IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 03/2024**
HOLDEN AT LUSAKA
(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**

AND

IN THE MATTER OF: **RULE 23 OF THE ARBITRATION (COURT PROCEEDINGS) RULES**

BETWEEN:

ROAD DEVELOPMENT AGENCY **APPELLANT**

AND

SAFRICAS ZAMBIA LIMITED **RESPONDENT**

Coram: Malila CJ, Hamaundu, Kaoma, Mutuna and Chisanga JJS

On 4th June, 2024 and 7th August, 2024

For the Appellant: *Mr. C. Sianondo and Mr. G. Mileji of Messrs Malambo and Company*

For the Respondent: *Dr. O.M.M. Banda, Mr. B. Zulu and Mr. W. Mwandila of Messrs O.M.M. Banda and Company*

J U D G M E N T

Mutuna JS delivered the judgment of the Court.

Cases referred to:

1) *Zambia Revenue Authority v Tiger Limited and Zambia Development Agency SCZ Judgment 11/2016*
2) *Light Weight Body Amour v Sri Lanka Army (2007) Sri LR, 412*
3) *ZCCM Investment Holdings Plc v Vendata Resources Limited and Konkola Copper Mines Plc SCZ Judgment No.14/2021*
4) *Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm) SCZ Judgment 52/2014*
5) *Mwila and others v Zambia State Insurance Corporation (2015) ZR 152 Vol 3*
6) *Zambia Revenue Authority v Hitech Trading Company Limited (2001) ZR 17*
7) *Nevers Sekwila Mumba v. Muhabi Lungu (Suing in his capacity as National Secretary of the MMD) (2014) ZR 351 Vol 3*
8) *Sun Country Limited and Others v Rodger Redin Savory and Another SCZ Judgment 122/2006*
9) *Savenda Management Services Limited v Stanbic Bank Zambia Limited Appeal No. 2/2015*
10) *Crossland Mutinta and Another v Donovan Chipanda Selected Judgment 53/2018.*

Legislation referred to:

1) *Arbitration Act, No. 19 of 2000*
2) *Arbitration (Court Proceedings) rules, S.I. No. 75 of 2001*

3) *The Constitution of Zambia, as amended by Act No. 2 of 2016*

4) *The Public Procurement Act, No. 12 of 2008*

5) *The Public Procurement Regulations, SI No. 63 of 2011*

Introduction

1) This appeal deals with one of the supervisory roles of the court to the arbitral process, being, setting aside of an award. It is an appeal against the decision of the Court of Appeal which overturned the decision by Lungu-Shonga J, setting aside an arbitral award.

Background

2) On 9th April 2013, the Appellant and Respondent entered into a contract, in terms of which, the Respondent was to execute certain road works for an agreed consideration. By clause 24.2 of the said contract, the Parties agreed on arbitration as their choice of dispute resolution method.

3) During the life of the contract, a dispute arose which prompted the Respondent to terminate the contract before the works were completed. It subsequently claimed for moneys due for works allegedly done, and damages suffered as a consequence of the Appellant's default leading to its decision to terminate the contract. The Appellant counterclaimed for specific performance of the contract.

4) After the dispute was declared, the parties agreed on an arbitrator and appointed him to adjudicate upon the dispute. The arbitrator promptly took conduct of the reference, held a hearing and rendered his award on 14th December, 2020 which substantially upheld most of the Respondent's claims and dismissed most of the Appellant's claims.

5) The Appellant was unhappy with the award and applied to the High Court to set it aside pursuant to section 17 of the ***Arbitration Act*** (the Act).

Proceedings in the High Court

6) The Appellant launched its application by way of originating summons supported by an affidavit and arguments in support of the motion. The affidavit was sworn by one Chabala Chabala, the principal engineer in the employ of the Appellant. He contended, without elaborating, that the award rendered by the arbitrator was contrary to public policy.

7) In the arguments in support of the motion to set aside the award, counsel for the Appellant, contended that the award was contrary to public policy for the following reasons:

   7.1 The reasoning and/or conclusion of the arbitrator go beyond mere faultiness and or incorrectness, they defy logic and/or acceptable moral standards and are contrary to commercial and construction sense;

7.2 The Arbitrator did not apply his mind to the questions and/or totally misunderstood the issues resulting in injustice; and,

7.3 The award consists of mistakes of law that are apparent from its face.

8) The Respondent's response was by way of an affidavit in opposition and skeleton arguments. The affidavit was sworn by one Besa Joseph Mfula, the managing director of the Respondent. He stated that the Appellant had not substantiated the allegation made that the award was contrary to public policy, in the evidence deployed before the Court.

9) The deponent stated further that at the commencement of the arbitration and on the arbitrator's request, the Parties submitted a list of the issues in contention. Based on this list, the arbitrator painstakingly applied his mind and rendered the award accordingly.

10) In the skeleton arguments, counsel for the Respondent argued that the Appellant had not provided sufficient evidence to justify the contention that the award was contrary to public policy. This omission, he argued, contravened the provisions of rule 23(3) of the ***Arbitration (Court Proceedings) Rules*** (The Rules).

11) Counsel argued further that the grounds for setting aside the award advanced by the Appellant did not surmount the standard of proof and were not justified.

Decision by the High Court Judge

12) In her consideration of the application, Lungu-Shonga J, began by noting that most of the Appellant's contentions in the application to set aside the award were inviting her to consider the merits and demerits of the arbitrator's reasoning. She went on to acknowledge the fact that her role was not to sit as an appellate court and as such she could not interrogate the merits and demerits of the award but rather check all the grounds raised by the Appellant against the test of inconsistency with public policy, in accordance with the decision in the case of ***Zambia Revenue Authority v Tiger Limited and Zambia Development Agency***[1].

13) The Judge described her role with reference to a decision by the Sri Lanka Supreme Court in the case of ***Light Weight Body Amour v Sri Lanka Army***[2] in the following terms:

> ***"...the court cannot sit in appeal over the conclusion of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal. The court cannot re-examine the mental process of the Arbitration Tribunal contemplated in its findings nor can it revisit the reasonableness of the deductions given by the arbitrator - since the arbitral tribunal is the sole judge of the quantity and quality of the mass evidence led before it by the parties – the only issue that needs consideration is whether the purported fundamental flaws of the award in question would be tantamount to a violation of public policy."***

She went on to say that in her consideration of the application she had looked out for fundamental flaws in the arbitrator's reasoning which are an assault on public policy of Zambia.

14) The Judge then determined the application by identifying what she referred to as a fundamental assault on the public policy of Zambia. She said this was the arbitrator's total disregard of the provisions of Article 177 (5)(d) of the ***Constitution*** (as amended) by Act No.2 of 2016, as read with section 54(2) (e) and (3) of the ***Public Procurement Act***, No.12 of 2008 and regulations 149 and 150 of the ***Public Procurement Regulations***, Statutory Instrument No. 63 of 2011. She found as a fact that despite the arbitrator acknowledging these constitutional and statutory provisions demanding that the Attorney General give advice and approval of contracts for public institutions and their variation, he proceeded to find that the contract entered into by the parties was varied, in the absence of proof of the required approval.

15) According to the Judge, this conduct amounted to disregarding the constitutional and statutory provisions which, in her view, was an indifference to the law which went beyond mere faultiness or incorrectness. It constituted an inequity that is so far reaching and which defies accepted standards that a fair-minded person is likely to consider it as a threat to the concept of justice in Zambia.

16) The Judge concluded that since the award was made on the basis of the validity of the extension of the contract which extension did not have the approval of the Attorney General, it

offends public policy. She accordingly set it aside in accordance with section 17(2)(b)(ii) of the Act.

17) The Respondent appealed against the decision of the High Court Judge to the Court of Appeal.

The Appeal to the Court of Appeal and decision by the Court

18) The Respondent advanced 15 grounds of appeal which can best be summarised as questioning:

18.1 The reliance by the High Court Judge on the provisions of the ***Constitution*** (as amended) to a contract which was executed in 2015, prior to the enactment of the amendments to the ***Constitution*** and her findings that the contracts between the parties contravened Article 177(5)(d) of the ***Constitution*** and provisions of the ***Public Procurement Act***;

18.2 The High Court Judge's failure to rule that the procedure adopted by the Appellant fell short of the requirements under rule 23 of the Rules;

18.3 The failure by the High Court Judge to adjudicate upon all the issues raised before her;

18.4 The decision by the High Court Judge to rule on issues which were not presented before her; and,

18.5 The procedure adopted by the High Court Judge of delving into the merits of the arbitrator's decision.

19) After the Court of Appeal heard the Parties, it began its consideration by acknowledging the legal position that in

dealing with an application to set aside an award, the courts in Zambia have no jurisdiction to sit as appellate courts to review and alter arbitral awards. The Court listed three Zambian decisions to that effect and quoted from a passage in our decision in the case of ***ZCCM Investment Holdings Plc v Vedanta Resources Limited and Konkola Copper Mines***[3].

20) The court went on to hold as follows:

20.1 The High Court Judge erred by dealing with the factual and substantive questions which the arbitrator had already dealt with. Here, the Court said that the finding by the High Court Judge that there was no approval from the Attorney General for the extension of the contract was baseless. It stated further that the High Court Judge erred when she held that there were fundamental flaws which were an assault on public policy of Zambia in the reasoning of the arbitrator due to his disregard of the law;

20.2 The High Court Judge erred when she proceeded to identify weaknesses in the arbitral award. The Court stated that the allegation by the High Court Judge that the arbitrator failed to apply the procurement laws is not a ground for setting aside an arbitral award in term of section 17 of the Act.

20.3 Advancing the decision it made in the preceding paragraph, the court went to great length in explaining the provisions of the law relating to the role of the office of the Attorney-General in approving Government

contracts. For reasons that will become apparent later in this judgment, we have not reproduced these arguments. Suffice to say that in relation to the constitutional provisions the Court found that they did not apply to the contract between the Parties which was executed in 2015, before the constitutional amendments.

21) The Court then proceeded to determine whether the procedure adopted by the Appellant in launching the application to set aside the award complied with rule 23 of the Rules. It set out the relevant provisions of the Rules and held that the affidavit in support filed by the Appellant did not comply with the provisions of the Rule because, although it stated the ground for setting aside as being the award contravening public policy, it did not include the facts to justify the ground.

22) According to the Court, the requirement under rule 23(3)(c) of the Rules is aimed at ensuring that the party opposite is given sufficient detail of the case it has to respond to in a meaningful manner. It went on to observe that despite the Respondent stating in the affidavit in opposition that the Appellant had not furnished sufficient facts to justify the ground of the award offending public policy, the Appellant did not counter this allegation by way of an affidavit in reply. The court held this to be a lost opportunity on the part of the Appellant to cure the omission.

23) Commenting on rule 23(3), the court held that it is couched in mandatory terms because the word *"shall"* is used in the rule although no penalty is prescribed for failure to comply with it. This latter fact, notwithstanding, the High Court Judge should have held the Appellant accountable for breaching the rule. The Court relied on our decision in the case of ***Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture suing (as a firm)***[4] and its decision in the case of ***Mwila and others v Zambia State Insurance Corporation Limited***[5] to support its holding. These two decisions restate the position that courts will not condone the failure by a litigant to follow rules of court in prosecuting or defending an action. Such failure will be visited by appropriate sanctions.

24) The court held further that arbitration has its own special rules which must be obeyed by those who opt to resort to it. It concluded that:

24.1 The High Court Judge misdirected herself by dealing with issues which were not raised by the Appellant in the affidavit in support;

24.2 The High Court Judge exceeded her jurisdiction by reviewing the substance of the award on the basis of issues she did not sit to try;

24.3 Since the High Court Judge decided to adjudicate on the issue of want of approval for the extension of the contract by the Attorney General, an issue which was not raised by the Appellant, she should have initially

given the Parties an opportunity to be heard on it. In making this decision the Court relied upon rule 23(4) of the Rules which states as follows:

> ***"On an application to set aside an award, the court may direct that an issue between the parties shall be settled and tried and may give such direction in relation to the trial of such an issue as may be necessary or make any other order considered necessary in the circumstances."*** and;

24.4 By receiving *viva voce* arguments from counsel for the Appellant on the issue of the want of the Attorney General's approval, which facts were not led in the affidavit evidence, amounted to the High Court Judge receiving evidence from the Bar which is inadmissible in line with the decision in the case of ***Zambia Revenue Authority v Hitech Trading Company Limited***[6].

25) The court, therefore, held that the Appellant had breached the mandatory rule 23(2)(c) and (d) and sub-rule (3) of the Rules and that it had not discharged the burden of proving that the award was against public policy as defined by law. It reversed the decision of the High Court Judge setting aside the award, with costs to the Respondent.

Appeal to this Court and arguments by counsel

26) The Appellant is aggrieved by the decision of the Court of Appeal and has launched this appeal fronting three grounds of appeal as follows:

26.1 The Court of Appeal erred both at law and in fact by misinterpreting the principles governing setting aside of an arbitration award which is against public policy as the same was inconsistent with the ***Constitution*** and the laws;

26.2 The Court of Appeal erred in law and in fact when it up-held an award which granted reliefs outside the jurisdiction of the arbitrator; and

26.3 The Court of Appeal erred both at law and in fact when it upheld an award which the arbitrator did not have jurisdiction to arbitrate as he was appointed contrary to the arbitration clause.

27) We were informed at the hearing that the Appellant had abandoned ground three of the appeal. We, therefore, did not consider it.

28) Prior to the hearing, counsel for the Parties filed written submissions which they relied upon. In arguing ground 1 of the appeal, Mr. C. Sianondo faulted the Court of Appeal when it held that the Appellant did not provide evidence to prove its contention that the award was against public policy. He argued further that it was a misdirection on the part of the Court of Appeal to hold that the Appellant ought to have filed an affidavit in reply to counter the evidence in the affidavit in opposition stating that the Appellant had failed to lead evidence in support of its contention.

29) According to counsel, the award was against public policy because it was based on a contract variation or extension which was made in contravention of the ***Constitution*** and the law. Therefore, since the basis of the arbitrator's decision was an irregular and illegal contract, the award should be set aside. There was thus no need for the Appellant to adduce further evidence to prove the contention that the award offended public policy.

30) Advancing his arguments on the latter point in the preceding paragraph, counsel attacked the holding by the Court of Appeal which rationalized rule 23(4) of the Rules and its insistence that the evidence in support of the contention that the award offended public policy should have been contained in the affidavit in support and not counsel's arguments.

31) Counsel went to great length to state why he contended that the award offended public policy, by reference to the provisions of the ***Constitution*** (as amended) which the High Court Judge relied upon and a number of decisions which define the phrase *"public policy"* and what amounts to an assault on public policy. We have not summarised these decisions here as they have no bearing on the decision we have made in relation to ground 1 of the appeal. Counsel argued that there was no misdirection on the part of the High Court Judge when she, of her own motion, based her decision on legal issues that were not presented to her. To augment this argument, he drew our attention to our decision in the case of ***Nevers Sekwila***

Mumba v Muhabi Lungu (Suing in his capacity as National Secretary of the MMD)[7]. He argued that in the ***Nevers Mumba***[7] case we held that a court can make a determination on a legal issue which is presented by the record even if it is not argued by any of the parties.

32) In the *viva voce* arguments, Mr. Mileji mainly restated the arguments in the written text before us. He, however, clarified that the responsibility to obtain the approval of the Attorney General for the revised contract lay with both parties. Therefore, the Court of Appeal misdirected itself when it blamed the Appellant for failing to secure the Attorney General's approval. Counsel argued further that the Attorney General's approval is a mandatory stage which the parties could not agree to opt out of.

33) On the question of the application before the High Court complying with Rule 23, Mr. Sianondo argued that non-compliance with that rule was not fatal for as long as the Respondent was alerted of the Appellant's case and it was not prejudiced. He drew our attention to our decision in the case of ***Sun Country Limited and Others v Rodger Redin Savory and Another***[8]**.** In that case we explained the form and content of an affidavit and consequences of defect in form and substance.

34) In respect of ground 2 of the appeal, Mr. Sianondo argued that the arbitrator derived his jurisdiction from the agreement of the

parties. This agreement sets out the parameters of adjudication by the arbitrator. For this reason, the arbitrator acknowledged that clause 60.2 of the contract is what prescribed the remedies that he could award in the event of termination of the contract. Contrary to this, however, the award made by the arbitrator was outside the provisions of clause 60.2 of the contract.

35) Concluding arguments on the point, counsel urged us to set aside the arbitrator's award in respect of the truncated road works and substitute it with an award calculated on the basis of clause 60.2 of the contract. This, he said, would be in line with what we did in the case of ***Savenda Management Services v Stanbic Bank Zambia Limited***[9]. We were urged to allow the appeal.

36) In the written arguments in response to ground 1 of the appeal, counsel for the Respondent submitted that the Appellant's affidavits in support of the application to set aside the award and reply to the affidavit in opposition did not reveal any facts which supported the contention that the award was contrary to public policy. The application, therefore, failed to meet the test in rule 23(2)(c) of the Rules. As such, the Court of Appeal did not err when it held that the application before the Judge was incompetent.

37) Counsel argued that there was no evidence led before the High Court Judge suggesting that the Appellant would rely on the lack of the approval of the revised contract by the Attorney

General as the basis for contending that the award offended public policy. They argued further that during the arbitral proceedings this issue was not one of the issues which the Parties placed before the arbitrator for determination. We would, according to counsel, be exceeding our jurisdiction if we considered the issue now as it was not one of the issues in contention.

38) Extending the argument in the preceding paragraph, counsel submitted that the arbitral process is founded on contractual principles whereby parties agree to refer their dispute to arbitration. In doing so, the parties also decide on the jurisdiction of the arbitrator by defining the extent of their dispute. This, counsel argued, ousts the jurisdiction of the court and it cannot delve into matters that are not referred to it for resolution. The High Court, in determining the effect of the lack of approval of the amended contract by the Attorney General, breached the agreement of the parties and delved into issues which were not laid before her.

39) Counsel concluded their argument by setting out the law in detail regarding: approval of contracts entered into by public institutions; whether or not such approval had been obtained and its effect; and, whose responsibility it was to obtain such approval. We have not summarized this portion of the Respondent's arguments. The reason for this is clear in our determination of the appeal later in this judgment.

40) As for ground 2 of the appeal, counsel argued that the issue of want of jurisdiction which the Appellant was advancing had not been raised in the Court of Appeal. We should, therefore, not consider it. They argued further that the Appellant was inviting us to delve into the merits of the award which courts are not permitted to do. The issue of whether or not there was a fundamental breach by the Appellant warranting the award of damages has already been dealt with by the arbitral tribunal whose decision cannot be contested by way of an appeal.

41) Counsel went on to counter the Appellant's arguments that a jurisdictional issue can be raised at any stage of the proceedings by stating that the principle does not apply to arbitration where an award has already been rendered. Counsel drew our attention to Article 16 of the Model Law and argued that its effect is that:

41.1 Any objection to the jurisdiction of the arbitrator should be raised during the arbitral proceedings after the Respondent has submitted its statement of defence;

41.2 The arbitral tribunal is competent to rule on its own jurisdiction;

41.3 If a party is dissatisfied with the arbitral tribunal's ruling on jurisdiction, recourse lies in that party appealing against such decision within 30 days; and,

41.4 Once the court hears the appeal, the decision of the court shall be final.

42) Concluding arguments on this point, counsel stated that the Appellant ought to have raised its objection to the appointment of the arbitrator during the arbitral proceedings because the court system is not the appropriate forum for raising the issue of jurisdiction and appointment of the arbitrator. In breach of this procedure, the Appellant participated in the appointment of the arbitrator and identification of the issues in dispute without raising any issue as to his jurisdiction. This position continued up to the Court of Appeal.

43) In the verbal arguments, in addressing ground 1 of the appeal, Mr. Zulu went to great length to restate the provisions regarding the Attorney General's approval of contracts entered into by public institutions, the form and content of such approval and whose responsibility it is to obtain such approval. For the same reasons highlighted earlier in our summary of the Appellant's arguments, we have not summarised this portion of the Respondent's arguments.

44) Regarding the Appellant's argument that the award exceeded the scope of the arbitration, Mr. Zulu argued that the Appellant did not raise it as a ground for attacking the award in the High Court and neither was it an issue before the Court of Appeal. He argued further that even the evidence contained in the

affidavit in support does not suggest that the Appellant would rely on that ground.

45) Concluding arguments under ground 2 of the appeal, counsel contended that the ends of justice will not be served if we are persuaded by the Appellant's arguments that we can consider the ground of the award exceeding the scope of the submission to arbitration even though it was not raised in the High Court. He submitted that rule 23 of the Rules is specific that an applicant must state the grounds upon which the award is being challenged and lead evidence to that effect. The Court can not, of its own motion, consider grounds and facts which are not alleged and presented.

46) In support of the arguments by Mr. Zulu in respect of ground 2 of the appeal, Mr. Mwandila submitted that the arbitrator did not in any way exceed his jurisdiction because all the decisions he made were based on the issues presented to him by the parties.

47) In the written arguments in reply, counsel for the Appellant, in addressing ground 1 of the appeal, contended as follows:

47.1 There was sufficient evidence in support of the Appellant's contention that the award offended public policy because it was placed before the High Court as an exhibit to the affidavit in support;

47.2 Arising from the argument in paragraph 47.1, the application which was before the High Court was, therefore, competent as it complied with rule 23 of the Rules; and,

47.3 Although the Parties did not address the High Court Judge on the issue of the Attorney General's approval of the amendment to the contract, the High Court Judge was on firm ground when she addressed it because it was a condition precedent. This, according to counsel, is in line with our decision in the case of ***Crossland Mutinta and Another v Donovan Chipanda***[10].

48) In addressing ground 2 of the appeal, the relevant portion of Appellants heads of argument in reply essentially restated the earlier arguments. For that reason, we have seen it fit not to repeat the arguments.

Consideration and decision by the Court

49) We have carefully considered the grounds of appeal and arguments by counsel, both written and verbal. Ground 1 of the appeal contends that the Court of Appeal misinterpreted the jurisdiction which governs the setting aside of arbitral awards. The contentions by the Appellant were as follows:

49.1 The Court of Appeal erred when it held that the Appellant did not provide sufficient details to prove its contention that the award was contrary to public policy;

49.2 The Court of Appeal erred when it erroneously found that the Appellant did not file an Affidavit in reply to counter the Respondent's contention that there was no evidence provided by it to support its contention that the award was contrary to public policy; and,

49.3 Even assuming that the Appellant's application fell short of the requirements of rule 23 of the Rules, the High Court did not err in considering it in light of precedent set by this Court.

50) We begin our consideration with the contention at paragraph 49.1. The decision of the Court of Appeal being challenged here is the one which held that the Appellant's application which was laid before the High Court Judge did not reveal evidence supporting the contention that the award offended public policy. It was, therefore, incompetent because it did not satisfy the requirement of rule 23(2)(c) of the Rules which states, in part, as follows:

> ***1) "An application, under section seventeen of the Act, to set aside an award shall be made by originating summons to a Judge of the High Court.***
>
> ***2) The application referred to in sub-rule (1) shall be supported by an affidavit –***
>
> > ***(a) exhibiting the original award or a certified copy thereof;***

(b) exhibiting the original arbitration agreement or duly certified copy thereof;

(c) stating to the best of the knowledge and belief of the deponent, the facts relied upon in support of the application..."

For our purposes the relevant portion is subrule 2(c).

51) The subrule compels a party to file an affidavit in support of the application to set aside the award which should set out the evidence in support of the application. This evidence explains the basis upon which the application is made, that is, the ground upon which it is sought to set aside the award and facts proving that ground.

52) The rationale for this, is not only, to alert the party opposite on the case which it has to defend, after all, the party is entitled to a fair hearing, but also the Court to understand the case to which it should align its jurisdiction.

53) In paragraph 51 of this judgment, we have deliberately used the word "compels", in explaining the effect of the rule in terms of the content of the paperwork to be filed by a party because the word used in the rule is "shall", thereby, making it a mandatory requirement.

54) An examination of the record of appeal reveals that the Appellant did indeed file an affidavit in support in accordance with the rule in which the ground for setting aside was stated

to be the award offending public policy. However, the affidavit does not, as the Court of Appeal quite rightly held, and as the Respondent argued, reveal the facts upon which the contention of the award offending public policy was based.

55) For completeness we are compelled to quote the relevant paragraphs of both the affidavit in support and in reply to demonstrate the point we have made in the preceding paragraph. The affidavit in support only has one paragraph referring to the ground relied upon as follows: -

> ***"15. That I am advised by in-House Counsel and I do verily believe that the contents of the Final Award are contrary to public policy."***

56) On the other hand, the affidavit in reply contains two paragraphs referencing the ground relied upon as follows: -

> ***"7. That in response to paragraph 10 and 11 of the Defendant's Affidavit in Opposition, I wish to state that the evidence that the Award is contrary to public policy lies in content of the Award dated 14th December 2020 itself which has been exhibited a "CC4" in the Plaintiff's Affidavit in Support.***
>
> ***8. That further, the issues which are considered to be contrary to public policy have been highlighted in the Plaintiff's Arguments. The said issues are based on legal principles [and] cannot be outlined in an Affidavit."***

57) The position we have taken is that the foregoing paragraphs do not satisfy the requirements of rule 23(2)(c) of the Rules because they do not in any way state or explain the facts which support the contention of the award offending public policy. In fact, paragraph 7 in the affidavit in reply is an admission of this fact and refers the Respondent and indeed the Court, to the award for purposes of ascertaining the evidence in support of the contention. We, therefore, accept the arguments by the Respondent to this effect and the holding by the Court of Appeal.

58) During the course of the hearing of the appeal, we engaged Mr. Mileji on the contents of the affidavits in support and in reply and asked him if they satisfied the requirements of rule 23(2)(c) of the Rules and he conceded that they do not. However, he insisted that the Court of Appeal erred when it ruled that the application to set aside the award was incompetent because:

58.1 The facts required under rule 23(2)(c) of the Rules were contained in the Appellant's skeleton arguments in support of the application to set aside. Therefore, the application was compliant; and

58.2 The facts were on legal issues which could not be articulated in evidence but only in legal argument.

59) We applaud Mr. Mileji's valiant, relentless and vigorous effort in articulating his client's case. However, his efforts came to

naught for the following reasons, and in the order, he presented them: -

59.1 The High Court Rules prescribe not only how matters will be presented before that Court, but also the manner in which evidence will be led before it. This is either by way of affidavit or a witness in person, i.e., *viva voce.* In the case of evidence in support of an application to set aside an award, the prescription, as per rule 23(1), is that the evidence shall be presented in an affidavit in support. The rule does not state that such evidence will be contained in the skeleton or heads of argument in support. This, in any event, would be a departure from the Court's tradition because the arguments are not settled by a witness but by counsel.

59.2 Rule 23 (2) (c) of the Rules makes no distinction between evidence arising from legal issues and that which does not arise from legal issues. The Rule merely compels all applicants to state *"...the facts relied upon in support of the application..."* regardless of their source and nature.

60) As for the contention in paragraph 49.2, to recap, counsel for the Appellant argued that the Court of Appeal erred when it held that the Appellant did not rebut the Respondent's contention as to the lack of facts in support of the allegation that the award offended public policy. The holding by the Court of Appeal was that the Appellant did not file an affidavit in reply to rebut the

Respondent's contentions. We agree with counsel's argument, because the Appellant did file an affidavit in reply but, as we have explained earlier, it was also lacking in detail.

61) We, however, do not agree with the interpretation given to Rule 23 (4) of the Rules by the Court of Appeal. The Court of Appeal stated as follows at paragraph 9.15 of the judgment:

> ***"Further, the Judge in the court below exceeded her jurisdiction by reviewing the substance of the award on the basis of issues which she did not sit to try. Since the court had identified the issues of non-approval of extensions or variations of the contract by the Attorney General arising from the respondent's submissions, it should have given a chance to both parties to be heard on that issue pursuant to rule 23(4) of the Arbitration (court proceedings) Rules 2001..."***

What the foregoing holding suggests is that on an application to set aside an award, a court may identify an issue outside those determined by the arbitrator and determine it as long as it has given the parties an opportunity to address it on the issue. This is what the Court held to be the effect of Rule 23(4). We respectfully disagree with the Court of Appeal because, as it rightly held, a Judge cannot, in determining an application to set aside an award, consider any issues which the arbitrator omitted to consider and enlarge the decision in an award.

62) On an application for setting aside, the duty of the court is to determine whether due process was followed in the making of

the award. It examines and determines the road map leading to the award and not the substance of the award.

63) As for the interpretation given to Rule 23 (4) of the Rules by the Court of Appeal, we begin by stating what the rule says: -

> ***"On an application to set aside an award, the court may direct that an issue between the parties shall be settled and tried and may give such direction in relation to the trial of such an issue as may be necessary, or move any other order considered necessary in the circumstances."***

Applications to set aside awards are held by way of a chamber hearing in which counsel for both sides make submissions based on the affidavits and skeleton arguments submitted. Where, however, an application is complicated and contentious, the Court, in the exercise of its case management role, may direct the parties to identify the issue in contention, or identify such issue in consultation with the parties, then hold a trial as opposed to a chamber hearing, for purposes of determining the application. This is the effect of rule 23(4) of the Rules.

64) Turning to the contention at paragraph 49.3. The Appellant argued that the failure in itself to comply with Rule 23(2)(c) in terms of form and content did not preclude the High Court from considering the application. There were a number of cases which counsel referred to in support of the argument and we will deal with this aspect of the appeal by reference to those cases.

65) The first case which counsel referred to was the ***Nevers Sekwila Mumba***[7] case and said that our decision in that case was that a Court can make a determination on a legal issue, which is contained in the record of appeal even though the parties did not refer to it. In support of this, counsel quoted the following passage at page 34:

> ***"A party cannot raise, on appeal, any issue that was not raised in the lower court. The court will, however, affirm or overrule a trial court on any valid legal point presented by the record, regardless of whether that point was considered or even rejected."***

This passage does indeed describe the role of an appellate court. An appeal is a rehearing on the record and an appellate court can consider any legal issue arising out of the record whether or not a party raised such an issue.

66) The situation in this matter is different from what transpired in the ***Nevers Sekwila Mumba***[7] case. The record which was before the High Court Judge was incompetent in that the application which was before her did not comply with a mandatory rule 23(2)(c) of the Rules. In any event, the High Court Judge was not sitting in an appellate capacity and did not even possess the jurisdiction to review the record of the arbitrator. The ***Nevers Sekwila Mumba***[7] case is therefore, distinguishable from this case and does not aid the Appellant's case. In any event, and as we have stated earlier in paragraph 61, a Judge cannot, in

determining an application to set aside an award, consider any issues which the arbitrator omitted to consider and enlarge the decision in an award.

67) The second case which counsel for the Appellant referred us to was the ***Sun Country Limited v. Rodger Redin Savory and Another***[8]. The argument here was that although the affidavit in support and reply were defective, the High Court Judge did not err when she considered the application. There is nothing wrong in a Court considering an application based on a defective affidavit.

68) In the ***Sun Country Limited***[8] case, we discussed at length the law regarding reception of evidence by a court in a defective affidavit. We held that where the defect is in form rather than substance, the defect or irregularity is not fundamental, therefore, it is curable. The defect which was in issue, in the case, and held to be curable, was the failure by the deponent to insert the date of swearing of the affidavit in the jurat. In the matter before us, the defect is not in form but rather substance, in that the Appellant failed to lead evidence to support its contentions in the motion before the High Court. Such defect is not curable.

69) The last case was ***Crossland Mutinta and Others v Donovan Chipanda***[10]. In that matter we restated the principle that a jurisdictional issue can be raised at any stage of the proceedings and also that a court can consider such an issue even if it is not

raised by a party. Applying this principle, counsel for the Appellant urged us to consider the application to set aside the award notwithstanding the defect in the originating process.

70) The matter with which we were engaged in the ***Crossland Mutinta***[10] case involved jurisdiction of a court to adjudicate upon a matter. We said that since jurisdiction affects the propriety of a court's decision, it can be considered at any stage of the proceedings. The issue in this case is not one of jurisdiction but failure by a party to comply with a mandatory provision of the Rules. To this extent, the ***Crossland Mutinta***[10] case does not aid the Appellant's case.

71) We now turn to ground 2 of the appeal. It is important at this juncture to remind ourselves that the Appellant abandoned ground 3 of the appeal which challenged the jurisdiction of the arbitrator to adjudicate upon the matter. We will, therefore, not address any jurisdictional issues which have been advanced in the arguments by the Respondent.

72) Ground 2 of the appeal contends that the arbitrator granted reliefs which were beyond the scope of his jurisdiction or reference to arbitration. The Appellant has argued that the particular award sought to be set aside exceeds the amount that could be awarded under clause 60.2 of the contract as read with clause 59 on fundamental breach. It, therefore, contends that the arbitrator exceeded the scope of the submission to arbitration. Counsel for the Appellant urged us to set aside the

arbitrator's awards for being excessive as we did the award by the High Court Judge in the case of ***Savenda Management Services Limited v. Stanbic Bank Zambia Limited[9].***

73) The Respondent has argued that the ground for setting aside being advanced in ground 2 of the appeal was not advanced in the application before the High Court. The ground, cannot be raised on appeal.

74) During the hearing, we referred Mr. Sianondo to section 17 (2) (a) (iii) of the **Arbitration Act** and he did agree that ground 2 of the appeal was anchored on that section. He also conceded that the sole ground advanced for setting aside the award in the High Court was that it offended public policy. He did not contend that the decision of the arbitrator exceeded the scope of the submission to arbitration before the High Court Judge. Counsel, however, contended that although the Appellant's claim in the High Court did not specifically address the ground under section 17(2) (a) (iii) of the Act, it can be inferred from the endorsement in the originating summons that the Appellant was also attacking the award based on that section.

75) Section 17(2) (a) (iii) of the Act states as follows, in the relevant portion: -

> ***"(2) An arbitral award may be set aside by the court only if –***
>
> ***(a) The party making the application furnishes proof that - ...***

(iii) 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..."

Arbitration is a dispute resolution mechanism which is party driven and depends on the consent of the parties. The parties define the nature and extent of their dispute which they place before the arbitrator by way of a submission or reference to arbitration. The arbitrator cannot determine the dispute beyond this submission or reference and if he does, he falls foul of section 17(2) (a) (iii) of the Act.

76) Mr. Sianondo has contended that a challenge under section 17(2) (a) (iii) of the Act can be inferred from the endorsement in the originating summons which was placed before the High Court. The particular endorsement is under sub-paragraphs (ii) and (iii) of paragraph 1 of the originating summons and it states as follows:

"(ii) The Arbitrator did not apply his mind to the questions and/or totally misunderstood the issue resulting in injustices; and

(iii) The Award consists of mistakes of law apparent from the face of the award..."

We are of the firm view that the foregoing endorsement does not in any way advance the ground contemplated in section 17(2) (a) (iii) of the Act. It falls far short of the requirements of the

section. We accordingly reject the arguments by Mr. Sianondo to that effect.

77) We have also rejected the arguments by Mr. Sianondo that we should apply the same principle we applied in the ***Savenda***[9] case in setting aside the arbitrator's award which was alleged to be excessive. In the ***Savenda***[9] case we set aside the award of K192,500,000.00 by a High Court Judge on the ground that there was no justification whatsoever for such an award. In arriving at our decision, we examined the merits of the decision by the High Court Judge and reviewed his decision. As an appellate court we are at liberty to conduct such an exercise with decisions coming from lower courts. We do not enjoy the same liberty in relation to an arbitrator's award because our power is restricted to reviewing the due process or road map leading up to the award and not the merits. To this extent, the ***Savenda***[9] case is distinguishable from this case.

Conclusion

78) We began this judgment by stating that it relates to the court's supervisory role in the arbitral process. Our determination in the preceding paragraphs reveals that the role is very restricted and limited to determining any errors an arbitrator may have made leading up to the award and tied strictly to section 17 of the Act. It does not extend to an examination of the merits of the arbitrator's award.

79) Our determination also shows that there is need for strict compliance with the mandatory rules of procedure aligned to the arbitral court process.

80) The appellant has failed the test in the preceding two paragraphs because both grounds of appeal lack merit resulting in the collapse of the appeal. We accordingly dismiss it with costs. These will be taxed in default of agreement.

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DR. M. MALILA, SC
CHIEF JUSTICE

.....
E. M. HAMAUNDU
SUPREME COURT JUDGE

.....
R. M. C. KAOMA
SUPREME COURT JUDGE

.....
N. K. MUTUNA
SUPREME COURT JUDGE

.....
F. M. CHISANGA
SUPREME COURT JUDGE