

IN THE HIGH COURT FOR ZAMBIA

2014/HK/ARB/02

AT THE DISTRICT REGISTRY

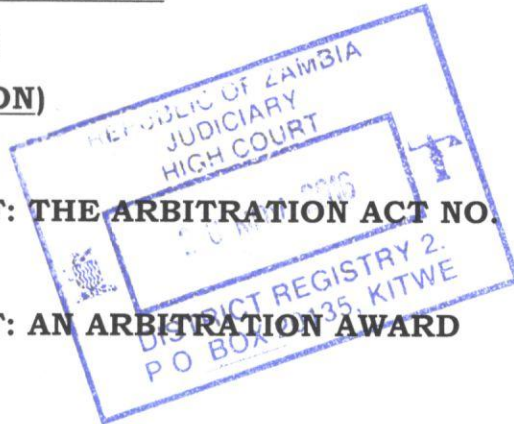
HOLDEN AT KITWE

(CIVIL JURISDICTION)

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

AND

IN THE MATTER OF: AN ARBITRATION AWARD



BETWEEN:

SATYAM SHIVAN SUNDARAM

1ST APPLICANT

CLASSIC MINING & TRADING LIMITED

2ND APPLICANT

AND

GIVEN CHISAKULA KAWINA

RESPONDENT

Before; Hon. Madam Justice C. B. Maka-Phiri

**For the Applicant: Mr. W. Nyirenda, S.C, with Mr. K Mwiinga
of Messrs William Nyirenda & Co.**

**For the Respondent: Mr. R. Mandona of Messrs Chilupe &
Permanent Chambers**

J U D G M E N T

Cases Referred to:

- 1. Konkola Copper Mines Plc. v Copper Fields Mining Services Limited (2010) Z.R. 156.**
- 2. E & M Storti Mining limited v Twapane Mining Co-operative Society Limited 2006/HK/ARB/1 (unreported).**
- 3. Cash Crusaders Franchising (PTY) Ltd v Shakers and Movers Zambia Limited (2012) Z.R. 176 vol. 3.**

Legislation referred to:

1. The Arbitration Act No. 19 of 2000.

The Applicants took out originating summons pursuant to the provisions of section 17 (2)(iii)and(iv) of the Arbitration Act No.19 of 2000 seeking to set aside the arbitral award on the following grounds;

- (i) That the Arbitrator went beyond the scope of arbitral process by awarding 49% of the shares in the 2nd Applicant company when in fact the Respondent only claimed 24% in the Writ of summons which she verily believe was her due entitlement as per her existing Shareholding Certificate.
- (ii) That the Arbitrator went beyond the scope of the arbitral process by relying on the Audit Report of Messrs Thewo and Company to determine the value and profitability for the 2nd Applicant Company.
- (iii) That the Arbitrator went beyond the scope of the arbitral process by relying entirely on the Audit Report of Messrs Thewo and Company to determine the profitability of the 2nd Applicant Company and thereby totally ignoring the parties' evidence adduced during the process.
- (iv) That the Arbitrator went beyond the scope of the arbitral process when he relied entirely on the Audit Report of Messrs Thewo and Company in writing back to the profit of the Company matters relating to the salary of the 1st Applicant, rental issues and Expatriate Employees Salaries. In affirming these matters the profitability of the Company was totally misconceived and totally outside the scope of the arbitral process. Accounting norms do not allow such kinds of write backs.

- (v) That the composition of arbitral tribunal was not in accordance with the agreement of the parties and/or the Articles of Association of the 2nd Applicant Company.
- (vi) Any other relief that the Court may deem appropriate in the circumstances.

An affidavit sworn by **Satyam Shivan Sundaram**, the 1st Applicant, was filed in support of the application. The Respondents' response was by way of affidavit in opposition filed on 19th January 2015.

The gist of the Applicants' affidavit evidence was that the Respondent commenced arbitral proceedings against the Applicants pursuant to the 2nd Applicant's Articles of Association exhibited as '**SSS1**'. The Arbitrator one **John Kabuka** rendered an interim final award on 31st July, 2014 exhibited as '**SSS2**' and the Applicants were notified of the award in a letter dated 5th August, 2014 and exhibited as '**SSS3**'. The Applicants are now seeking to set aside the award based on grounds outlined above and specifically set out in paragraph 6 of the affidavit in support. The gist of the argument was that the arbitrator went beyond the scope of the Respondent's submission rendered to arbitration. Further that the 2nd Applicant did not participate in the appointment of **Messrs Thewo and Company**, the audit firm that audited the 2nd Applicant. This was notwithstanding a consent order executed by the parties that **Messrs Thewo and Company** would be appointed to conduct a forensic audit.

The affidavit evidence in opposition was that the action that the Respondent commenced in the High Court against the 2nd Applicant was discontinued and or stayed by the Deputy Registrar in the order dated 5th July, 2006 and exhibited as '**GCK1**'. That subsequently the High Court proceedings did not form part of the arbitral proceedings. The Respondent stated further that the appointment of Messrs Thewo and company as Auditors was by consent of the parties pursuant to a consent order dated 2nd September, 2012 and exhibited as '**GCK2**'. Further that the Independent Audit verification Report was prepared based on the information and materials given by the Applicants. The Respondent stated further that the issue relating to the value and profitability of the 2nd Applicant were among other issues and claims that by consent of the parties were referred to arbitration for determination. The Respondent stated that her amended statement of claim dated 6th November, 2007 and the Applicant's defence dated 8th July, 2007 were the basis upon which the issues that were referred to arbitration were premised. It was stated that all the parties testified before the arbitrator who took into account the evidence in determining the issues. The Respondent noted that the Independent Audit verification Report was given to the parties prior to the arbitration and the application never raised any objections with the Report.

On the issue that one arbitrator presided over the arbitral proceedings instead of two, the Respondent stated that the choice of one arbitrator was at the instance of the Applicants. The

Respondent noted that issues pertaining to the validity of the arbitration agreement as well as the arbitrator's jurisdiction were dealt with by the arbitrator and the High Court as shown in the ruling dated 17th August, 2010 and the Judgment dated 1st February, 2011 respectively both of which were exhibited. The Respondent stated in conclusion that the issues relating to the Respondent's shareholding in the 2nd Applicant's company were deliberated and determined accordingly in the partial award exhibited as '**GCK7**'. The Respondent deposed that the arbitration between the parties was properly conducted and she urged the Court to dismiss the application with costs.

At the hearing of the matter, Counsel for the Applicants made oral submissions and relied on the supporting affidavit filed on 18th August, 2014 and the written submissions filed on 5th September, 2014.

Mr. Nyirenda, S.C. submitted that the Applicants' argument was that the arbitrator exceeded the scope of his responsibilities when he considered matters which were outside the scope of the arbitration. Reliance was placed on the Respondents' Writ of Summons and Statement of claim issued in the High Court under cause No.2006/HK/52 and the Shareholder Certificate as exhibited. The Applicant argued that there was no evidence that was adduced to show that the Respondent owned 49% shares in the company.

The second argument was that the Audit Report was fundamentally flawed in so far as it related to issues of right back of the salary of the expatriate in the company and the lease agreement.

The third argument was that the composition of the arbitral tribunal was contrary to Article 24 of the 2nd Applicant's Articles of Association exhibited as **"SSS1"** in the affidavit in support which provides for two arbitrators each appointed by either party. That it was therefore erroneous and outside the scope of the arbitral process to have one arbitrator.

On behalf of the Respondent, Mr. Mandona relied on the affidavit in opposition and the skeleton argument dated 27th March, 2015. In addition, Counsel submitted that arbitration is a process governed by the consent of parties and quoted as follows; **"A fundamental aspect of arbitration is that it is based on consent. The parties have freedom to adopt the particular arbitration to the needs of their contractual relationship."**

Counsel further submitted that the dispute that was referred to arbitration was contained in the Respondents' amended statement of claim and the Applicant's defence exhibited as **'GCK3'** in the affidavit in opposition. Counsel further argued that the issue of the arbitrator having exceeded his authority was before Court and was determined in the Judgment exhibited as **'GCK16'**. That the Applicants did not appeal against the said Judgment and subsequently presented themselves before arbitration.

Counsel further argued that the issue of shareholding was dealt with in the partial award dated 20th January, 2012. With regard to consent order, Counsel submitted that it speaks for itself. He argued that the parties were given an opportunity to examine the document and the witnesses. On the issue of the appointment of the arbitrator, Counsel submitted that it was the Applicant who proposed the three names of arbitrators and the Respondent was asked to choose one. On the issue of appointing one arbitrator contrary to the Articles of Association of the company, Counsel submitted that the parties agreed to subject themselves to one arbitrator. That since arbitration is based on consent it was within the parties rights to do so. That the email dated 31st July, 2008, came long after the Applicants had subjected themselves to the arbitration before one arbitrator. Counsel submitted that the Applicants cannot now argue against the process that they participated in. Counsel noted that Article 16(2) of the Arbitration Act provides a procedure and time frame within which any challenge like the one the Applicants are pursuing can be mounted.

Counsel further submitted that the arbitral award can only be set aside on specific grounds as contained in the Act. Further that as was held by the High Court, an application to set aside the arbitral award is not an appeal or review. Counsel further submitted that the Applicants have not stated in paragraph 6 how the arbitrator exceeded his authority. Counsel argued that the arbitrator can not be faulted and the award should be lifted.

In reply, Mr. Nyirenda S.C., submitted that notwithstanding that arbitration is governed by the consent of parties, the Arbitration Act and the Rules provided safe guards in the arbitration process. That in this case, the parties' choice of one arbitrator was contrary to the legal position as contained in the Company's Articles of Association. That the parties could only depart from what was agreed in the articles in accordance with the law. That in any case there was no evidence before Court to show that the parties had agreed to depart from the Articles of the Association on dispute resolution. Counsel submitted that there was evidence that one of the Applicants' questioned the appointment of one arbitrator, an indication that there was no consensus to depart from the articles.

With regard to the amended Statement of Claim filed at arbitration, State Counsel submitted that the Respondent did not dispute that she owned only 24% of the shareholding in the company. The Court was referred to paragraph 4.8 - 4.10 of the amended statement of claim to show that the Respondent's call on the shareholding was 24%. Counsel submitted that the Applicants' reserved the right to challenge the final award which was flawed under section 17 of the Act. Lastly, that the action in the High Court was not discontinued but was stayed pursuant to the provisions of section 10 of the Act and the dispute between the parties was referred to arbitration.

I have considered the evidence and the arguments by Counsel for both parties. The starting point in determining this matter is section 17 (2) of the Act which sets out the grounds upon which an arbitral award can be set aside. The provision relevant to this case is section 17(2)(iii)(iv) of the Act upon which an arbitral award would be set aside if it strays beyond the scope of the submission to arbitration and the composition of the arbitral tribunal offends the agreement of the parties or the Act. It should be noted that were the ground relate to exceeding the scope of the submission to arbitration, then only that part of the award that contains decisions not submitted to arbitration will be set aside.

It should further be noted from the outset and in so doing I do agree with the Respondent's submission that, **"an application to set aside the award is not intended for the court to review the award of a tribunal or conduct a hearing akin to an appeal."** This was the holding of the court in the case of Konkola Coppermines v Copper Fields Mine Services Limited⁽¹⁾ as well as the case of E & M Storti Mining limited v Twapane Mining Co-operative Society Limited⁽²⁾ cited by the Respondent.

The issues for determination are as follows;

1. **Whether the Arbitrator went beyond the scope of the arbitral process when he held that the Respondent was entitled to 49% shares in the 2nd Applicant Company when her claim in the High Court was for 24% shareholding.**

The Applicants' advocates have argued that since the Respondent's claim as indorsed on the writ of summons was for 24% of shares, the Arbitrator went outside the scope of arbitration when he awarded the Respondent 49% of shares. It is not in dispute that in the writ of summons issued in the High Court, exhibited as "**SSS4**", the Respondent's claim was for payment of 24% company shares. The proceedings in the High Court were stayed by order of the Deputy Registrar dated 5th July, 2006 and exhibited as "**GCK1**" in the Respondent's affidavit in opposition. The Respondent's submission therefore that the proceedings in the High Court were discontinued is not correct. It is further not in dispute that the referral of the matter to arbitration was at the instance of the Applicants and as submitted by counsel for the Applicants, what was referred to arbitration was the dispute between the parties and not the parties or the proceedings that were before the High Court.

The mode of commencement of arbitral proceedings are set out in Article 23 of the Model Law under the Act. The claimant is supposed to file a statement of claim while the Respondent is supposed to file the statement of defence. It is through these documents that the parties exchange points of dispute at arbitration.

In casu, it is not in dispute that the points of disputes between the parties at arbitration were set out in the Respondent's amended statement of claim and the Applicants' statement of defence both

exhibited as '**GCK3**' in the Respondent's affidavit in opposition. The dispute that was therefore submitted for arbitration was stated in the two documents and that was what the Arbitrator arbitrated upon. The dispute between the parties was twofold; firstly whether or not the Respondent was a Shareholder in the 2nd Applicant company and secondly the percentage of shares that she held in the Company. The Arbitrator ably dealt with the issues that were before the arbitration and rendered his decision. It is my considered view that the arbitrator was not bound by the claims that were before the High Court and as such his decision did not go outside the scope of the submission to arbitration.

If the Applicants were in any case of the view that the Arbitrator had exceeded the scope of the arbitral process or its authority, they should have raised the objection before filing the statement of defence. That was not done and in terms of Article 4 of the model law, the Applicants' waived their right to object as to the scope of the arbitral process. The Applicants subjected themselves to the arbitration and efforts to impugn the jurisdiction of the Arbitrator were duly dismissed by the Arbitrator and the High Court respectively.

In terms of section 17 (2) (a) (iii) of the Act an arbitral award can only be set aside if the award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the

submission to arbitration. In this case, the award dealt with the very issues that the parties submitted to arbitration in the amended statement of claim and statement of defence. The Applicants have failed to prove this ground and it hereby fails.

2.The the Arbitrator went beyond the scope of the arbitral process by relying on the Audit Report of Messrs Thewo and Company to determine the value and profitability of the 2nd Applicant Company.

The starting point is that the appointment of Messrs Thewo and company was by consent of the parties. The consent order dated 21st September, 2012 was exhibited . The said firm was to conduct a forensic audit of the 2nd Applicant and thereafter produce an independent Audit verification Report. The Report was given to both parties before the evidential hearing at the arbitration. Both parties therefore had the opportunity to raise objections with the said Report. This was not done until the hearing. The person who produced the Report appeared before the tribunal as an expert witness and he was cross examined by both parties. The Report was therefore tested at the hearing and the Arbitrator did not exceed the scope of the arbitral process when he relied on the audit Report. The Arbitrator noted in his findings that the Applicant's Advocates only made attempts to impeach certain aspects of the expert evidence in the submissions and not during the evidential hearing. The Applicants had the opportunity to challenge the Report but

opted not to do so and they cannot raise the issues to do with the substantive report before this Court. The Applicants seems not to be satisfied with the decision rendered by the Arbitrator. The argument seems to be that the Arbitrator fundamentally erred in determining this matter and arriving at the decision that he made. It is my considered view that section 17(2) (a) (iii) does not extend to what the Applicants seem to argue about. In the case of **Konkola Copper Mines**⁽¹⁾, the Court declined to set aside the arbitral award on grounds that the award was not reasoned. The Court stated that section 17 (2) (a) (iii) of the Act does not extend to unreasoned award. This ground fails.

3.The Arbitrator went beyond the scope of the arbitral process by relying entirely on the Audit Report of Messrs Thewo and Company to determine the profitability of the 2nd Applicant's company and thereby totally ignoring the parties' evidence during the process.

This ground seem to raise issues which do not fall under section 17 (2) of the Act. It also goes to the merit of the award and not the due process. As already noted, the selection of the Audit firm was by consent. The parties had sufficient opportunity to interrogate the Report and impugn it. Both parties were given full opportunity to present their case before the tribunal. Therefore issues of natural justice do not arise in this case. The Arbitrator considered all he evidence that was before him and rendered the award.

The Applicant's arguments that the choice of Arbitrator was based solely on the Respondent's preference cannot be sustained. If the Applicants had objections to the choice of Arbitrator, they should have raised the issue at the earliest time possible and before filing statement of defence. With regard to choice of Auditing firm, the same was by consent. The argument that the Applicants were coerced and ill-advised cannot be sustained. This ground fails.

4. The composition of the Arbitral award was not in accordance with the agreement of the parties and/or the Articles of Association of the 2nd Applicant Company.

It is not in dispute that clause 24 of the Articles of Association of the 2nd Applicant provided for referral of the dispute to two arbitrators, each appointed by either party to the dispute. The parties in this matter as members and or Directors in the 2nd Applicant were well aware of this clause. The parties however settled on one arbitrator and submitted to his jurisdiction. According to letter dated 12th January, 2007, exhibited as 'GCK,' in the affidavit in opposition, it was in fact the Applicants through their advocates who proposed the names of Arbitrators from whom the Respondent was asked to pick one. As submitted by Mr. Mandona, arbitration is premised on party autonomy. The parties can agree on how they should proceed and the Court will not interfere with such agreement.

If the Applicants had any objection to one Arbitrator presiding over the arbitral proceedings, they should have raised the objection at the earliest time. The email dated 30th July, 2008 that the Applicants seem to rely on and in which the 1st Applicant raised the issue of second arbitrator was addressed to the Applicants' own advocates then, **Messrs MNB Legal Practitioners**. The letter or issue of second arbitrator was not raised at arbitration and in any case it was written way after the Applicants had settled the statement of defence to the arbitration. Strictly speaking the Applicant never raised the issue of the need for a second arbitrator with the arbitral Tribunal. The Applicant choose to remain salient until after the award was delivered. Therefore by the principle of waiver, the Applicant is estopped to raise the said objection after the award has been delivered. This is in line with Article 4 of the model law where in the Applicant is deemed to have waived his right to object.

I totally agree with the Respondent that arbitration is based on consent and as such parties have significant autonomy to adapt the particular arbitration to the needs of their contractual relationship. I also acknowledged the complimentary role of the Court in the arbitral process. The purpose of that role is to assist the arbitral process to make it effective as was held in the case of **Cash Crusaders Franchising (PTY) Ltd v Shakers and Movers Zambia Limited**⁽³⁾.

It should be noted that the Act does provide for instances when a party can have recourse on a number of issues such as issues to do with partiality and independence of the arbitrator. These issues can be raised at the stage of appointment of the arbitrator or any stage of the arbitral proceedings. However where a party sits on his rights, and waits until the final award is delivered, the Court will be under obligation to give effect to the arbitral award. In any case, the grounds upon which an arbitral award can be set aside are only those set out in section 17 of the Act. The High Court has no mandate to review the award of the tribunal or conduct a hearing akin to an appeal.

With the foregoing, I am satisfied that the Applicants have failed to prove the grounds upon which I can set aside the arbitral award. The application therefore has no merit and it is hereby dismissed with costs to the Respondent. The ex-parte order staying Registration and Enforcement of an arbitral award dated 18th August, 2014 is hereby discharged.

Leave to appeal is granted.

Delivered at Kitwe; this 30th day of November, 2016.

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C. B. Maka-Phiri (Mrs.)
Judge