IN THE COURT OF APPEAL OF ZAMBIA **CAZ/08/561/2022**
HOLDEN AT LUSAKA **Appeal No. 17/2023**
(Civil Jurisdiction)

IN THE MATTER OF:	**AN APPLICATION FOR AN ORDER TO SET ASIDE AN ARBITRAL AWARD**
IN THE MATTER OF:	**SECTION 17 OF THE ARBITRATION ACT NO. 19 OF 2000**
IN THE MATTER OF:	**RULE 23 OF THE ARBITRATION (COURT PROCEEDINGS) RULES**

BETWEEN:

SAFRICAS ZAMBIA LIMITED **APPELLANT**

AND

ROAD DEVELOPMENT AGENCY **RESPONDENT**

Coram: Makungu, Sichinga and Ngulube, JJA

On the 2nd May, 2023 and 30th May, 2023

For the appellant: *Dr. O. M. M. Banda, Mr. B. N. Zulu & Mr. W. Mwandila of O.M.M. Banda & Company*

For the respondent: *Mr. M. Mulonda, In-House Counsel*

RULING

MAKUNGU, JA delivered the ruling of the Court

Cases Referred to;

1. *Ladd v Marshall (1954) 1 W.L.R 1489*
2. *Joseph Malanji v Charles Abel Mulenga and Electoral Commission of Zambia-2021/CCZ/A0021*

3. *Saluja v Gill (t/a P Gill Estate Agents Property Services) and Another (2002) EWHC 1435 (ch) 24*
4. *Knox Magugu Mbazima v Tobbaco Association of Zambia CAZ Appeal No. 114/2018*
5. *Youjun Zhuang and Others v Bumu General Trading FZE CAZ Appeal no. 57 of 2021*

Legislation Referred to;

1. *The Court of Appeal Act, No.7 of 2016*
2. *The Rules of the Supreme Court of England 1965 (White Book) 1999 Edition.*
3. *The Arbitration Act No. 19 of 2000*

1.0 INTRODUCTION

1.1 This is a ruling on the appellant's Notice of Motion for an Order for Production of Documents on Appeal filed on 9th January 2023. The application is made pursuant to **section 24 (b) (i) of the Court of Appeal Act, No. 7 of 2016**[1] as read together with **order 59 rule 10 (2) of the Rules of the Supreme Court of England (RSC)**[2]. The application is based on the following grounds;

i. *The evidence in question is relevant and credible to the matters in the appeal and will help the Court arrive at a just decision.*

ii. *The said evidence was in existence at the time of the hearing in the High Court but could not be retrieved even after a diligent search.*

iii. *The said evidence would have an important influence on the outcome of the appeal.*

2.0 BACKGROUND

2.1 On 18th January, 2023, the appellant lodged an appeal in this Court (No. 17 of 2023). The appeal is against the decision of Judge B. G. Shonga of the High Court dated 21st December, 2022 in which she set aside an Arbitral Award dated 14th December, 2020. The learned Judge found mainly that the arbitral award was made on the basis of the validity of extension of the contract between the parties. That there was in fact no approval of the extension by the Attorney General, and that; the absence of approval offends public policy.

2.2 The application to adduce further evidence was filed on 9th January, 2023 and heard on 2nd May, 2023 the date set for hearing of the appeal. After the hearing, we reserved the ruling and ordered that the appeal will be heard after delivery of the ruling on the said application.

2.3 The application to adduce further evidence was initially made before a single judge of this Court namely the undersigned Hon. Justice C.K. Makungu who referred it to the full court

pursuant to **order 10 rule 6 of the Court of Appeal Rules** on 2nd March, 2023.

2.4 The affidavit in support of the application filed on 30th January, 2023 and further affidavit in support filed on 14th February 2023 were both sworn by Wezi Mwandila, Counsel seized with conduct of the matter on behalf of the appellant. In the same, he gave the background of the case as stated above.

2.5 He further stated that it has come to the attention of the appellant that there are certain documents which are not part of the record of appeal which are relevant to the matters in the appeal, will assist the Court reach a just decision and will affect the outcome of the case.

2.6 The documents are exhibited and marked "WM1" collectively. That some of these documents were in existence at the time of the hearing in the High Court while others came into existence while the matter was pending before the High Court.

2.7 The affiant went on to state that this Court has the jurisdiction to grant this application if made timely and if the

respondent will not be prejudiced in any way. He therefore, urged us to allow the appellant to adduce fresh evidence on appeal.

2.8 The appellant did not file any skeleton arguments.

2.9 The respondent opposed the application by filing an affidavit in opposition on 27th February, 2023 sworn by Chabala Chabala, the Principal Engineer-Construction and Rehabilitation for the respondent. He deposed that some of the documents that the appellant seeks to produce could have been obtained and produced with reasonable diligence at the hearing before the lower court while others are of no relevance to the appeal presently before this Court.

2.10 The deponent further states that he was advised by counsel for the respondent and that he verily believes the same to be true that the appellant is merely attempting to re-litigate the matter.

2.11 He further averred that the respondent will be greatly prejudiced if this court allows the application as it is not in the best interest of the parties to adduce fresh evidence at appeal stage without meeting the threshold for its admission.

2.12 The affidavit in reply filed on 28th February, 2023 was sworn by Besa Joseph Mfula- the Managing Director for the appellant company. He stated that there are more documents which the appellant intends to include in the supplementary record of appeal exhibited as "BJF1", which documents are relevant for the determination of the issues raised in the appeal and are likely to affect the outcome of the case.

2.13 That some of these documents were in existence at the time of the hearing in the High Court while others came into existence when the matter was pending before the High Court.

2.14 He further stated that the issue of approvals by the Attorney General for the alleged extension of the contract was not raised by the respondent during the arbitration proceedings and in the lower court during the hearing of the respondent's application to set aside the arbitral award.

2.15 That the respondent and its legal counsel were at all material times aware that the Attorney General (Mr. Likando Kalaluka, SC) had approved the extension of the contract on the 9th September, 2016. That exhibit BJF3 is the said approval from the Attorney General dated 9th September, 2016 which was

brought to the affiant's attention by sources within the respondent's institution after the appeal had been lodged.

2.16 That since it has emerged that the respondent deliberately misled the lower Court on the facts, it is only fair and in the interest of justice that the said approval from the Attorney General and many other documents exhibited in the affidavit in support deposed to by Wezi Mwandila be allowed to be produced before this Court. The same will be helpful to meet the ends of justice especially that the issue of approval of Attorney General was not an issue during the hearings, and it is not the main issue.

2.17 That contrary to the respondent's allegation, the appellant has demonstrated to this Court the necessity and relevance of the fresh evidence being sought to be admitted.

3.0 RESPONDENT'S SKELETON ARGUMENTS

3.1 The respondent's skeleton arguments and list of authorities filed on 27th February, 2023 are to the effect that **section 24(1) (b) (i) of the Court of Appeal Act**, gives this court discretionary power to admit new evidence on appeal.

However, that admission should be necessary or expedient in the interest of justice.

3.2 Counsel contended that the appellant has not demonstrated the necessity of the evidence sought to be admitted. That at paragraph 11 of the affidavit in support of the application, the appellant admits that some of the documents sought to be produced were available at the time of the hearing in the lower court. As for the others, the appellant has not explained how their admission will help to meet the ends of justice.

3.3 Counsel submitted further that the explanatory notes under Order **59/10/11 of the RSC** state as follows:

"Where there has been a "trial or hearing on the merits" (see para 59/10/12) fresh evidence cannot be admitted before the court of appeal unless:

i. "special circumstances" have been established (r.10 (2)). To establish "special circumstances" the applicant must satisfy the three conditions laid down in Ladd v Marshall[1], see para 59/10/13 et seq); or

ii. it is one of the exceptional cases where the Ladd v Marshall[1] conditions do not apply, or apply only in a modified form (see para 59/10/13 et seq); or

iii. "the evidence relates to matters which have occurred after the date of the trial or hearing" (see para. 59/10/18).

3.4 On the basis of the above authorities, counsel for the respondent submitted that the appellant has not met the threshold for the grant of its application. He stated that the rationale for putting stringent requirements before admitting fresh evidence on appeal is so that parties are not allowed to re-litigate a matter on appeal. He cited the case of **Ladd v Marshall**[1] where it was held as follows:

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed,

or in other words, it must be credible although it need not be incontrovertible."

3.5 In light of the preceding authority, Counsel submitted that the above three requirements ought to be met by the party applying to adduce further evidence. Counsel urged us to dismiss the appellant's application on the ground that the documents exhibited were available during trial. He stated that the "other documents" have not been clearly identified and therefore cannot be admitted in evidence. Counsel proceeded to cite a number of authorities including the case of **Joseph Malanji v Charles Abel Mulenga and Electoral Commission of Zambia**[2], where the Constitutional Court held as follows;

"The sum of all this is that the reception of fresh evidence during the hearing of an appeal in this court is exceptional. This is because the admission of such evidence has the potential to undermine the principle that litigation ought to come to an end. That an appeal should not be a second trial. We adopt as our own, the principles that for fresh evidence to be admissible it should not have been obtainable with reasonable

diligence at the time of trial. That it must also be both significant and credible. This to us is the import of "necessity" and "expediency" in the interests of justice as laid out in section 25 (1) (b)."

3.6 It was further submitted that **section 25 (1) (b) of the Constitutional Court Act No.8 of 2016** and **section 24 (1) (b) (i) of the Court of Appeal Act** are couched in similar terms.

3.7 We were also referred to the case of **Saluja v Gill (t/a P Gill Estate Agents Property Services) and Another**[3] where it was stated that;

"Litigants should be disciplined into ensuring that they only fight an action once. For that reason in most cases it will be unfair to a litigant to subject him to a retrial, for example, because his opponent culpably failed to put all the best relevant evidence before the court at the first trial."

3.8 On the basis of the cited authorities, counsel submitted that this is not a fit and proper case for this Court to allow the appellant to adduce fresh evidence on appeal as the appellant

palpably failed to demonstrate the relevance of the exhibited documents and it was possible to obtain the same when the matter was before the lower court.

4.0 VIVA VOCE SUBMISSIONS

4.1 At the hearing, Dr. O.M.M. Banda, Counsel for the appellant submitted viva voce that the arbitral award was set aside due to the absence of the approval letter by the Attorney General. However, the appellant has since discovered that on 9th September, 2016 the Attorney General had written its approval of the extension of contract. The said letter was received by the Director Legal Services of the respondent on 14th September, 2016. Nevertheless, the respondent concealed this fact at the hearing of the matter in the lower court thereby misleading the Court. That the appellant did not have the said documents at the arbitral proceedings and hence it is crucial that the said documents be produced in this Court.

4.2 Dr. Banda further submitted that the Attorney General's approval was not an issue in the arbitral proceedings. It has only became an issue after the arbitral award was set aside for lack of proof that the Attorney General had approved the

extension of contract, and that lack of approval was contrary to public policy.

4.3 In response, Mr. Mulonda, Counsel for the respondent, took issue with the fact that the affidavit in reply dated 28th February, 2023 contains some documents that were not brought to the attention of the Court in the affidavit in support of the application filed on 9th January, 2013. He however reiterated that the said documents do not meet the requirements set out in the case of **Ladd v Marshall**[1].

5.0 OUR ANALYSIS AND DECISION

5.1 We have considered the Notice of Motion, the affidavit evidence pertaining to the same and the written and oral submissions made by both parties.

5.2 We shall start by looking at the law on introducing fresh evidence. **Section 24 (1) (b) (i) of the Court of Appeal Act** provides as follows:

"The court may, on the hearing of an appeal in a civil matter-

(a).....

(b) where necessary or expedient in the interest of justice-

(i) order the production of a document, exhibit or other thing connected with the proceedings, the production of which may be necessary for the determination of the matter."

5.3 **Order 59 rule 10 (2) of the RSC** reads;

"The court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on special grounds."

5.4 The above provisions of the law are crystal clear.

5.5 The crucial question to be determined is whether the appellant can be granted an order to produce new evidence on appeal post final arbitral award which the lower court set aside. We also have to determine whether the documents in

issue are necessary for the determination of the appeal before us.

5.6 In the case of **Knox Magugu Mbazima v Tobbaco Association of Zambia[4],** concerning the arbitration process, we delivered a judgment on 4th November 2020, wherein we held inter alia that:

"The arbitration process is final and binding on the parties that have submitted themselves for arbitration. Courts do not have jurisdiction to sit as appellate courts to review and alter arbitral awards. These principles were confirmed in the case of Savenda Management Limited v. Stanbic Bank Zambia."

5.7 In the same case, we rejected an application by the appellant to produce fresh evidence as it was available during the arbitral proceedings and it was possible for him to subpoena it pursuant to **Article 4 of the Model Law**. The appellant's application for leave to appeal was initially refused by this Court.

5.8 The Supreme Court dealt with a renewed application from the refusal by a single Judge of that Court to grant leave to appeal

against our judgment of 4th November, 2020. The Honourable Chief Justice Dr. Mumba Malila delivered the ruling of the Court and stated inter alia as follows:

"5.7 .....it is imperative for us to note that we have stated on numerous occasions that with regard to setting aside arbitral awards, the hands of the Court are tied in a strait jacket. The courts have very little wriggle room, if at all, with respect to the circumstances under which they are allowed to set aside an award. The number of cases in which we have echoed this position are legion."

"5.8. Fairly recently in ZCCM Investments Holdings PLC v Vendata Resources Holdings Limited and Konkola Copper Mines PLC we stated as follows:

"It is obvious that it should not be the remit of this Court to attempt to make a determination on the issues that were already a subject of determination by the arbitral tribunal.

In keeping with the spirit of Article 5 of the Model Law, our courts are enjoined to embrace the principle of

limited court intervention in arbitration....obviously, a principal rationale for the non-interventionist stance is respect for party choice and autonomy."

5.9 His Lordship further pointed out that **Section 17 of the Arbitration Act** clearly illustrates the fact that the courts may only set aside awards in very limited circumstances.

5.10 Further, that the report which the appellant Magugu wanted to produce was available during the arbitration proceedings, but he failed to produce it. That failure by the arbitrator to take into account that evidence (the report) does not constitute a ground for setting aside the arbitral award. The Supreme Court finally dismissed the application for leave to appeal.

5.11 The above authorities indicate that courts have no jurisdiction to review or alter arbitral awards. Therefore, when an arbitral tribunal which is the trier of facts makes a final award, it is highly unlikely that fresh evidence will be admitted in the lower court or the appellate court as the only option that a party aggrieved with the award has, is to apply to set aside the award pursuant to **Section 17** of the **Arbitration Act**[3]. **Section 17(2) (b) (2**) provides that if the

court finds that an arbitral award is in conflict with public policy, it may set aside the award.

5.12 In order not to pre-empt our decision of the appeal, we shall not comment on the substantive issues of the appeal. Discernibly, even if the evidence which the appellant seeks to produce were allowed, we would not be in a position to review the arbitral award.

5.13 The main question to be determined upon hearing the appeal is whether the lower court was on firm ground to set aside the arbitral award on the ground that it was in conflict with public policy. That can be determined without fresh evidence as the appellant has submitted that the issue of the Attorney General's approval did not arise during the arbitral proceedings and during the hearing of the application to set aside the arbitral award.

5.14 In any case, the principles laid down in the case of **Ladd v Marshal**[1] have not been met by the appellant. We note that in paragraph 5 of the affidavit in support of the notice of motion and also in paragraph 5 of the affidavit in reply, the appellant admits that some of the documents it intends to produce were in existence at the time of the arbitral

proceedings and during the hearing of the matter in the lower court. Although the appellant blames the respondent for having hidden the approval letter from the Attorney General, we are of the view that it was possible with due diligence for the appellant to have found that document and other documents exhibited before or during the arbitral proceedings. Perhaps the appellant did not find it necessary to find those documents and produce them because the questions answered herein were not raised then.

5.15 Bearing in mind our limited jurisdiction on hearing applications emanating from arbitral proceedings, we are of the considered view that granting the application before us would potentially undermine the integrity of the arbitral proceedings as it would entail calling witnesses to adduce evidence concerning the said documents. Consequently, we would end up not only reviewing the lower court's judgment, but the arbitral award as well.

5.16 It follows that the appellant cannot be granted an order to produce new evidence on appeal. Additionally, we are of the firm view that the documents in question are not necessary for the determination of the appeal before us.

We hold as the Constitutional Court held in the **Joseph Malanji**[2] case that an appeal should not be a second trial and the production of fresh evidence on appeal in this Court is also exceptional. The principles in **Ladd v Marshal**[1] are indeed applicable in relation to **Section 24 (1) (b) (1) of the Court of Appeal Act.**

6.0 CONCLUSION

6.1 We accordingly find no merit in the motion for production of new evidence and dismiss it. However, considering all the circumstances of the case, the costs will abide the outcome of the appeal.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE