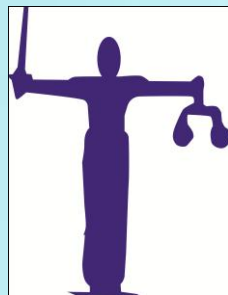


● Hon. Mr. Justice Nigel Kalonde Mutuna

Hon. Mr. Justice Nigel Kalonde Mutuna CIArb obtained his LLB degree from the University of Zambia in 1984 and was admitted to the Bar as a practitioner in 1985. From 1999 to 2009, he served as President for Zambia Association of Arbitrators.

Hon. Mr. Justice Mutuna completed a Special Member course, CIArb in 2002 and was admitted to membership, he also took the first step to Fellowship CIArb, Amsterdam in 2004 and is an accredited tutor CIArb, London. He served as Judge of the High Court Commercial List from 2009 until 2016 when he was appointed Judge of the Supreme Court of Zambia.

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THE ANNUAL JUDICIAL CONFERENCE – 15TH TO 18TH NOVEMBER 2016 AT AVANI VICTORIA

THE COMPLIMENTARY ROLE OF THE COURTS IN THE ARBITRAL PROCESS - BEFORE, DURING AND AFTER ARBITRAL PROCEEDINGS

“Strengthening the capacity of Judiciary to Respond to the needs of the Public”

BY NIGEL KALONDE MUTUNA, JS, MCI Arb

Introduction

- ▶ Relevant statute is the ***Arbitration Act*** No.19 of 2000
- ▶ This is a modern piece of legislation that has adopted the Model Law and paved the way for Zambia to ratify the New York convention of 1958
- ▶ Rules are the Arbitration (Court Proceedings) Rule, S.I. No.75 of 2001

Introduction Cont....

- ▶ Stages of the Presentation
- ✓ Rationale for complimentary role and this paper
- ✓ Role of the court before arbitral proceedings are commenced
- ✓ Role of the court during the arbitral proceedings
- ✓ Role of the court after the arbitral proceedings

- ▶ Rationale for the Complimentary Role & this Paper
 - ✓ Arbitrator is a private judge
 - ✓ No powers to enforce his orders
 - ✓ Does not have the backing of state machinery
 - ✓ His role is optional - default position derived from the parties

Rationale for the Complimentary Role & this Paper Cont....

- ✓ Preamble to the Act

*"... redefine the supervisory role of the courts in the
arbitral process ...*

- ✓ *"Supervisory role"* is the *"complimentary role"* of the
courts as referred to by the Act

- ✓ Word supervisory used here because Act, Cap 40, the old
Arbitration Act provided for interference by the courts in
the arbitral process

Rationale for the Complimentary Role & this Paper Cont....

- ✓ The purpose is to assist the arbitral process to make it effective
- ✓ There is no definition or reference to "*complimentary*" role in the Act
- ✓ ***Cash Crusaders Franchising (PTY) Ltd -vs- Shakers & Movers Zambia Limited*** (2012) ZR volume 3 at page 176 dicta defines complimentary role of courts as follows:
 - ✓ "*... means that the courts merely assist the arbitral process to be effective because, since it is manned by private citizens and not the state, there are no systems put in place to make it effective such as those available to the state*".
- ✓ ***The Encyclopedia of Forms and Precedents***, gives a twofold definition of "*complimentary role*" of the courts as "supportive" and "supervisory".

Rationale for the Complimentary Role & this Paper Cont....

- ▶ Why should we discuss the complimentary role of courts?
- ✓ Need to be alive to the functions of the court in the arbitral process
- ✓ The manner in which we deal with applications arising from arbitral proceedings determines whether or not Zambia is a preferred choice for the seat of arbitration
- ✓ This boosts international trade and investments and therefore, satisfies the needs of the public in accordance with the theme of this seminar
- ✓ We must be alive to the fact that our Act is the Model Law which is an international instrument
- ✓ In interpreting and applying the Act, we should have regard to its international origin and need to preserve international uniformity (see section 2(3) of the Act)

Rationale for the Complimentary Role & this Paper Cont....

See also Supreme Court decision of ***Zambia Revenue Authority vs. Tiger Limited and Zambia Development Agency*** selected judgment No.11 of 2011 where the Supreme Court observed as follows:

"When interpreting the Model Law, one must, therefore, not lose sight of the fact that it is an international instrument to be used on the international plane. Further ... there is need to have uniformity, worldwide, on how the articles of the Model Law are interpreted

We are mandated under the constitution (as amended) to be guided by ADR principles see article 118(2)(d) of Act no. 2 of 2016

COMPLIMENTARY ROLE OF THE COURTS

- ▶ ***Before proceedings are commenced***
- ✓ ***Grant of interim measures:*** preservation, interim custody, sale or inspection of any goods; order securing the amount in dispute or costs and expenses; interim injunction or other interim order; or any order to ensure award rendered is not ineffective
 - An order of injunction can only be granted if tribunal is not yet appointed, therefore, do not allow an application for an injunction where evidence reveals that arbitrator has already been appointed
 - See section 11 of the Act and Rule 9 of the Rules
- ✓ ***Appointment of arbitrator:*** where parties fail to appoint or arbitrators fail to appoint or act

COMPLIMENTARY ROLE OF THE COURTS

- Decision of the court not subject to appeal, therefore, need to thoroughly research before you render your decision
- Court has regard to qualifications of the arbitrator in relation to the nature of the dispute
- See section 12 of the Act and Rule 10 of the Rules
- ✓ Stay of proceedings and referral of parties to arbitration:
 - Court has an obligation to refer the parties to arbitration, ***if one of them so requests***, where they are before court in contravention of arbitration agreement

COMPLIMENTARY ROLE OF THE COURTS

- Court stays proceedings and refers parties to arbitration
- Exceptions:

Where court finds that the agreement is null and void, inoperative or incapable of being performed

See case of ***Ody's Oil Company Limited vs The Attorney General and Constantinos James Papoutsis*** (2012) ZR volume 1 at page 164

"... the court must be satisfied that there is first an agreement, that the arbitration agreement is valid, and or that it is not null and void, inoperative or incapable of being performed".

"If the court finds that the arbitration agreement is null and void, inoperative or that it is not capable of being performed, then the court will not refer the dispute to arbitration for settlement".

COMPLIMENTARY ROLE OF THE COURTS

- There is no reason why a court should hold on to a record if the proper place for it is arbitration. This helps decongest the court
- The agreement referred to in the section is the arbitration agreement and not main contract
- Referral is of the "*parties*" and not the "*dispute*", to arbitration
- See section 10 of the Act and Rule 4 of the Rules

COMPLIMENTARY ROLE OF THE COURTS

▶ *During the proceedings*

- ✓ Interim measures (already discussed)
- ✓ Recourse to decision on challenge to appointment (independence, impartiality or qualifications)
 - See the case of ***Kasanga and another vs. Mumba and 2 others*** (2006) ZR page 7 defines what amounts to perception of bias and how to deal with such an allegation
 - See also case of ***Konkola Coppermines Plc vs. Copperfields Mining Services Limited*** (2010) ZR Vol.3 page 353

Held:

"A challenge relating to the independence and impartiality of the arbitrator can be raised not only at the stage of the appointment of the arbitrator, but at any stage of the arbitral proceedings".

- The arbitrator's perceived lack of independence and impartiality can not be raised as a ground for setting aside an award

COMPLIMENTARY ROLE OF THE COURTS

- Application to be made within 30 days of receipt of notice of appointment of arbitrator
- Decision of the court on the matter shall be final and not subject to appeal, therefore, need to thoroughly research before you render your decision
- See Articles 12 and 13 of the Model Law and Rule 12
- ✓ Determination of issue whether or not arbitrator is: unable to perform his functions; to perform them promptly; or his mandate has terminated
- A decision of the court on the matter is final and not subject to appeal once again need for you to thoroughly research before you render a decision
- See Article 14 of the Model Law
- ✓ Recourse to decision on challenge to jurisdiction (existence or validity of arbitration clause)
- Application to be made to court within 30 days
- A decision on the matter by the court shall be final and not subject to appeal, again be thorough in your research before you render a decision
- See Article 16 of Model Law and Rule 11

COMPLIMENTARY ROLE OF THE COURTS

- ✓ Executory Assistance in the enforcement of:
 - An arbitrator's order on an interim measure of protection
 - An arbitrator's order on payment of deposit on fees and security for costs
 - An arbitrator's order compelling attendance of a witness to give evidence or produce documents
 - An arbitrator's order for a witness to submit to examination on oath or affirmation before the tribunal or officer of the tribunal or any other person
 - An arbitrator's order for discovery of documents and interrogatories
 - An arbitrator's order issuing a commission or request for the taking of evidence out of jurisdiction
 - An arbitrator's order detaining, preserving or for inspection of property in the custody possession or control of a party
 - See section 14 of the Act and Rule 12
 - All these instances are what *Encyclopedia of Forms and Precedents* refers to as the "supportive" role

COMPLIMENTARY ROLE OF THE COURTS

▶ *After the arbitral proceedings*

✓ Setting aside of an award

- This is the sole recourse against an award

- The case of ***Lendor Limited -vs- Hawkwood Property Investment Limited and Mukwa Investment Limited*** 2006/HPC/0163 confirms that the only recourse available to a party against an award is under section 17 of the Act which spells out the grounds upon which an arbitral award may be set aside.

- Grounds are an attack on the due process

COMPLIMENTARY ROLE OF THE COURTS

- See the case of ***Konkola Copper Mines Plc vs Copperfields Mining Services Limited*** (2010) ZR Vol.3 page 156

- Held:

"Section 17 of the arbitration Act makes it abundantly clear that the grounds to be proved before an award can be set aside are those set out in the section.

An application to set aside an award is not intended for the Court to review the award of a Tribunal, or conduct a hearing akin to an appeal".

COMPLIMENTARY ROLE OF THE COURTS

- Party must prove:
 - Incapacity of party to the arbitration agreement
 - Invalidity of the arbitration agreement
 - Want of notice of appointment of the arbitrator or the proceedings
 - Inability to present ones case
 - The award strays beyond the scope of the submission to arbitration/here court must preserve portion of award that has not strayed
 - Composition of arbitral tribunal offends agreement of the parties or the Act
 - Award not binding yet, set aside or suspended by a court of the country it was made or under the laws it was made

COMPLIMENTARY ROLE OF THE COURTS

- Or where court finds:
 - Subject matter if the arbitration not arbitrable under Zambian law
 - The award is in conflict with public policy
 - See the case of ***Zambia Revenue Authority -vs- Tiger Limited and Zambia Development Agency*** selected Judgment No.11 of 2016 where the Supreme Court defined public policy and the thresholds that have to be met in satisfying section 17

COMPLIMENTARY ROLE OF THE COURTS

- The making of the award was induced or affected by fraud corruption or misrepresentation.
 - See section 17 and Rules 23 and 24
 - Section 17 is a replica of Article 34 of the Model Law and Article V of the New York Convention except for one or two subsections. This is deliberate as it conforms to international standards in that awards should be exposed to the same standards worldwide

COMPLIMENTARY ROLE OF THE COURTS

- ✓ Enforcement of awards.
- Where a party refuses to comply with an award, the winning party must take the necessary steps to enforce it
- Klaus Peter Berger, Arbitration Interactive defines recognition thus:
 - "An arbitral award is rendered by a "*private*" tribunal whose decision-making power is based on a "*private*" agreement of the parties. This "*private*" award needs an official confirmation by the domestic courts in order to function as an enforcement title for state enforcement authorities against the losing party."
- The steps are provided for under section 18 of the Act which is on recognition of an award
- Recognition is in effect registration of an award by the court

COMPLIMENTARY ROLE OF THE COURTS

- Party must place before the court:
 - The duly authenticated original of the award/or duly certified copy thereof
 - The original arbitration agreement/or duly certified copy thereof
 - If the award is not in the official language, a duly certified translation thereof
 - Specify interest rate sought or interest due on the award
- Full name, title, trade or business of entity or person liable for execution

COMPLIMENTARY ROLE OF THE COURTS

- The application must comply with Rules 15 and 16 of the Rules and may be made *ex parte*
- The grounds upon which a court can refuse to register an award are set out in section 19
- These grounds are the same as those under section 17 for setting aside
- At the point of registration and enforcement of the award you must be mindful that you cannot stay execution of an award

COMPLIMENTARY ROLE OF THE COURTS

- See case of ***Konkola Coppermines Plc vs. Copperfields Mining Services Limited*** (2010) ZR Vol.3 page 353

- Held

"The fact that an award has become enforceable in the same manner as an order of the court does not in, and of itself render it open to a stay of execution

The attempt by the plaintiff to say sale pending appeal, has the effect of attempting to stay execution. The award was rendered by an Arbitral Tribunal, and not the Court. The Court has no jurisdiction to stay that which it did not render.

It is not the function, or role of the Court in the arbitral process to stay execution of an award".

-Rules provides for automatic stays see rules 17 and 20(1) and (2)

COMPLIMENTARY ROLE OF THE COURTS

- ✓ Protection of confidentiality of arbitration
 - See section 27
 - Court maintains a separate confidential registry and register of awards and matters arising from arbitral proceedings
 - Not subject to a search by members of the public except counsel for the parties
 - It is an offence to breach the Rules on confidentiality
 - Exceptions to the rules
 - See Rules 25 to 31 of the Rules
 - These instances are what the *Encyclopedia of Forms and Precedents* refers to as the "supervisory" role.

THANK YOU!