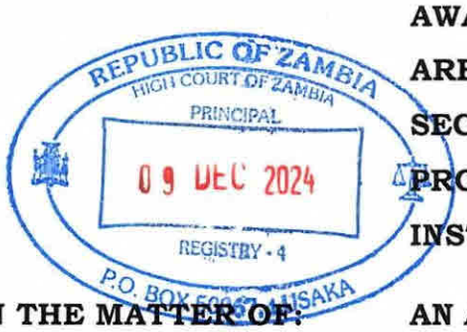
IN THE HIGH COURT FOR ZAMBIA **2023/HP/ARB/002**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD PURSUANT TO SECTION 17 OF THE ARBITRATION ACT NO. 19 OF 2000 AND SECTION 23 OF THE ARBITRATION (COURT PROCEEDINGS) RULES STATUTORY INSTRUMENT NO. 75 OF 2001.**



IN THE MATTER OF: **AN ARBITRAL AWARD DATED 21ST NOVEMBER, 2022 AND MADE IN LUSAKA, ZAMBIA.**

BETWEEN:

FOOD RESERVE AGENCY	**APPLICANT**
AND	
LUSAKA PROVINCE CO-OPERATIVE UNION LIMITED	**RESPONDENT**

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN CHAMBERS, ON THE 9TH DAY OF DECEMBER, 2024.

For the Applicant: *Mr. K. Banda – Messrs. AMW & Co. Legal Practitioners.*

For the Respondent: *No Appearance.*

JUDGMENT

CASES REFERRED TO:

1. *NHA-MKP Estate Development Limited and Workers Compensation Fund Control Board – Appeal No. 44 of 2017;*
2. *Metalco Industries Limited and Nubian Resources Limited – SCZ No. 37 of 2016;*
3. *Photo Bank Limited v. Shengo Holding Limited – SCZ Appeal No. 26 of 2006;*

4. *Harji Engg. Works Pvt Ltd v. M/S Bharat Heavy Electricals Ltd and Another, OMP No. 241 of 2006;*
5. *Rural Development Corporation v. Bank of Credit and Commerce (Z) Limited (1987) Z.R. 35;*
6. *Twampane Mining Corporation Society Limited v. E & M Storti Mining Limited (2011) Vol. 3 Z.R. 67;*
7. *Robbie Tembo v. National Milling Corporation and Yasiku Mainga – Appeal No. 30 of 2002;*
8. *ZESCO Limited v. Bakewell Bakers – SCZ Judgment No. 20 of 2005;*
9. *Alios Finance Zambia Limited v. Kibron Ruling – 2016/HPC/0563; and*
10. *Vangelatos and Vangelatos v. Metro Investment Limited and Others – SCZ No. 35 of 2016.*

LEGISLATION REFERRED TO:

1. *The Arbitration Act No. 19 of 2000;*
2. *The Arbitration (Court Proceedings) Rules – Statutory Instrument No. 75 of 2001;*
3. *The Constitution (Amendment) Act No. 2 of 2016;*
4. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia;*
5. *The Rules of the Supreme Court of England, (1999 Edition), London Sweet & Maxwell;*
6. *The Code of Conduct for Arbitrators – Statutory Instrument No. 12 of 2007;*
7. *The Interpretation and General Provisions Act – Chapter 2 of the Laws of Zambia;*
8. *The Legal Practitioners' Practice Rules, 2002; and*
9. *The CIArb (Chartered Institute of Arbitrators) Arbitration Rules (2015).*

OTHER WORKS REFERRED TO:

1. *Redfern and Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, Third Edition, 1999) at pages 417 and 418.*

1. INTRODUCTION

1.1 The Record herein was re-allocated to this Court on 11th March, 2024, following the departure of Justice T. I. Katanekwa from the Judiciary. A perusal of the Record revealed that the Court had heard an interlocutory Application and the substantive Application simultaneously, on 17th August, 2023, and reserved the

delivery of Ruling and Judgment to 31st August, 2023. A further perusal of the Record revealed that the said Ruling and Judgment were never delivered as scheduled. Accordingly, I scheduled the matter for Status Conference to chart the way forward.

1.2 On the return date only Counsel for the Applicant was in attendance. The Respondent and its Advocates were not in attendance and no reason was advanced for their absence. I proceeded with the hearing. Considering the nature of the matter, Counsel for the Applicant implored the Court to proceed to render the Judgment which will take into account the pending interlocutory Application on Record.

1.3 Accordingly, this Judgment is in respect of the Applicant's substantive Application to set aside the Arbitral Award and the interlocutory Application made herein.

2. BACKGROUND

2.1 The genesis of this matter, as can be ascertained from the Affidavit evidence, is that sometime in October, 2016, a dispute arose between the Applicant, Food Reserve Agency, and the Respondent, Lusaka Province Co-operative Union Limited. The dispute arose out of a number of Contracts entered into on diverse dates between 2010 and 2012, which resulted in the Parties proceeding to Arbitration. It is alleged that the Arbitration

proceedings were concluded on 7th July, 2017 and on 21st November, 2022, the Arbitrator issued the Award, wherein she found in favour of the Respondent and ordered the Applicant to pay the awarded amount within three months of the date of the Award, being 29th September, 2016.

2.2 The Applicant alleges that the Arbitral procedure employed in the Arbitration of their dispute was not in accordance with the Agreement of the Parties or the Arbitration Act or the laws of the Country.

2.3 It is against this backdrop, that the Applicant launched this suit by way of an Originating Summons, filed on 20th February, 2023, pursuant to ***Section 17*** of ***The Arbitration Act***[1] *and* ***Section 23*** of ***The Arbitration (Court Proceedings) Rules***[2]. The Applicant seeks the setting aside of the Arbitral Award dated 31st November, 2022 (the "Award") made by Mrs. Mary Ncube (The "Arbitrator") on the following grounds: -

i. The Applicant was not given an opportunity to present its case;

ii. The Arbitrator delivered an Award that contains decisions on matters beyond the scope of the submission by the parties;

iii. *The arbitral procedure adopted by the Arbitrator was contrary to the Agreement of the parties and the law;*

iv. *The award and/or the conduct of the arbitral proceedings offends public policy; and*

v. *That the costs occasioned by the Application herein be for the Applicant in any event.*

3. AFFIDAVIT EVIDENCE

3.1 The Application is supported by an Affidavit deposed to by ***Kondani Chunga***, an Accountant employed by the Applicant, who avers, *inter alia*, that between 2010 and 2012 the Parties entered into a number of Warehouse Management Contracts ("the Contracts") wherein the Respondent agreed to be the Warehouse Manager for the Applicant and receive, sieve, clean, re-bag, weigh, stack, manage and dispatch the designated agricultural food commodities in the specified storage shed on behalf the Applicant.

3.2 The Deponent deposed that the contracts provided for Arbitration as the dispute resolution mechanism. Sometime in or about 2016, a dispute arose between the Parties relating to the Contracts. The Parties submitted the dispute to Arbitration to be determined by the

Arbitrator. A copy of the Arbitration Agreement marked **"KC1"** was produced.

3.3 It was further deposed that by Agreement of the Parties, the scope of the Dispute hinged on the enquiry and determination of the following: -

i. *An allegation by the Respondent that the Applicant made several deductions amounting to ZMW1,400,522.12 attributed to "losses in tonnage" against the Respondent's account; and*

ii. *A counterclaim by the Applicant against the Respondent for payment of all sums due and owing under the Warehouse Manager Agreements totalling ZMW83,814.73 plus interest.*

3.4 By an Order for Directions issued by the Arbitrator, it was agreed that the matter would be determined by documentary and oral evidence presented at the hearing. The Order for Directions also set timelines within which all pleadings would be filed. A copy of the Order for Directions marked **"KC2"** was produced.

3.5 In compliance with the Orders, on 7th July, 2017, the oral hearings were concluded and the Parties were informed that the Award would be delivered in due course. However, contrary to the Arbitrator's indication and the Parties' expectation, the Arbitrator failed to deliver the Award

causing the Parties to enquire over the delay, which inquisition took over a year with no response from the Arbitrator.

3.6 The Deponent vied that surprisingly, on 2nd May, 2018, the Arbitrator issued an Order for Directions No. 4, wherein she thanked the Parties for their patience in the matter and intimated that to finalise the Award, she needed the following by 14th May, 2018: -

i. *To have sight of the documents supporting the individual entries making up the figure of ZMW892,010.00 on 2nd February, 2015, on page 13 of the Respondent's Bundle of Documents captioned "Maize Loss from 2011 season stock take LPCU (the Respondent) satellites"; and*

ii. *To receive confirmation from both Parties of her understanding that the Warehouse Management Contract for the 2012 season excludes responsibility for the Satellites depots.*

3.7 A copy of the Order for Directions marked **"KC3"** was exhibited and produced. It was deposed that the procedure was very strange as the matter had already concluded and that the evidence that the Arbitrator was seeking was being solicited from lawyers who did not take oath nor was the information to be supplied subjected to a verification mechanism. Further, it was deposed that the

Arbitrator reopened the matter after the Parties had already filed submissions and the matter was merely awaiting a final Award.

3.8 Reluctantly, the Parties' lawyers advised the Arbitrator that they had already addressed those concerns in their evidence and the submissions and that beginning to search for the documents would be a difficult challenge. Despite the said correspondence and to the surprise of the Parties, the Arbitrator did not issue the Award soon after the 14th day of May, 2018, but instead a number of years passed during which period the Arbitrator failed, refused or neglected to deliver the Award before she could render her Award.

3.9 The Parties contested the Award and the Arbitrator threatened to withhold the Award and sue the Parties. The miscellaneous emails between the Arbitrator and the Parties marked **"KC 4"** was exhibited and produced. After the threat and discussions, the Arbitrator agreed to be paid an agreed amount before she could release the Award.

3.10 It was asserted that on 21st November, 2022, over five years after the date of hearing, the Arbitrator issued the Final Award. The Award ordered the Applicant to pay the sum of ZMW1,183,885.27, with interest at the Bank of Zambia rate, for the period beginning 29th September,

2016. A copy of the Award marked **"KC 5"** was exhibited and produced.

3.11 The Deponent vied that upon perusal of the Award, he discovered that: -

i. *The Award did not determine the Applicant's Counterclaim;*

ii. *The Award did not provide any rationale before arriving at the conclusions it did;*

iii. *Interest was awarded to the Respondent for the period between 2016 and 2022, which is predominantly the period in which the Arbitrator delayed and/or failed, refused and/or neglected to issue the Award;*

iv. *The Arbitrator relied on an email from the lawyer, which was not given under oath or during proceedings but informally in email inquisitions.*

3.12 The Applicant's lawyers on Record reviewed the Award and advised the Applicant that the Award ought to be set aside as: -

i. *The Applicant was not given an opportunity to present its case;*

ii. *The Arbitrator delivered an Award that contains decisions on matters beyond the scope of the submissions;*

iii. *The Arbitral procedure adopted by the Arbitrator was contrary to the Agreement of the parties and the law and;*

iv. *The Award and/or the conduct of the arbitral proceedings offends public policy.*

3.13 It was deposed that as a result of the said Award, the Applicant has suffered great prejudice as it has been condemned to pay interest for a 5-year period during which the Arbitrator failed, refused and or neglected to deliver the Award. A copy of the demand for the sum marked **"KC6"** is a true copy of the Respondent's demand for the sum awarded plus interest as well as documents computing interest for the period between 29th September, 2016 and 28th December, 2022.

3.14 The Deponent vied that he had been advised by his Advocates that this a proper case within which this Court can exercise its jurisdiction to set aside the Arbitral Award.

3.15 By the Affidavit in Opposition to the Affidavit in Support of Originating Summons for an Order to set aside Arbitral Award, deposed by **Kennedy Liamba**, the Finance and Administration Manager at the Respondent Company, it

was asserted that it was not true that the Arbitrator failed to deliver the Award but instead issued Order for Directions No. 4, which action was within the Rules of Arbitration as the Arbitrator wanted to have finality of the matter before her.

3.16 It was deposed that the assertion by the Applicant that the inquisition by the Parties on the Award took over a year is not true as at the time, the Parties had not paid the Arbitration fees in full.

3.17 Further, the Deponent vied that it is not true that the evidence the Arbitrator wanted was being solicited from the Lawyers as it was the duty of the respective Advocates to solicit such evidence from their clients and it was the respective clients who were to present such evidence before the Arbitrator. It was asserted that nowhere in the Order for Directions No. 4 does it say the Lawyers were to adduce evidence, but the Parties. It was deposed that when the Order for Directions was issued, the Applicant even requested for extension of time within which to allow for a search for the information requested for. A copy of the email dated 10th May, 2018, marked **"KL1"** wherein the Applicant requested for extension of time was exhibited and produced.

3.18 It was affirmed that in Arbitration, Orders for Directions could be given at any time before the Award is rendered

and that as such, there was no rule that was violated by the Arbitrator when she issued the Order for Directions No. 4.

3.19 The Deponent vied that the delay in concluding the matter was mainly caused by the Applicant. Copies of two emails marked **"KL2"** wherein the Applicant was being prodded to take steps that would close the matter but it did not, were exhibited and produced. It was asserted that the Arbitrator could not deliver the Award soon after 14th May, 2018, as the Applicant was not giving its position on the information requested for and the Arbitration fees had not been settled in full.

3.20 Further, it was deposed that the Applicant did not agree to the Arbitration fees for a long time which contributed to the delay. It was asserted that the Applicant took over eight months to agree to pay the Arbitration fees. Copies of the email from the Applicant agreeing to pay the Arbitration fees, dated 12th November, 2021, marked **"KL 4"** was produced.

3.21 It was averred that the final Award was issued about five months after the Parties settled the Arbitration fees and that it is the rule in Arbitration that a final Award cannot be released if Arbitration fees are not fully paid.

3.22 The Deponent deposed that the Award determined the Counterclaim as shown on page 4 paragraph 8(2) of the

final Award. It was stated that there was no informal communication as clients who are represented can only communicate to the Arbitrator through their Advocates.

3.23 It was asserted that the Applicant was given more than ample time to present its case including being given extension of time. It was further deposed that the Award does not contain any decision beyond the scope of the submissions of the Parties and that the procedure was not contrary to law or rules of Arbitration nor did it offend public policy.

3.24 The Deponent avowed that it was not true that the Applicant has suffered great prejudice and it ought to pay the sum and interest in the Award. It was further avowed that the Respondent does not see anything wrong with the Award, whose delay was purely attributed to the Applicant as evidenced by various emails.

4. SKELETON ARGUMENTS

4.1 By the Applicant's Skeleton Arguments, the Applicant cited ***Section 17*** of ***The Arbitration Act***[1] as follows: -

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

iv) ...the arbitral procedure was not in accordance with the Agreement of the parties or, failing such Agreement, was not in accordance with this Act or the law of the Country where the arbitration took place;

(b) if the court finds that-

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

4.2 Counsel submitted that the scope of the dispute and the jurisdiction of the Arbitrator could be deduced from the Parties' pleadings. The case of ***NHA-MKP Estate Development Limited and Workers Compensation Fund Control Board***[1] was cited as follows: -

"However, the appellant's counsel is correct to assert that in order to ascertain jurisdiction of an arbitrator, it is open to the court to look at the award itself and the affidavits and pleadings of the parties if the submission to arbitration is not available as stated in the book entitled 'Law Relating to Arbitration and Conciliation."

4.3 Counsel submitted that it was clear that there was a claim for K1,400,522.12 by the Respondent and Counterclaim for K83,814.73 by the Applicant. Counsel asserted that this formed the scope of the Arbitration. He stated that, however, a perusal of the Award reveals that only the

Respondent's Claim was determined and the Applicant's Counterclaim for K83,814.73 was completely ignored. Counsel submitted that on this score alone, the procedure adopted by the Arbitrator was alien to the Parties' Agreement and a clear indication that she failed to conduct the proceedings in accordance with the scope of what she was engaged for. Counsel cited the case of ***Metalco Industries Limited and Nubian Resources Limited***[2] in support of the foregoing submission.

4.4 Counsel called to aid the case of ***Photo Bank Limited v Shengo Holding Limited***[3] in support of the submission that a Counterclaim is an entire separate claim from the main claim. It was submitted that the Arbitrator completely omitted to determine the Applicant's Counterclaim, which was a gross breach and renders the Award null and void for non-compliance with the law and the Arbitration Agreement by the Parties.

4.5 Counsel submitted that a careful reading of the Award reveals that the four paged document falls below the standard of Judgment writing in that it is predominantly a brief outline of the matter and the analysis does not demonstrate that the Arbitrator wrestled with the evidence and the law offered by the Parties.

4.6 It was further submitted that the Applicant was not treated fairly, which is at the core of Arbitrations, in particular,

and all dispute adjudications in general. It was submitted that the Award is in conflict with public policy due to inordinate delay, invalidity and contrary to public policy as it did not determine the key issues, is not properly reasoned and substantiated.

4.7 Counsel contends that that where an Arbitrator breached a term of ***The Code of Conduct for Arbitrators***[6], that Award must be set aside as there was no fairness in the proceedings. The case of ***Harji Engg. Works Pvt Ltd v M/S Bharat Heavy Electricals Ltd and Another***[4] was cited in support of the contention.

4.8 Counsel argued that the Award breached ***Article 118 (2)*** of ***The Constitution***[3] in that it was delayed. It was asserted that the Arbitrator must not take on a matter when he or she has no time to determine the dispute. Counsel submitted that the inordinate delay by the Arbitrator caused the Applicant to suffer prejudice as the interest payments it has been condemned to remit to the Respondent are for the prolonged duration of five years, which period covers the Arbitrator's own delay and neglect.

4.9 It was submitted that the Parties to the Arbitration Agreement agreed that evidence would be tendered in by way of documentary evidence submitted before the hearing and oral evidence submitted at the hearing. Counsel further submitted that contrary to the Agreement, the

Arbitrator anchored her Award on email correspondence by the Applicant's lawyers made years after the matter had been concluded and pending issuance of an Award.

4.10 Finally, it was submitted that had the Arbitrator followed the right procedure and afforded the Parties an opportunity to be heard on the issue, then the Applicant's witnesses would have submitted to the Arbitrator on the issues surrounding individual entries making up the figure K892,010.00.

4.11 The Respondent did not file any List of Authorities and Skeleton Arguments with the Affidavit in Opposition.

5. NOTICE OF MOTION TO EXPUNGE RESPONDENT'S AFFIDAVIT IN OPPOSITION

5.1 By a Notice of Motion filed on 24th March, 2023 the Applicant sought the following Orders: -

i. *That the Respondent's Affidavit in Opposition filed herein be expunged from the Record;*

ii. *That the Respondent be debarred from being heard on the main matter and any application and that the Court proceed to deliver its final judgement on the matter; and*

iii. *That the Respondent be ordered to pay for costs of this application and the main matter.*

5.2 The grounds of this Application were set out as follows: -

1. *That the Respondent has failed to enter an Appearance and/or file an Affidavit in Opposition within the 7-day time-frame as required by* ***Section 34*** *of* ***The Arbitration (Court Proceedings) Rules***[2] *as read together with* ***Order 11***, ***Rule 22*** *of* ***The High Court Rules***[4], *and* ***Order12***, ***Rules 9*** *and* ***10****;*

2. *That the Respondent has failed to file Skeleton Arguments and List of Authorities as required by* ***Order 30***, ***Rule 3A*** *of* ***The High Court Rules***[4]*; and*

3. *That the Respondent as a result of having breached the Rules of Court exhausted all its rights or entitlement to extension of time to file an Affidavit in Opposition and therefore, debarred from adducing evidence in the matter as per* ***Order 28***, ***Rule 10*** *of* ***The Rules of the Supreme Court of England***[5].

5.3 By the Affidavit in Support of the Notice of Motion sworn by **Kondani Chunga**, an Accountant in the Applicant company, it was deposed, *inter alia*, that on 23rd February, 2023, and 9th March, 2023, the Respondent was served with an Affidavit in Support of Originating Summons and Skeleton Arguments; and an Originating Summons and

Notice of Hearing, respectively. A copy of the received letter of service marked **"KC1"** were exhibited and produced.

5.4 It was deposed that on 16th March, 2023, the Respondent purportedly filed an Affidavit in Opposition to the Affidavit in Support of Originating Summons for an Order to set aside Arbitral Award. After a review and perusal of the said process, the Applicant's Advocates on Record advised the Deponent that the Affidavit in Opposition flouts the Rules of this Court in the following manner:

i. *That the Affidavit in Opposition was filed outside the 7-day time-frame within which it ought to have been filed;*

ii. *That the Affidavit in Opposition is not supported by Skeleton Arguments; and*

iii. *That the Affidavit in Opposition is not supported by a List of Authorities.*

5.5 A copy of the Search Form and letter of service that show that no Skeleton Arguments and List of Authorities were filed or served by the Respondent were exhibited marked **"KC 2"**.

5.6 The Deponent vied that based on the above, the Applicant had been advised by his Advocates and believed the same to be true that the said Affidavit in Opposition is irregular and ought to be expunged from the Court Record and that

the Respondent be barred from being heard in the main matter.

5.7 By the Applicant's Arguments and List of Authorities in support of the Notice of Motion, the Applicant's Counsel cited ***Order 2***, ***Rules 1*** and ***2*** and ***Order 2***, ***Rules (2)*** of ***The Rules of the Supreme***[5] pursuant to which the Application had been made.

5.8 Counsel submitted that the Respondent filed an Affidavit in Opposition outside the timeframe stipulated in ***Section 34*** of ***the Arbitration (Court Proceedings) Rules***[2] and the Order of the Court. Counsel further submitted that a Party has no leverage to decide when it should file its Affidavit in Opposition. Counsel referred the Court to ***Section 34*** of ***The Arbitration (Court Proceedings) Rules***[2] in support of the foregoing submission. The said provision states as follows: -

> ***"A party served with an Origination summons or Summons and an affidavit may within seven days after service, file an affidavit in opposition or an answer and shall deliver a copy to that party's affidavit to the party serving the originating summons or summons at least two clear days before hearing date."***

5.9 Counsel cited ***Order XXX***, ***Rule 3A*** of ***The High Court Rules***[4] in support of the submission that the Respondent's Affidavit flouted mandatory Rules of Court in that it was

not accompanied by Skeleton Arguments and List of Authorities.

5.10 It was submitted that the Respondent's failure to file an Affidavit in Opposition within the stipulated timeframe and in accordance with the mandatory Rules of Court, is a clear indication that the Respondent has no intention to defend this action. It was contended that as such, the Respondent should not be allowed to disrupt the proceedings herein.

5.11 Counsel cited ***Order XI***, ***Rule 22*** of ***The High Court Rules***[4] and the case of ***Rural Development Corporation v. Bank of Credit and Commerce(Z) Limited***[5] in support of the submission that the Respondent's failure to enter Appearance entails that it has no right of audience within the matter.

5.12 It was Counsel's submission that the effect of the Respondent's failure to comply with the Rules of Court is aptly stated in ***Order 28***, ***Rule 10*** of ***The Rules of the Supreme Court***[5], which provides that the Application ought to be dismissed and the Respondent debarred from adducing any evidence before the Court. Additionally, it was submitted that the Court should proceed to determine the Originating Summons based on the documents filed into Court by the Applicant. The case of ***Twampane Mining Corporation Society Limited v. E & M Storti***

Mining Limited[6] was cited, wherein the Supreme Court held that those who choose to ignore the Rules of Court will do so at their own peril.

5.13 Counsel submitted that this Court has no jurisdiction to entertain the Respondent's defective Affidavit in Opposition and that the procedure adopted by the Respondent should be met by the requisite penalties.

6. RESPONDENT'S RESPONSE TO APPLICANT'S NOTICE OF MOTION TO EXPUNGE RESPONDENT'S AFFIDAVIT IN OPPOSITION

6.1 The Respondent opposed the Applicant's Notice of Motion by filing an Affidavit in Opposition, deposed by ***Kennedy Liamba***, the Finance and Administration Manager at Lusaka Province Co-operative Union Limited, the Respondent herein. The Deponent asserted that the Applicant's Court Process was served on Mwansa Phiri Shilimi and Theu Legal Practitioners who at the time were not instructed to act for the Respondent. It was further asserted that the Applicant should have served the process directly on the Respondent as they did not have any information that the Respondent's Advocates were Messrs. Mwansa Phiri Shilimi and Theu Legal Practitioners. As such, the service of the Court process was on the wrong party, which contributed to any delay being alleged.

6.2 It was deposed that the delay in filing the Affidavit in Opposition was for one day only, which delay is not fatal as the rules use the words "may". Further, it was deposed that the Applicant should not advance technicalities to defeat the cause of justice.

6.3 The Deponent vied that the Applicant has not shown any prejudice it has or is likely to suffer as a result of the alleged delay in filing the Affidavit in Opposition. Further it was vied that matters of this nature ought to be determined on Merit not on technicalities.

6.4 The Respondent's Affidavit in Opposition was accompanied by Skeleton Arguments and List of Authorities, wherein Counsel for the Respondent cited ***Section 34*** of ***The Arbitration (Court Proceedings) Rules***[2] in support of the submission that contrary to the Applicant's assertion, the law cited is discretionary and does not provide that the filing of the Affidavit in Opposition should be done within seven days. It was asserted that the law above indicates that the party responding to the Originating Summons may file their opposition within the seven days or after the said days have elapsed but should make sure that the copy is served on the other party at least two clear days before the return date.

6.5 Counsel cited ***Article 118*** of ***The Constitution (Amendment) Act***[3] and submitted that this Article clearly

provides that the administration of justice is of priority as compared to disposing of matters based on technicalities. Based on this, the Respondent vehemently opposed the Notice of Motion being raised by the Applicant.

6.6 Counsel further emphasised that in the interest of justice matters should be determined on merit and not on technicalities. The case of ***Robbie Tembo v. National Milling Corporation and Yasiku***[7] was cited in support of the foregoing submission. Counsel asserted that if the Affidavit in Opposition is not allowed, it would prematurely halt the wheels of justice, leading to injustice.

6.7 Counsel submitted that equity demands that "he who comes to equity must come with clean hands" and asserted that the Applicant herein is fully aware that their service of the process was wrong. He further asserted that having been fully aware that it had made wrong service, the Applicant cannot come to Court to claim the reliefs sought using this Notice of Motion. The case of ***ZESCO Limited v. Bakewell Bakers***[8] was cited in support of the foregoing submission.

6.8 It was the Respondent's prayer that this Court dismisses the Notice of Motion being prayed for by the Applicant herein. Counsel further prayed that in the event that this Court decides that the delay was uncalled for, that the

Court grants the Respondent an extension of time within which to file a fresh Affidavit.

7. APPLICANT'S AFFIDAVIT IN REPLY TO THE RESPONDENT'S AFFIDAVIT IN OPPOSITION TO ORGINATING SUMMONS

7.1 The Applicant filed herein its Affidavit in Reply to the Respondent's Affidavit in Opposition to Originating Summons, which is deposed by ***Kondani Chunga***, the Accountant employed by the Applicant Institution. The Deponent asserted, *inter alia*, that contrary to the Respondent's assertions, the Order for Directions No. 4 was issued on the 2nd day of May, 2018, over 9 months after the final date of hearing on 7th July, 2017, which was inordinately long. It was deposed that the delay was not owing to any demand for fees or the Applicant's alleged failure to provide the requested documents but at the instance of the Arbitrator who simply went quiet, which is in contravention of the Rules.

7.2 The Deponent vied that both the Applicant and the Respondent contested the Arbitrator's fees. It was asserted that it was in fact the Respondent who was negotiating for fees forcefully. A copy of an email from the Respondent's Advocates to the Arbitrator, requesting that the interest for the period which the Arbitrator delayed to

issue award be waived by the Arbitrator, marked **"KC 1"**, was exhibited and produced.

7.3 It was avowed that it is true that after the Arbitrator's fee note was issued in April, 2021, the Arbitrator delayed a further 18 months before issuing the Award and that this was after she had already delayed by over 42 months from the date of final hearing.

7.4 The Deponent vied that the Counterclaim was not determined. It was asserted that the Award offends public policy as the Arbitrator took over 60 months to deliver the Award from the date of final hearing. It was further asserted that the Applicant has suffered prejudice and this is manifestly clear from the unjust Order to pay interest for the delay of 60 months occasioned by the Arbitrator.

7.5 By the Applicant's List of Authorities and Arguments in Reply, the Applicant's Counsel asserted that from the Respondent's Affidavit in Opposition, it was clear that the Respondent admits having breached the Rules of Court but simply deny the gravity of their offence and proffer excuses for the said default. Counsel reiterated that the Respondent flouted the mandatory Rules of Court in that it filed an Affidavit in Opposition that was not accompanied by Skeleton Arguments and List of Authorities.

7.6 It was contended that the Respondent has alleged that the Court must compute the 7-day time-frame using working

days and not include weekends in its computation. However, it was asserted that this allegation by the Respondent is contrary to the mandatory provisions of the law. Counsel cited ***Section 35*** of ***The Interpretation and General Provisions Act***[7] in support of the submission.

7.7 Counsel submitted that the Respondent's Contention that the Applicant ought to have served the Court process on the Respondent and not on the Respondent's Counsel is bereft of merit. Counsel contended that it is trite that all Court proceedings during or after Arbitration proceedings are part of the arbitral proceedings and therefore, the Applicant was *terra firma* and in compliance with the Rules when it served the process on the Respondent's Advocates. Counsel cited ***Rule 37 (3)*** of ***The Legal Practitioner's Practice Rules***[8] in support of the submission.

7.8 Counsel further reiterated that the Respondent's reliance on ***Article 118*** of ***The Constitution***[3] is misplaced and unfounded. The case of ***Alios Finance Zambia Limited v Kibron Ruling***[9] was cited in support of the submission.

7.9 Counsel also reiterated that this Court has no jurisdiction to entertain the Respondent's defective Affidavit in Opposition and cited the case of ***Vangelatos and Vangelatos v Metro Investment Limited and Others***[10] where it was held that: -

"Where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

8. CONSIDERATION AND DECISION OF THE COURT

8.1 I have considered the substantive Application as well as the interlocutory Application and the Affidavit evidence on Record. I have further considered the Skeleton Arguments and List of Authorities cited, for which I am grateful to Counsel. As earlier stated, the interlocutory Application will be considered in this Judgment of the substantive matter.

8.2 Before I proceed to determine the Applicant's substantive Application to set aside an Arbitral Award, I shall first consider the Applicant's Notice of Motion to expunge the Respondent's Affidavit in Opposition filed on 16th March, 2023, and to debar the Respondent from being heard or giving evidence.

8.3 The Applicant's Application to expunge the Respondent's Affidavit in Opposition was made pursuant to ***Order 2***, ***Rules 1*** and ***2*** and ***Order 28***, ***Rule 10*** of ***The Rules of the Supreme Court***[5], ***Order XI***, ***Rule 22*** and ***Order XXX***, ***Rule 3A*** of ***The High Court Rules***[4] and ***Section 34*** of ***The Arbitration (Court Proceedings) Rules***[2].

8.4 The grounds on which the Applicant seeks an Order to expunge the Respondent's Affidavit in Opposition and

debar the Respondent from adducing evidence were set out as follows: -

i. *That the Affidavit in Opposition was filed outside the 7-day time-frame within which it ought to have been filed;*

ii. *That the Affidavit in Opposition is not supported by Skeleton Arguments; and*

iii. *That the Affidavit in Opposition is not supported by a List of Authorities.*

8.5 In determining this Application, I shall begin by considering the first ground of whether the Respondent's Affidavit in Opposition was filed outside the 7-day time-frame within which it ought to have been filed and thereby ought to be expunged.

8.6 The Applicant contends that it served the Respondent with the Affidavit in Support of the Originating Summons and Skeleton Arguments on 23rd February, 2023, and that the Originating Summons and Notice of Hearing were served on 9th March, 2023. The Applicant further contends that the Respondent, therefore, was required to file its Affidavit in Opposition within 7 days from the date of receipt of the Originating Summons.

8.7 In response to this contention, the Respondent has asserted that the law relating to filing an Affidavit in

Opposition does not provide that the Affidavit should be filed within seven days. The Respondent contends that the law provides that a party responding to the Originating Summons may file their opposition within seven days or after the seven days has elapsed but should make sure that the copy is served on the other party at least two clear days before the return date.

8.8 The law relating to the filing of Affidavit in Opposition in civil proceedings such as this one is provided for under ***Rule 34*** of ***The Arbitration (Court Proceedings) Rules***[2] as follows: -

> ***"A party served with an originating summons or summons and an affidavit may, within seven days after service, file an affidavit in opposition or an answer and shall deliver a copy of that party's affidavit to the party serving the originating summons or summons at least two clear days before the return day."***

8.9 The import of the foregoing provision, in my view, is that in an action that is commenced in the High Court relating to Arbitration proceedings, a party served with an Originating Summons and Affidavit has an option to file an Affidavit in Opposition or not. In the event that the party chooses to file an Affidavit in Opposition, that party ought to file the Affidavit in Opposition within seven days after receipt of the Originating Summons and deliver a copy of

the said Affidavit to the party serving the Originating Summons at least two clear days before the return day.

8.10 On my analysis of the documents on Record, I find that the Applicant served the Originating Summons on the Respondent on 9th March, 2023. Therefore, the Respondent ought to have filed an Affidavit in Opposition herein within seven days thereof. On my perusal of the Affidavit in Opposition filed by the Respondent, I find that it was filed on 16th March, 2023. By my computation of time, this date being the seventh day from the date of service, the Respondent filed the Affidavit in Opposition within the seven-day prescribed period.

8.11 My finding is fortified by ***Section 35 (a), (b)*** and ***(d)*** of ***The Interpretation and General Provisions Act***[7], which provides as follows: -

> ***"In computing time for the purposes of any written law-***
>
> ***(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
>
> ***(b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as "excluded days") the period shall include the next following day, not being an excluded day;***
>
> ***(c) N/A***

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time." *(Court's emphasis)*

8.12 Based on my finding above, I am of the view that the Applicant's contention that the Respondent failed to file an Affidavit in Opposition within the 7-day prescribed period lacks merit and is accordingly dismissed.

8.13 It follows therefore, that the Applicant's contention that the Respondent failed to enter Appearance also lacks merit as the Respondent by filing an Affidavit in Opposition within the required time-frame did enter Appearance within the meaning of ***Order XI***, ***Rule 22*** of ***The High Court Rules***[4]. The said provision states as follows: -

> ***"The parties served with an originating summons shall, save as otherwise provided, before they are heard, enter appearances, and give notice thereof. A party so served may appear at any time before the hearing of the summons. If he appears at any time after the time limited by the summons for appearance he shall not, unless the Court or a Judge shall otherwise order, be entitled to any further time for any purpose, than if he had appeared according to the summons."***

8.14 Similarly, ***Order 2***, ***Rules 1*** and ***2*** of ***The Rules of the Supreme Court***[5], pursuant to which the Applicant sought the Order to expunge the Affidavit in Opposition, does not apply in this case, as the Respondent filed the Affidavit in

Opposition within the required time-frame and as such there was no irregularity. The said ***Order 2***, ***Rules 1*** and ***2*** of ***The Rules of the Supreme Court***[5] is couched as follows: -

> ***"(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.***
>
> ***(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."***

8.15 I now turn to address the remaining grounds of whether the Respondent failed to file Skeleton Arguments and List of Authorities as required by ***Order XXX***, ***Rule 3A*** of ***The High Court Rules***[4]. The Applicant contends that the

Respondent herein has failed, refused and/or neglected to file Skeleton Arguments and List of Authorities together with its Affidavit in Opposition. I note that the Respondent did not respond this contention in its Affidavit in Opposition.

8.16 The said ***Order XXX***, ***Rule 3A*** of ***The High Court Rules***[4], on which this contention is based, provides as follows: -

> ***"(1) At the time of filing the summons, the applicant shall file skeleton arguments of their case and list of authorities.***
>
> ***(2) The Skeleton Arguments shall set out concisely as possible the-***
>
> ***(a) Issue arising in the application***
>
> ***(b) brief arguments that will form the basis of the case by the party filing it and the authorities in support; and***
>
> ***(c) reasons for or against the application***
>
> ***(3) On receipt of the affidavit in support of the applications, the skeleton arguments and list of authorities, the respondent shall file an affidavit in opposition with the skeleton arguments and list of authorities.***
>
> ***(4) The Skeleton arguments to be filed by the respondent shall meet the requirements set out under sub-rule (2)."*** *(Court's emphasis)*

8.17 On my analysis of the foregoing provision, I am of the view that the said provision relates to Summons (interlocutory) and not to Originating Summons, as is the case herein. Therefore, the requirement to file Skeleton Arguments and List of Authorities does not apply to the Respondent in this case.

8.18 This position is further fortified by ***Rule 34*** of ***The Arbitration (Court Proceedings) Rules***[2] cited above, which does not require the Respondent to file Skeleton Arguments and List of Authorities with the Affidavit in Opposition. Similarly, ***Order XI***, ***Rule 22*** of ***The High Court Rules***[4] cited above, that provides for the requirement of Appearance of a party to Originating Summons, does not require a Respondent to file Skeleton Arguments and List of Authorities. Accordingly, I find that the Applicant's contention that the Respondent failed to file List of Authorities and Skeleton Arguments with the Affidavit in Opposition lacks merit and is accordingly dismissed.

8.19 Based on the foregoing, the Applicant's contentions in the Originating Notice of Motion lack merit and the Application is accordingly dismissed.

8.20 I now turn to consider the substantive Application for determination before this Court of whether the Applicant has demonstrated sufficient basis for this Court to set

aside the Arbitral Award. The Applicant's Originating Summons was made pursuant to ***Section 17*** of ***The Arbitration Act***[1] and ***Section 23*** of ***The Arbitration (Court Proceedings) Rules***[2].

8.21 ***Section 17*** of ***The Arbitration Act***[1] provides as follows: -

> ***"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).***
>
> ***(2) An arbitral award may be set aside by the court only if-***
>
> ***(a) the party making the application furnishes proof that-***
>
> ***(i) a party to the arbitration Agreement was under some incapacity; or the said Agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;***
>
> ***(ii) the party making the application was not given proper notice of the appointment of an arbitral or of the arbitral proceedings or was otherwise unable to present his case;***
>
> ***(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, provided that, if the decision on matters***

submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside;

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

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia; or

(ii) the award is in conflict with public policy; or

(iii) the making of the award was induced or effected by fraud, corruption or misrepresentation."

8.22 By the said Originating Summons, the Applicant herein seeks the following reliefs: -

1. *That the Arbitral Award dated 21st November, 2022 made by Mrs. Mary Ncube (the Arbitrator) be set aside on grounds that:*

    i. *The Applicant was not given an opportunity to present its case;*

    ii. *The Arbitrator delivered an Award that contains decisions on matters beyond the scope of the submission by the parties;*

    iii. *The arbitral procedure adopted by the Arbitrator was contrary to the Agreement of the parties and the law and;*

    iv. *The award and/or the conduct of the arbitral proceedings offends public policy.*

    v. *The costs occasioned by the Application herein be for the Applicant in any event.*

8.23 I wish to emphasise at this juncture that the purpose of an action to have the award set aside is to preserve the integrity of the Arbitral process and does not serve as a means to achieve a review of the Arbitrator's decision on the merits. This Court's view is fortified by the learned authors, ***Redfern and Hunter, Law and Practice of International Commercial Arbitration***[1], where they state that: -

"Arbitral rules, such as those of UNCITRAL... provide unequivocally that an arbitration award is final and binding. These are not intended to be mere empty words. One of the advantages of arbitration is that it is meant to result in the final determination of the dispute between the parties. If the parties want a compromise solution to be proposed, they should opt for mediation. If they are prepared to fight the cause to the highest court in the land, they should opt for litigation. By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is, in principle, final and binding. It is not intended to be a proposal as to how the dispute might be resolved; nor is it intended to be the first step on a ladder of appeals through national courts."

8.24 I shall address the grounds on which the Application is based in the manner they have been outlined by the Applicant starting with whether the Applicant has led sufficient evidence to prove that it was not given an opportunity to present its case.

8.25 To support this ground, the Applicant asserts by its Affidavit in Support of the Application and Skeleton Arguments that in compliance with the Arbitrator's Orders for Directions, the oral hearings between the Parties were concluded on 7th July, 2017, and it was informed that the Award would be delivered in due course. When the Arbitrator failed to deliver as expected, the Parties made inquiries. Later, on 2nd May, 2018, the Arbitrator issued

the Order for Directions No. 4, wherein she requested the Applicant herein to avail documents supporting the individual entries making up the figure of ZMW892,010.00 on page 13 of the Applicant's Bundle of Documents.

8.26 It was deposed that reluctantly the Applicant's lawyers advised the Arbitrator informally by email that they had already addressed the concerns in their evidence and submissions and that beginning to search for the documents would be a difficult challenge. It was further contended that on 21st November, 2022, the Arbitrator issued the final Award and relied on an email from the lawyer which was not given under oath or during the proceedings but informally and as such, the Applicant was not given an opportunity to present its case on the issue.

8.27 On my reading of ***Section 17 (2) (a) (ii)*** of ***The Arbitration Act***[1], I find that it provides for an Award to be set aside if it is shown that a party to Arbitration proceedings was not given an opportunity to present its case. The said provision states as follows: -

> ***"An arbitral award may be set aside by the court only if-***
>
> ***(ii) the party making the application was not given proper notice of the appointment of an arbitral or of the arbitral proceedings or was otherwise unable to present his case; ..."***

8.28 On my analysis of the Applicant's contention and the foregoing provision, I note that the Applicant's contention is based on the allegation that the Arbitrator did not give the Applicant an opportunity to formally present its case in relation to the request for supporting documents, but instead relied on the informal emails that were sent by its lawyers explaining the difficulty that would be faced in sourcing the said documents.

8.29 On my analysis of this contention, I find that the request for supporting documentation from the Applicant by the Arbitrator prior to the issuance of the Award, did not require the Applicant to be given an opportunity to present its position on the issue as the request was for the presentation of documents that would clarify the evidence that the Applicant had already presented during the proceedings. Therefore, the Applicant's contention that it was not given an opportunity to present its case lacks merit.

8.30 I am further of the view that the Arbitrator was well within her authority to request for the said clarifying documents from the Applicant despite the conclusion of the hearing as the Arbitral proceedings were still ongoing and were only to end at the issuance of the Final Award. My finding is fortified by ***Article 27 (3)*** of ***The CIArb (Chartered Institute of Arbitrators) Arbitration Rules***[9] on which

Rules the Parties' Arbitration Agreement is based. The said Article provides as follows: -

> ***"At <u>any time</u> during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal may determine."*** *(Court's emphasis)*

8.31 I am further of the view that the Arbitrator's consideration of the Applicant's lawyer's response to the request for clarifying documentation in her Award was well within the Arbitrator's authority. This is because the Parties herein were represented by Counsel and as such, the communication from the Applicant's Counsel in response to the Arbitrator's formal request for clarifying documentation was correctly interpreted by the Arbitrator as a formal response to the request on behalf of the Applicant.

8.32 This position is fortified by the fact that in the Order for Directions No. 1, dated 4th December, 2016, the Arbitrator directed that all communication to the Arbitrator would be by email or post. Therefore, the Applicant's lawyer's email to the Arbitrator was indeed formal communication of the Applicant's position on the request for further documentation. It follows, therefore, that the Applicant's contention that it was not given an opportunity to present its case, lacks merit and is accordingly dismissed.

8.33 I now turn to consider the Applicant's contention that the Award and/or conduct of the Arbitral proceedings offends public policy. In support of this ground, the Applicant contends that the Award is contrary to public policy as there was inordinate delay for over five years in delivering it. It was further contended that the Applicant was condemned to pay interest for the period between 2016 and 2022, which said period was the period when the Arbitrator delayed and/or failed, refused and neglected to deliver the Award.

8.34 In response to this contention, the Respondent asserted that the delay in concluding the matter was mainly caused by the Applicant who had not given its position on the information requested for by the Arbitrator as per Order for Directions No. 4 and that the Arbitration fees had not been settled in full. It was contended that years lapsed because the Applicant was not giving its definite position on the documents and had failed to confirm that it could not find the documents for which it requested an extension of time. The Respondent exhibited a copy of correspondence wherein the Applicant was being prodded for the requested documents.

8.35 The Respondent further contended that the Applicant did not agree to the Arbitration fees for a very long time. It was asserted that the delay to deliver the award was not five

years as alleged as the final award was issued approximately five months after the Parties settled the Arbitration fees.

8.36 ***Section 17 (2) (b) (ii)*** of ***The Arbitration Act***[1] on which this ground is based provides as follows: -

> ***"An arbitral award may be set aside by the court only-***
>
> ***(b) if the court finds that –***
>
> ***(ii) the award is in conflict with public policy; ..."***

8.37 Further, ***Rule 1 (2)*** of ***The Code of Conduct for Arbitrators***[6] provides as follows on delay in resolving disputes: -

> ***"An Arbitrator shall treat each party fairly and shall- during the conduct of arbitral proceedings, adopt procedures which are suitable to the case and will avoid unnecessary delay and expense in resolving the dispute."***
> *(Court's emphasis)*

8.38 Based on the foregoing authorities and my analysis of the evidence adduced by the Parties, it is clear that the hearings in the Arbitration proceedings were concluded on 7th July, 2017. It is also clear that the Arbitrator issued further Order for Directions No. 4 on 2nd May, 2018, wherein she sought further information from the Parties that she required to finalise the Award. I note, however, that the Applicant did not indicate whether the Arbitrator had given the Parties an indication on whether both

Parties' cases had been closed and when the Award would be issued.

8.39 The lack of this information makes it difficult for this Court to determine whether the issuance of the Order for Directions No. 4 after the close of the hearings was irregular or unexpected especially considering that the Arbitration Rules cited above on which the Arbitration Agreement was based permits the Arbitrator to request for more evidence from the Parties prior to the issuance of the Award.

8.40 In my view, the Arbitrator's issuance of further Order for Directions No. 4 after the conclusion of the hearing is an indication that though the hearings had been concluded, the Arbitration proceedings were still on going as the Award had not yet been issued. Therefore, the Applicant's contention that the Arbitrator caused the delay between the conclusion of the hearing and the issuance of the Order for Directions No. 4 lacks merit and is dismissed.

8.41 On my further analysis of the evidence on Record, I find that it is the Applicant's conduct that mainly contributed to the delay of the issuance of the Award as it took approximately 3 years to confirm that the documents requested for could not be found. This is evident from the Applicant's lawyers email dated 29th March, 2021,

addressed to the Arbitrator exhibited as **"KC3"** in the Applicant's Affidavit in Support.

8.42 I am further of the view that the Respondent's contention that the Arbitral Award was delayed due to the Applicant's delay in making payment has merit, as the Arbitration Agreement between the Parties tied the issuance of the Award to the Parties making full payment of the fees. This is evident from clause 4 of the Schedule of Arbitrator's fees exhibited in the Applicant's Affidavit in Support of the Application. This is also evident from the email correspondence between the Applicant and the Respondent wherein the Respondent is prodding the Applicant to pay its portion of the Arbitrator's fees on 24th May, 2021, as per exhibit **"KL3"**. From the email correspondence, the Applicant only communicated its willingness to settle the fees on 12th November, 2021. Further, the said email correspondence reveals that by 26th April, 2022, the Arbitrator was still requesting the Applicant to settle the interest sum due on the principle sum paid as Arbitration fees.

8.43 Based on the foregoing, it is evident that the Applicant's conduct was the main reason for the delay in the issuance of the Arbitral Award. As such, the Applicant's contention that the Arbitrator's conduct led to the 5-year inordinate delay and that the Arbitrator's Order to pay interest for the

period of the alleged delay was contrary to public policy, lacks merit and is accordingly dismissed.

8.44 I now turn to consider the second ground of whether the Arbitrator delivered an Award that contains decisions on matters beyond the scope of the submission of the Parties. On this ground, the Applicant asserted that from the pleadings presented before the Arbitral Tribunal it was clear that the claim was for ZMW1,400,522.12 by the Respondent and a Counterclaim for the sum of ZMW83,814.73 by the Applicant. It was contended that a perusal of the Award reveals that only the Respondent's claim was determined but that the Applicant's claim for ZMW83,814.73 was completely ignored. The Applicant contended that on this score alone, the procedure adopted by the Arbitrator was alien to the Parties' Agreement. Consequently, it was asserted that this failure by the Arbitrator was a clear indication that she had failed to conduct the proceedings in accordance with the scope for which she was engaged.

8.45 On the other hand, the Respondent contends that the Arbitrator duly determined the Applicant's Counterclaim in the Award and that it does not contain any decisions on matters beyond the scope of the submissions of the Parties. It was asserted that the Arbitration procedure was not contrary to any known law or Rules of Arbitration.

8.46 ***Section 17 (2) (a) (iii)*** and ***(iv)*** of ***The Arbitration Act***[1] on which this ground is based provides as follows: -

> ***"An arbitral award may be set aside by the court only if-***
>
> ***(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, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside;***
>
> ***(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Agreement of the parties or, failing such Agreement, was not in accordance with this Act or the law of the country where the arbitration took place; ..."***

8.47 Further, in the case of ***Metalco Industries Limited and Nubian Resources Limited***[2], cited by the Applicant, the Supreme Court held as follows regarding the duty of Arbitrators: -

> ***"It is also trite law that is the duty of the arbitrator to decide all the matters referred to him by the party's determination. Where he omits to decide some of the questions referred to him by the parties, the award is bad or invalid and should be remitted for reconsideration..."***

8.48 Based on the foregoing, it is clear that an Arbitral Award can be set aside if it determines issues not falling within the terms of the submission to Arbitration, or contains decisions on matters beyond the scope of the submission to Arbitration. Further, it is clear that when the Award omits to determine issues referred to it by the Parties, it is invalid.

8.49 On my analysis of the Arbitral Award, the Parties' contentions and the foregoing authorities, I am of the view that though the Applicant's Counterclaim for the sum of K83,914.73 was considered by the Arbitrator as is evident from paragraphs 2 and 8(2) of the Award, I note however, that the Award did not clearly indicate its determination or decision of the Counterclaim. Therefore, the Award fell short of the standards required and is invalid. My finding is fortified by the case of ***Metalco Industries Limited and Nubian Resources Limited***[2], wherein the Supreme Court held that: -

> ***"In this case, the Arbitrator breached his duty to deal with all the issues in contention by referring the assessment of damages to the Deputy Registrar. He had no authority to delegate assessment to a third party. He did not complete his mandate and he rendered a partial award which is bad and or invalid because the parties' expectation where for a final award."*** *(Court's emphasis)*

8.50 Based on the foregoing, I find merit in the Applicant's contention that the failure to determine the Applicant's Counterclaim is an indication that the procedure adopted by the Arbitrator in determining the Arbitration was contrary to the Parties' Agreement and was in breach of her duty as an Arbitrator. Therefore, the Award is invalid and is accordingly set aside.

9. CONCLUSION

9.1 In conclusion, the Applicant's contention that the Respondent failed to file an Affidavit in Opposition within the 7-day prescribed period lacks merit and is accordingly dismissed. It follows therefore, that the Applicant's contention that the Respondent failed to enter Appearance also lacks merit as the Respondent by filing an Affidavit in Opposition within the required time-frame did enter Appearance within the meaning of ***Order XI***, ***Rule 22*** of ***The High Court Rules***[4].

9.2 Further, I find that the Applicant's contention that the Respondent's Affidavit in Opposition should be expunged as the Respondent failed to file List of Authorities and Skeleton Arguments with the Affidavit in Opposition lacks merit and is accordingly dismissed.

9.3 Additionally, the Applicant's contention that it was not given an opportunity to present its case lacks merit.

9.4 Further, the Applicant's contention that the Arbitrator caused the delay between the conclusion of the hearing and the issuance of the Order for Directions No. 4 lacks merit and is dismissed.

9.5 I find that the Applicant's conduct was the main reason for the delay in the issuance of the Arbitral Award. As such, the Applicant's contention that the Arbitrator's conduct led to the 5-year inordinate delay and that the Arbitrator's Order to pay interest for the period of the alleged delay was contrary to public policy, lacks merit and is accordingly dismissed.

9.6 Finally, I find that there is merit in the Applicant's contention that the failure to determine the Applicant's Counterclaim is an indication that the procedure adopted by the Arbitrator in determining the Arbitration was contrary to the Parties' Agreement and was in breach of her duty as an Arbitrator.

9.7 Therefore, the Award is invalid and is accordingly set aside.

9.8 Costs are for the Applicant to be taxed in default of Agreement.

SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 9TH DAY OF DECEMBER, 2024.

P. K. YANGAILO
HIGH COURT JUDGE