of ***Zambia Revenue Authority v. Tiger Limited and Zambia Development Agency*** [1] the court established that when interpreting the model law, one must not lose sight of the fact that it is an international instrument to be used on an international plane. That the appellant's appeal before this court is merely requesting this court to review the award on its merits.

He concluded by stating that grounds one and two must fail because there was no proof of procedural impropriety to satisfy Section 17 (2) (a) (iv) of the Act. [1]

In response to grounds three and four, Mr. Ngulube submitted that the trial court was on firm ground when it declined to award damages to the appellant and that this did not constitute an inequity that was so far reaching or outrageous to defy logic or accepted standards that a fair minded person would consider the decision of the tribunal to have intolerably hurt the concept of justice in Zambia.

In arguing ground five, Mr. Ngulube submitted that the trial court was entitled to award costs to the respondent in the exercise of its discretion. He relied on the case of ***Y.B. and F. Transport v. Supersonic Motors Limited*** [7] where the court held *inter alia* as follows:

"The general principle is that costs should follow the event, in other words, a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it."

In light of this authority counsel stated that in the present case, it is improper for the appellant to question the trial Judge's discretionary power to award costs because the respondent did nothing wrong in the conduct of the case. That the lower courts findings cannot be set aside pursuant to the ***Wilson Masuso Zulu*** *(8)* case because the appellant has failed to show that the findings were either perverse or made in the absence of any relevant evidence or upon a misapprehension of facts. He therefore urged us to dismiss the appeal with costs to the respondent.

We have scrutinized the record of appeal and carefully considered the written arguments made by both parties. We shall determine the grounds of appeal in the order in which they have been argued.

As regards the first and second grounds, it is clear that on page 17 of the Ruling, the court below considered whether or not the arbitral tribunal had acted contrary to the Arbitration Agreement. The lower court found that the Arbitration Agreement only provided procedure for the appointment of the arbitral tribunal and gave parties liberty to call witnesses. We have read the Agreement for submission to Arbitration dated 8th July, 2013 on pages 31 to 34 of

the record of appeal. We note that the said agreement does not merely provide for the procedure for appointment of the arbitral tribunal and the calling of expert witnesses but also provides for the governing law and jurisdiction etc. The lower court therefore erred to find that it merely provides for the appointment of an arbitral tribunal and the calling of witnesses. The arbitral tribunal was required to apply Zambian law as part of the procedure. We also note that despite the said error, the court considered the refusal to award damages as an issue touching on the substantive issues determined by the arbitral tribunal. In the court below, the applicant had argued that the failure of the arbitral tribunal to award damages was against Zambian law. That it was therefore an error to find that the applicant had misconceived Section 17 (i) (a) (iv) of the Act.

It is clear to us that in paragraph 156 of the Award which paragraph is quoted at page 8 hereof, the arbitral tribunal refused to award the applicant damages on the basis of the recognized principle of law in Zambian jurisprudence that he who alleges must prove. The tribunal found no proof of the claim for general damages. We are of the view that the tribunal cannot be faulted for

failing to cite Zambian cases in support of its holdings and findings. It is sufficient that the tribunal had considered Zambian law.

Although the case of ***David Chiyengele and 5 others v. Scaw Limited*** [4] was decided much later than the case of ***J.Z Car Hire*** [6] the law that it is for the party claiming any damages to prove the damage has not changed. Since the tribunal found no evidence of the claim for damages it cannot be faulted for not finding the respondent liable for damages. We accept the Respondents submissions that the tribunal acted in accordance with Section 15 (c) of the Arbitration Act [1] and Article 19 (2) of the schedule to the Act. [1]

We cannot fault the lower court's finding on page 9 of the judgment to the effect that she could not delve into issues of substance because it would defeat the whole essence of arbitration as an alternative dispute resolution mechanism. According to the lower court issues regarding the liability and quantum of damages are substantive and they were ably handled by the arbitral tribunal.

In light of the case of ***Konkola Coppermines v. Copperfields*** [6] where it was held that:

"An application to set aside an award is not intended for the court to review the award of the tribunal or indeed conduct a hearing akin to an appeal," we are of the considered view that the lower court was on firm ground.

As regards the appellants argument that the lower Court's Ruling is not a Judgment within the meaning of the ***Lee Habasonda*** [2] case. We are of the view that the Ruling to a large extent complies with the laid down format because on pages 2-5 of the Ruling the Judge summarized the claims before her. On pages 5-14 the court referred to affidavit evidence and submissions of the parties, she also analysed the issues and facts and applied the law to the facts. The Judge's omission to summarise the evidence and the submissions before her does not warrant nullification of the Ruling.

For the foregoing reasons, the 1st and 2nd grounds of appeal cannot be sustained.

As regards the third and fourth grounds of appeal, it is clear that the applicant relies heavily on the case of ***David Chiyengele and 5 others v. Scaw Limited*** [4] to show that the arbitral award was against public policy. The applicant argues that the tribunal should have awarded even nominal damages to the applicant for breach of

contract. The ***Chiyengele*** [4] case is distinguishable from the case at hand in that it was an appeal against the Deputy Registrar's assessment of damages for loss of employment while this is an appeal against part of an arbitral award. The facts of the ***Chiyengele*** [4] case are very different from the facts of this case. The integrity of the arbitral process must be preserved by not reviewing an award or part thereof unless on cogent grounds, which do not exist in this matter.

The definition of public policy adopted in the ***Tiger Limited Transport*** [1] case shows that a very high standard of proof is set for a person applying to set aside an award on an allegation that it is contrary to public policy. Our view is that for an award to be set aside on that ground there must be proof that the arbitral tribunal has done gross injustice. In the present case, we agree with the lower court that there was no evidence upon which a finding that the award is against public policy as defined by law could be made. Failure to award nominal damages did not in this particular case result in gross injustice. Grounds three and four therefore also fail.

Coming to the fifth ground of appeal, we entirely agree with the Respondent that having dismissed the applicant's application, the

court below was entitled to exercise its discretion to award costs to the Respondent because normally costs follow the event. Applying the case of ***Y. B. and F Transport v. Supersonic Motors Limited*** [7] to the facts of this case, we agree with the Respondent's counsel that the Respondent was not guilty of any improper conduct during the proceedings and therefore it deserved an award of costs. Ground five therefore also fails.

For the foregoing reasons, the appeal is hereby dismissed with costs which may be taxed in default of agreement.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE