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

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

BETWEEN:

SAFRICAS ZAMBIA LIMITED **APPELLANT**

AND

ROAD DEVELOPMENT AGENCY **RESPONDENT**

Coram: Makungu, Ngulube and Chembe JJA

On the 2nd May, 2023 and 18th August, 2023

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

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

JUDGMENT

MAKUNGU, JA delivered the judgment of the Court.

Cases Referred to:

1. *National Airport Corporation Limited v Reggie Ephraim Zimba and Saviour Konie (2000) ZR 154*
2. *Bank of Zambia v Chibote Meat Corporation (1999) ZR 103*
3. *Zambia Revenue Authority v Hitech Trading Company Limited (2001) Z.R 17*
4. *Hakainde Hichilema & Others v The Government of the Republic of Zambia SCZ No.28/2017*
5. *Murray & Roberts Construction Limited & Another v Lusaka Premier Health Limited & Industrial Development Corporation of South Africa Limited SCZ Appeal 141/216*
6. *Attorney General v Marcus Kampumba Achiume (1983) Z.R 1*
7. *Grave v Mills- 7H & N 917*
8. *Bank of Zambia v Vortex Refrigeration Company Limited & Another SCZ Appeal No. 004/2013*
9. *Light Weight Body Armour v Sri Lanka Army (2007) 1 SRI LR, 412*
10. *Valsamos Koufou v Anthon Greenberg (1982) Z.R 30*
11. *Savenda Management Services v Stanbic Bank Zambia Limited SCZ Appeal No.39/2017*
12. *Fratelli Locci SRI Estrazion Minerarie v Road Development Agency15 CAZ Appeal No. 112 of 2017*
13. *Knox Magugu Mbazima v Tobbaco Association of Zambia CAZ No. 114/2018*
14. *ZCCM Investment Holdings PLC v Vedanta Recourses Holdings Limited and Konkola Copper Mines PLC SCZ Appeal No. 14 of 2021*
15. *Access Bank (Zambia) Limited And Group Five / Zcon Business Park Joint Venture (Suing As A Firm) SCZ/8/52/2014*

16. *Pule Elias Mwila and others v Zambia State Insurance Corporation Limed (2015) Vol. 3 Z.R 152*
17. *Martin Misheck Simpemba Rose Domingo Kakompe v Nonde Munkanta, Zambia Industrial Mineral Limited (2012) Vol. 1, Z.R 72*
18. *Bonar Travel Limited v. Lewis Susa SCZ No.13 of 1994*
19. *Zambia Revenue Authority v. Tiger Limited and Zambia Development Agency Selected Judgment No. 11 of 2016 (SC)*

Legislation Referred to:

1. *The Constitution (Amendment) Act, No.2 of 2016*
2. *The Public Procurement Act, No.12 of 2008*
3. *The Public Procurement Regulations, S.I No.63 of 2011*
4. *The Arbitration Act, No.19 of 2000*
5. *The Arbitration (Court Proceedings) Rules, 2001*
6. *The High Court Act, Chapter 27 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is an appeal against the decision of B.G Shonga J, of the High Court dated 21st December, 2022 setting aside the Final Arbitral Award dated 14th December, 2020 rendered by Mr. Fredrick Shabani Mtamira, the Sole Arbitrator on the ground that it offends public policy.

1.2 On 31st December, 2020, the respondent issued out of the Commercial Division of the High Court, Originating Summons for an order to set aside the said Arbitral Award for the following reasons:

i. *That the said award is contrary to public policy.*

ii. *The reasoning and /or conclusions go beyond mere faultiness and /or incorrectness, defy logic and /or accepted moral standards and are contrary to commercial and construction sense.*

iii. *The arbitrator did not apply his mind to the questions and/ or totally misunderstood the issues resulting in injustice; and*

iv. *The award consists of mistakes of law apparent from the face of the award.*

1.3 In this judgment we shall refer to the parties according to their designations herein.

2.0 BACKGROUND

2.1 On 9th April, 2013, the respondent entered into a contract with the appellant for the upgrading of roads namely: D753/A2 Kenneth Kaunda International Airport through Kasisi to Great East Road which is approximately 24.7 km and D 176 Ngwerere Road from T2 Great North Road at Kabangwe to D753 at Kasisi Mission junction which is approximately 23km, D562 from T2 at Caltex to D 176 at Ngwerere Basic School which is about 7km as well as the

Zambezi Extension from Roma Park to Ngwerere which is about 6km. The initial contract sum was K168,786,867.66 for a period of 18 months.

2.2 On 28th May, 2013, the respondent issued the commencement order for the said works to the appellant. The dispute between the parties arose when the appellant wrote a letter dated 10th February, 2020 to the respondent terminating the said contract. The appellant then declared a dispute relating to the performance and termination of the contract.

2.3 Clause 24.2 of the said contract provided inter alia that any dispute arising out of the said contract shall be resolved by alternative dispute resolution. Clause 24.4 further stipulated that where the parties had chosen to refer the matter to arbitration, such arbitration would be governed by the Arbitration Act, No.19 of 2000.

2.4 The parties therefore referred the matter to arbitration and appointed Mr. Fredrick Shabani Mtamira as sole arbitrator pursuant to a letter dated 28th April, 2020.

2.5 The appellant had raised the following claims before the arbitrator:

i. *Damages for loses due to the abrupt truncation of 30km of road works from the contracts, on 13th June, 2016 and the subsequent failure by the respondent to issue replacement work on the D176 as promised.*

ii. *Damages for losses due to fundamental breach of the contract by the respondent under GCC 59.2 (b) due to the indefinite stoppage of all work by the respondent as of 28th September, 2016.*

iii. *Damages for losses resulting in the termination of the contract by the respondent due to fundamental breach of the contract under GCC 59.2 (b), which related to late or non-payment by the respondent.*

iv. *Damages for losses resulting from delays and disruption losses caused by the respondent's or Project Manager's late issuing of detailed design and the late engagement of the Project Manager by the respondent.*

v. *Recalculation of interest due to the appellant for late payments.*

vi. *Damages for currency losses due to the 26 months project delay by the respondent and*

vii. *Recalculation of Interim Payment Certificate (IPC) no. 24.*

2.6 The respondent denied the claims and counterclaimed as follows:

i. *Damages for breach of contract.*

ii. *The service of four motor vehicles that were returned to the respondent by the appellant before they were serviced, which was contrary to the requirements under the contract.*

iii. *The return of accompanying documentation such as white books and spare keys to the respondent.*

iv. *The return of computers, printers, power supply-claim and peripherals (Digital camera, GPS) as required under specification section C10107 (h) and (I) of the contract and*

v. *costs*

2.8 **ARBITRATION PROCEEDINGS**

We hasten to mention that the arbitration proceedings were between the appellant as claimant verses the respondent herein as 1st respondent and National Road Fund Agency as 2nd respondent. The arbitration proceedings took place on the 1st, 2nd and 4th September, 2020 at the chambers of the appellant's advocates Messrs OMM Banda and Company.

2.9 **SUMMARY OF FINAL ARBITRAL AWARD**

2.10 In the final arbitral award rendered on 14th December, 2020 the arbitrator determined inter alia as follows:

2.11 On the issue whether the truncation of 30km of roadworks by the respondent was agreed upon by the parties; the arbitrator found that the parties had agreed in minutes of the meeting held on Saturday 11th April, 2015 that the appellant would be given Chaminuka to Kabwe roadworks in exchange for the truncated 30km of Ngwerere road which was given to AVIC International Limited and since the replacement Chaminuka to Kabwe road has never been awarded to the appellant is entitled to damages for loss of profit for the truncated 30km portion in the sum ZMW 38, 746, 175. 64.

2.12 On the question whether there was a fundamental breach of contract by indefinite stoppage of the works by the respondent, the arbitrator held firstly, that under the contract, the appellant could not claim compensation for prolongation costs for unproductive time as the only available remedy was termination. Secondly, that the respondent never instructed the appellant to suspend the works indefinitely.

2.13 On the question whether the late/non-payment by the respondent was a fundamental breach entitling the appellant

to terminate the contract, the arbitrator found that the contract could not be terminated by effluxion of time because there was no such provision. That there was no evidence that the contract was terminated by the respondent for convenience.

2.14 That there was a further extension validly granted by the respondent by letter dated 20th October, 2015 from 28th September, 2015 to 27th September, 2016, as per practice, and no notice of termination of the contract was given by the respondent after the extension period, therefore the contract was still in force.

2.15 Under clause 59.2 (d) of the contract, the appellant could terminate the contract for fundamental breach due to late or non-payment by the respondent. On this basis, the appellant was awarded damages for loss of profit due to termination in the sum of ZMW 4,670,456.56 for the 3 bridges given to AVIC International Limited and ZMW 44,816,409.56 for the balance of the 13km on D176 plus 21.7Km for the Katende Kasisi section remaining outstanding at the time of the termination.

2.16 On the question whether the appellant was entitled to damages for delays and disruptions to the project caused by

the respondent, the arbitrator found that as admitted by the respondent in the Additional Statement of Defence, the respondent delayed in issuing detailed designs which led to the extension of time by the project manager or contract variation as per clause 28.1 of the contract.

2.17 That the project manager in his letter dated 20th October, 2015 to the appellant approved the design by the appellant and on account of the delay due to the design component addition, awarded an extension to the intended completion date from 28th September, 2015 to 27th September, 2016.

2.18 The arbitrator further awarded damages in the sum of ZMW2,790,000.00 for unrecoverable expenses for the plant and equipment standing time.

2.19 The arbitrator further found that the respondent ordered for an extension of the contract for a period of 22 months and the contract was still subsisting for a further period of 4 months from the last extended period up to the termination by the appellant, bringing the total delay to 26 months. On this basis, the arbitrator held that the appellant was entitled to damages in the sum of ZMW 24,380,352.32 for loss of overheads contribution.

2.20 On the issue of recalculation of interest for late payments, the appellant was awarded ZMW 1,069,242.13 additional interest for the period between certification of payments by BICON Zambia Limited the project manager employed by the respondent to the dates when the respondent checked/verified the Interim Payment Certificates (IPCS).

2.21 The arbitrator further awarded the appellant the sum of K8,467,033.13 for unclaimed interest to date as it was uncontested by the respondent.

2.22 The claim for VAT reversal of ZMW 17,666,623.00 was disallowed on the principle that VAT cannot be paid on interest.

2.23 The arbitrator found that the appellant was not entitled to damages for currency losses during the 26 months project delay by the respondent because pursuant to clause GCC 44.2 of the contract the project manager was empowered to increase the contract price and extend the completion period. Therefore, it was not a matter of currency loss depreciation.

2.24 On the issue of recalculation of IPC No. 24, the arbitrator found that the appellant was entitled to this. That the amount due was K469,370.85 for the design of the 15km road from Chatonel to Chaminuka Lodge and ZMW 550,000.00 for the

design of the bridges. This was due to the fact that the works were given without the design and the appellant was not contracted to design the road as well. That the appellant had submitted its prices for the designs to the respondent who remained silent.

2.25 The appellant was further awarded ZMW 3,808,756.56 for materials on site and ZMW 15,208,426.68 for revision of rates.

2.26 As regards the counterclaim, the arbitrator determined as follows:

2.27 The respondent was entitled to the return of the vehicles, together with the vehicle documents, and spare keys. The claim for the vehicles to be serviced failed because the contract only stipulated that the service maintenance of the vehicles would be done over a period of 18 months and that there was no stipulation that the vehicles should be serviced before handover.

2.28 Since the appellant admitted that it did not hand-over the computers, printers, power supply and peripherals (Digital Cameras, GPS) as required by the contract, the respondent was entitled to the return of the said items.

3.0 AFFIDAVIT IN SUPPORT OF ORIGINATING SUMMONS FOR AN ORDER TO SET ASIDE THE FINAL AWARD

3.1 The affidavit in support of the application to set aside the award filed on 31st December, 2020 was sworn by Chabala Chabala, the Principal Engineer for the respondent who gave the background of the matter as stated herein before. He further stated that he was advised by in house counsel that the award was contrary to public policy.

4.0 AFFIDAVIT IN OPPOSITION

4.1 The affidavit in opposition filed on 4th February, 2021, was sworn by Besa Joseph Mfula, the Managing Director of the appellant company who made it clear that the background of the matter was common ground. In brief, he stated that he had been advised by counsel and verily believed the same to be true that the deponent of the affidavit in support of the originating summons for an order to set aside the award did not provide any evidence to substantiate his assertion that the award is contrary to public policy. That the issues were defined by the parties at the beginning of the arbitral proceedings and the arbitrator determined each and every issue raised.

4.2 The deponent further stated that should the arbitral award be set aside; the integrity of the arbitral proceedings would be seriously undermined and this would inadvertently engender considerable pecuniary quandary to the detriment of the appellant who is entitled to enjoy the fruits of the award.

5.0 DECISION OF THE COURT BELOW

5.1 In determining the matter, the lower court relied on **section 17 (2) (b) (ii) of the Arbitration Act No. 19 of 2000** which empowers the court to set aside an arbitral award on the ground of being in conflict with public policy.

5.2 As regards the definition of public policy, the Court below adopted the holding in **Zambia Revenue Authority v. Tiger Limited and Zambia Development Agency[1].**

5.3 The lower court found that the arbitrator demonstrated that he applied his mind to the issues that were before him and made a reasoned award. Nevertheless, she was of the view that there were fundamental flaws in the award as follows;

5.4 That Article 177 (5) (d) of the Constitution of Zambia 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 regulation 149 and 150 of the Public Procurement

Regulations Statutory Instrument No. 63 of 2011 had been disregarded.

5.5 That despite acknowledging the constitutional and statutory provisions that require the Attorney General to give advice and approval of contracts and variations of contracts in which government has an interest, the arbitrator proceeded to determine that the contract was varied without proof of the required approval.

5.6 That indifference to constitutional and public procurement statutory requirements goes beyond mere faultiness or incorrectness. That, the disregard constitutes 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.

5.7 The learned Judge found that the award having been made on the basis of the validity of extension of the contract, absence of the approval of the Attorney General offends public policy. She accordingly set the arbitral award aside pursuant to section 17 (2) (b) (ii) of the Act. Costs were awarded to the applicant.

6.0 MEMORANDUM OF APPEAL FILED HEREIN

6.1 The appellant has advanced fifteen (15) grounds of appeal as follows:

1. ***The learned Judge in the court below erred in law and fact when she applied the constitutional provisions of 2016 retrospectively to the contract variations issued by the respondent itself in 2015 before the Constitutional Amendments of 2016 came into force without taking into account that at the time the role of the Attorney General was merely advisory in nature and purely an internal issue and that the approval body was the Road Development Agency Procurement Committee as per the approval requirement procedures imposed by the Public Procurement Act of 2008 and Public Procurement Regulations of 2011 and thus did not in any way offend public policy.***
2. ***The learned trial Judge misdirected herself in law and fact when she ruled that the contract was contrary to Article 177(5) (d) of the Constitution, as amended by Act No. 2 of 2016***

and section 54 (2) (e) and (3) of the Public Procurement Act when the requirement to get the advice and/ or approval of the Attorney General is the sole responsibility of the respondent and in any case, it is an internal procedure which is not the concern of the appellant, it being a third party.

3. *The learned trial Judge misdirected herself when she completely took a lackadaisical approach by failing to rule on issues that transpired before the variation/extension of time were introduced by the parties and on which other parts of the arbitral award were based such as materials on site, payment for design fees, payment for truncated works and many other issues thereby completely misconstruing the spirit of the contract entered into by the parties and the legal entitlements thereof.*
4. *The learned Judge in the court below erred in law and in fact when she accepted evidence from the respondent which was not included in the*

affidavit, in contravention of Rule 23 of the Arbitration (Court Proceedings) Rules, 2001.

5. *The learned Judge in the court below erred in law and in fact when she accepted evidence from the bar adduced by learned counsel for the respondent during the hearing as the respondent failed to proffer the requisite particulars to indicate that the Arbitral Award rendered by the tribunal was contrary to Public Policy in its affidavit in support of the application to set aside the Arbitral Award.*
6. *The learned trial Judge in the court below erred in law and fact when she failed to adjudicate upon each and every issue that was raised in the court below thereby inadvertently engendering a miscarriage of justice.*
7. *The learned Judge in the court below misdirected herself when she proceeded to rule on issues that were never raised by the respondent either at the Arbitral Proceedings or indeed at the hearing of its application in the High Court thus exceeding*

her jurisdiction and assuming the capacity of a litigant.

8. *The learned Judge in the court below abdicated her responsibility when she declined or did not adjudicate on the consequences of setting aside an Arbitral Award without charting the way forward for parties thus leaving the appellant discombobulated especially that the respondent had already started paying towards the Arbitral Award in clear admission of the respondent's own obligations.*
9. *The learned Judge in the court below erred in law and fact when she failed to critically analyze the issues in contention between the parties thus penning a judgment that offends the tenets of good judgment writing.*
10. *The learned trial Judge in the court below misdirected herself in law and fact by not taking into account the conduct of the respondent's ostensible portrayal to the appellant that indeed the Attorney General's approval for variation/extension had apparently been*

obtained by the respondent as the respondent's subsequent Certified Interim Payment Certificates (IPCS) and Final Account later sent to the appellant quoted the new increased contract sum.

11. *The learned trial Judge in the court below erred in law and fact when she made a sweeping statement that the arbitrator actually acknowledged that there was no approval of the Attorney General to sanction a variation but she failed to point to the exact page in the Arbitral Award where that was the case, thus basing her judgment on sweeping statement that is not underscored, underpinned or buttressed by any cogent evidence.*

12. *The learned trial Judge in the court below erred in law and fact when she disregarded the entire contract based on allegations of a variation which was not allegedly legitimatized by the Attorney General without cogent evidence adduced either at the arbitral proceedings or at the hearing of the application, consequently*

making a caricature of reality leading to a total miscarriage of justice.

13. *The learned trial Judge erred in law and fact when she delved into the merits of the award by holding that a failure to allegedly obtain approval by the Attorney General made the contract between the parties invalid which was an attempt by the court to re-open the decision of the Arbitral Tribunal.*

14. *The learned trial Judge erred in law and fact when in one breath, she acknowledged that the arbitrator demonstrated that he applied his mind to all the issues at hand but in another breath deduced that the arbitrator acknowledged that there was no approval from the Attorney General for a variation which deduction is an oxymoron.*

15. *The learned trial Judge erred in law and fact when she interfered with the finding of facts of the tribunal and sought to undermine them when it was the tribunal that had the opportunity to*

interrogate all the evidence that the witnesses adduced before it.

7.0 APPELLANT'S HEADS OF ARGUMENT

7.1 At the hearing of the matter, counsel for appellant relied on the heads of argument filed on 18th January, 2023. In arguing ground one, counsel pointed out that the trial judge belabored to demonstrate that the contract between the parties did not comply with the provisions of **Article 177 (5) (d) of the Constitution (Amendment) Act, No. 2 of 2016**, which requires the Attorney-General to give advice and approval of contracts in which the government has an interest.

7.2 According to counsel, the import of **Article 177 (5) (d) of the Constitution (Amendment) Act, No. 2 of 2016**, is that the Attorney General's role is merely to offer legal advice and thus, the onus to seek that legal advice from the Attorney General before signing a contract to which the government intends to be a party lies on the government. Where the government neglects to do so, the party entering into a contract with the government should not be punished for that

lapse or negligence. That the above law does not apply to variations.

7.3 Counsel further submitted that in any case, the duty to seek advice from the Attorney General was only included in the Constitution (Amendment) Act, No. 2 of 2016 which came into force on 5th January, 2016. Thus, the lower court's reliance on the said provisions was a complete misdirection as the law does not operate retrospectively. Moreover, the purported illegal variations were done in 2015.

7.4 Counsel further submitted that it is not true that clearance of the Attorney General was never obtained. In fact, the Attorney General had consented and given clearance before the contract was executed. Our attention was drawn to the letter dated 2nd April, 2013 from the Ministry of Justice signed by the then Attorney General Mumba Malila SC, which appears on page 81 of the Record of Appeal, which reads:

> ***"I have examined the two draft contracts relating to upgrading of RD 149 and D 151 Lusaka Province and D 753/A including D 564 respectively. They are satisfactory and are cleared for signature."***

7.5 Counsel contended that the conclusion by the trial judge that the contract had no clearance/approval from the Attorney General was an unjustifiable extrapolation of fact which was purely based on conjecture. The contract between the parties was executed by the last party on 9th April, 2013. Therefore, the contract had the full clearance and approval of the Attorney General and was valid.

7.6 On ground 2, counsel for the appellant referred us to **Section 54 (2) (e) and 3 of the Public Procurement Act, No. 12 of 2008** particularly paragraph (e) which stipulates the need to get approval of the "Attorney General". He also referred us to **Section 2** and **Section 22 (2)** of the same Act in furtherance of the argument that the Attorney General was not listed as an approving authority.

7.7 That even assuming that there was no approval from the Attorney General, that dereliction of duty by the respondent would not have been the appellant's concern because matters of internal procedure are not the concern of third parties. To buttress this point, counsel referred us to a number of authorities including the cases of **National Airport Corporation Limited v Reggie Ephraim Zimba**[1] **and**

Saviour Konie and Bank of Zambia v Chibote Meat Corporation[2].

7.8 Counsel further stated that, although the cases cited dealt with companies, the principle can be extended to body corporates such as the Road Development Agency and National Road Fund Agency which are statutory bodies. He further referred us to clauses 25.1 and 25.2 of the contract between the appellant and the respondent which provide as follows:

> ***"25.1 The client (respondent) has full power and authority to enter into and perform this contract and this contract when executed will constitute a valid and binding obligation on the client in accordance with its terms."***
>
> ***"25.2 The contractor (appellant) is a corporation in good standing, duly organized and validly existing under the laws of Zambia, and has all corporate power and legal authority to carry on its business as now being conducted."***

7.9 According to counsel, the import of the foregoing is that at the time of execution of the contract, the respondent had full

power and authority to enter into the contract. Thus, throughout the arbitral proceedings and the trial in the High Court, there was no mention of the respondent's alleged want of authority to enter into the said contract.

7.10 Counsel further pointed out that there are two parts of the contract in question;

a) Before the contract sum was revised.

b) After the contract sum was revised.

7.11 That there is no evidence to support the deduction by the trial court that the approval of the Attorney General was never obtained before the initial contract which has a contract sum of ZMW 283,339,988.28 was awarded. Thus, the judge's decision to invalidate the whole contract was not based on cogent evidence and has no merit. Counsel was of the view, that the trial judge failed to appreciate the difference between a variation and an amendment in a construction contract. That according to clause GCC 1 (z) at page 51 of the Record of Appeal;

"A variation is an instruction given by the Project Manager which varies the work."

7.12 Counsel further submitted that the combined effect of clauses 37.1, 38.3, 39.1, 40.1, 40.2, 40.3 and 40.4 of the contract is that a variation is simply an instruction issued by the Project Manager to the contractor where the value of the works has changed or where certain conditions have been encountered which make the performance of the contract difficult or impossible. Further that where the contract price increased by 15%, the procedure was that the Project Manager only needed the approval of the client, who in this case is the respondent before authorizing it. It was further contended that the revised contract sums were approved by the respondent and the Project Manager in keeping with the contract. Therefore, the trial judge erred in treating a variation as an amendment.

7.13 On ground 3, counsel submitted that the arbitral award was based on the initial contract and not on the revised sum. Notably, the arbitral tribunal was called upon to determine 10 claims by the parties during the arbitration and only one of them related to issues that happened after the contract sum was revised.

7.14 Counsel further stated that the relationship between the parties was regulated by the contract, contract documents and the Public Procurement Act and Regulations. That **Regulation 149 (3) of the Public Procurement Regulation, 2011** which the trial court relied on, deals with amendments and not variations. That the combined effect of **Regulation 149 (3) and 150 (1) (a) (b) and (2) of the Public Procurement Regulation, 2011** is that an officer appointed under contract, in this case, the Project Manager, has authority to vary the contract where it is clear that unforeseen circumstances have occurred.

7.15 Counsel also referred to clause 44.1 and clause 28.1 of the contract in furtherance of the argument that the trial judge erred in holding that the variation needed the approval of the Attorney General before it could be validated. The drawings form part of the contract and the clearance given in the letter dated 2nd April, 2013 also cleared the drawings.

7.16 The gist of the argument on ground 4 is that **Rule 23 (3) of the Arbitration (Court Proceedings) Rules, S.I No.75 of 2001** requires the applicant to show in the affidavit, evidence with respect to the grounds relied upon. In casu, the

respondent relied on **section 17 (2) (b) (ii) of the Arbitration Act**, but has failed to furnish any evidence to establish that the final award was contrary to public policy. This entails that all the facts and evidence relied upon by the respondent ought to have been included in the affidavit in support and not in the skeleton arguments.

7.17 On the 5th ground, counsel submitted that the trial judge erred in law by accepting submissions which were not based on facts included in the affidavit. He cited the case of **Zambia Revenue Authority v Hitech Trading Company Limited**[3] to the effect that evidence from the bar no matter how spirited is inadmissible. Counsel further argued that during the hearing of the matter, there was no mention that the contract in question was not valid or that there was no approval from the Attorney General. Therefore, the decision by the trial judge was predicated on inadmissible evidence and thus should be set aside.

7.18 On ground 6, counsel argued that the trial court failed to adjudicate upon each and every allegation/issue raised so that there is finality. Counsel alleged that the following issues

raised by the appellant were not determined by the lower court, for instance;

1. The appellant contended that the respondent had made a sweeping statement that the arbitral award was contrary to public policy in paragraph 15 of its affidavit but the court never ruled on this point.
2. That the respondent's application was seeking to challenge the merits of the award as opposed to the procedure but the trial court failed to adjudicate on that.
3. The appellant contended at the hearing that the application by the respondent in the court below was not competent as there was no evidence adduced upon which the ground of public policy could be supported but the court glossed over this issue.
4. The appellant contended that the entire application by the respondent was contrary to **rule 23 of the Arbitration (Court Proceedings) Rules, 2001** which requires all the evidence to be contained in the affidavit and not skeleton arguments but this was glossed over.

7.19 On the 7th ground, counsel submitted that the lower court did not call upon the parties to address her on the issues of validity of extension and variation orders made under the contract. The same issue was not even raised during the arbitral proceedings.

7.20 That by volunteering a ruling the judge misdirected herself. To fortify this submission counsel cited the cases of **Hakainde Hichilema & Others v the Government of the Republic of Zambia**[4] and **Murray & Roberts Construction Limited & Another v Lusaka Premier Health Limited & Industrial Development Corporation of South Africa Limited**[5] on the principle that trial courts should not grant reliefs beyond what has been prayed for.

7.21 The argument on the 8th ground was that the trial judge simply set aside the arbitral award without guiding the parties as to course of action to take under the circumstances. In any case, the respondent already started making substantial payments towards the arbitral award which was a clear admission of its obligations.

7.22 On ground 9, counsel contended that in the present case, the Judge made a biased evaluation of the evidence in that she

did not rule on the fact that it was the respondent's responsibility to seek approval of the Attorney General before approving the extension of time. The case of **Attorney General v Marcus Kapumba Achiume**[6] was cited on the need for trial courts to make a proper and balanced evaluation of the evidence before it.

7.23 Additionally, counsel submitted that in the letter dated 20th October, 2015 the respondent informed the appellant that extensions were pending clearance from the Attorney General. Therefore, if that clearance was not obtained, then it was the respondent's fault. Counsel relied on the case of **Grave v Mills**[7] which underscores the principle that a party cannot be allowed to rely on his default to escape liability.

7.24 The submission on the 10th ground was that in any case, termination of the contract was as a result of a fundamental breach which entitled the appellant to damages for loss of profit.

7.25 Counsel further submitted that the respondent has never denied the fact that the variation for extension of time was correctly granted by them.

7.26 In support of ground 11, counsel submitted that the trial Judge failed to appreciate the fact that variations of contracts only require the approval of the project manager and not the Attorney General. That the arbitrator had analyzed and reproduced all the variation orders in the arbitral award.

7.27 That even assuming that the extension of time was not approved by the Attorney General, the initial contract which was approved by the Attorney General was still in force until the appellant terminated it on 10th February, 2017. Hence, the validity of the variations or alleged failure to get approval from the Attorney General does not affect the contract which was still valid.

7.28 Counsel further submitted that there was no objection by the Attorney General to the letter dated 20th October, 2015, and based on the reasons stated above, it is clear that the Attorney General had no problem with the extension of time and price adjustment.

7.29 In support of the 12th ground, counsel submitted that the variation orders were all issued by the respondent and not the appellant. Besides, the contract does not specify the maximum number of variation orders that would constitute

an amendment. Counsel pointed out that when the contract was awarded to the appellant it had no drawings. He referred to clause 2.3 of the contract under the heading "interpretation". The said clause lists the documents forming part of the contract as follows:

1. Contract
2. Letter of acceptance
3. Contractor's bid
4. Special conditions of the contract
5. General conditions of the contract
6. Specifications
7. Drawings
8. Bill of quantities
9. Any other document listed in the contract as forming part of the contract.

7.30 He submitted that the letter of clearance by the Attorney General dated 2nd April, 2013 cleared even the drawings and bill of quantities as they form part of the contract. That since the Attorney General had already given clearance with regards to the drawings and specifications which were supposed to be designed by the respondent, the failure to

produce the drawings on time was a compensation event which necessitated an extension of time. Consequently, there was no need to obtain clearance from the Attorney General for the variation as drawings form part of the contract. The Attorney General only needed to be informed that the completion date would be extended because of the failure to produce drawings on time.

7.31 Counsel further submitted that in engineering contracts, the client through its engineers has to prepare the drawings, designs and specifications which are to be used by the contractor. Thus, in an admeasurement contract, as such the one in *casu*, where the contractor (the appellant) took up the responsibility of preparing the drawings and designs, the appellant was entitled to be paid for that extra work. That the extra work affected the Bill of Quantities and necessitated both the extension of time as well as the adjustment of the agreed contract sum from ZMW 283,339,988.28 to ZMW 488,847,579.53.

7.32 He further drew our attention to the minutes of the meeting held between the parties, which appear at page 369 of the Record of Appeal where it reads;

"Lack of Design

The contract awarded was a "build" only contract. However, at the time of commencement, there was no design available and therefore, no works could be done. Only after 4 months from commencement did RDA extend the works contract to include design responsibilities for the contractor with the duration of 6 months. This resulted in a total delay of 10 months.

The contractor further stated that lack of designs was a common feature on all link Zambia Projects leading to project delays.".

7.33 That it was clear from the minutes of the meeting that the appellant was formally tasked with the responsibility of coming up with the drawings and designs for the works at a cost. Counsel cited the case of **Bank of Zambia v Vortex Refrigeration Company Limited and Another**[8] in furtherance of the argument that where the contractor has made drawings, designs and specifications, he is entitled to recover the money spent as an extra cost. Furthermore, the

contractor will be entitled to an extension of time as that is a compensation event.

7.34 Counsel further stated that the contract price only changed in proportion to the cost estimates and the quantities in the bill of quantities. That the appellant cannot be faulted for the delay which was occasioned by the respondent. The contract sum is basically a cost estimate and is not fixed. That this contract was regulated by **Regulations 132 (1)-(6) of the Public Procurement Regulations, S.I No. 63 of 2011**.

7.35 That the damages were based on the agreed rates in the Bill of Quantities which never changed even after the contract price was adjusted. In fact, regulation 132(1)-(6) of the Public Procurement Regulations discusses obtaining approval from the approving body for an amendment and not a variation. Thus, the court erred by holding that the alleged failure to obtain approval from the Attorney General before effecting the variations was a misdirection. We were also referred to **section 138 (1) and 138 (3) (f) and (4) of the Public Procurement Regulations, 2011** in support the contention that regulations provide for price adjustment where there is a provision in the contract that sanctions it. Clauses 38.1,

38.2, 38.3 of the contract provided the procedure for price adjustment and the letter dated 20th October, 2015 was confirmation that the contract sum was adjusted by the project manager in consultation with the respondent. That even assuming that there was need to obtain approval for the variation, that would not affect the validity of the rest of the contract as per clause 68.1 of the contract.

7.36 On the 13th ground, counsel referred us to the case of **Light weight Body Armour v Sri Lanka Army**[9] to advance the argument that it is not the duty of the court when dealing with an application to set aside an arbitral award to look into the merits of the case by re-examining the evidence or conclusions of the arbitral tribunal.

7.37 In light of the above authority, it was submitted that the trial judge in this case misdirected herself by looking into the merits of the case.

7.38 On the 14th ground, counsel submitted as follows: That despite finding that the arbitrator applied his mind to the issues which were before him, the lower court u-turned and held that the extensions were not valid. In other words, she re-opened the findings of the arbitrator and disregarded

them. This is wrong in principle because it exceeds her jurisdiction as she had no opportunity to hear evidence from the witnesses.

7.39 The submissions on the 15th ground of appeal were substantially the same as the submissions under ground 14.

7.40 In conclusion, counsel stated that having demonstrated that the judgment of the learned trial judge is wrong in principle and that it was made on the basis of erroneous facts and principles of law, he prayed for;-

a) An order that the judgment appealed against be set aside.

b) An order reinstating the arbitral award dated the 14th day of September, 2020 and that the respondent be ordered to pay the arbitral sum together with interest within 28 days of the judgment in keeping with the contract.

c) An order that a reconciliation of accounts at National Road Fund Agency should be done by taking into account the monies already paid towards the arbitral sum.

d) Any other relief the court may deem fit and

e) Costs.

8.0 RESPONDENT'S HEADS OF ARGUMENT

8.1 The respondent opposed the appeal and relied on the heads of argument filed on 16th February, 2023 wherein. To counter ground one, counsel for the respondent submitted that the appellant misunderstood the basis of the learned trial judge's reliance on the constitutional provisions under this ground. This is because the issue in dispute does not relate to whether or not the Attorney General gave approval to sign the contract at its inception. However, what is in issue is the lack of approval of the variation of the contract by the Attorney General. This is an important distinction because as it would appear, the arbitrator's award stemmed largely from his finding that the contract was varied without apparent clearance from the Attorney General's chambers.

8.2 That the arguments fronted by the appellant relating to the alleged retrospective application of **Article 177 (5) (d) of Constitution (Amendment) Act, No.2 of 2016**, to an alleged variation of contract which allegedly took place in 2015 is misleading as the lower court's holding was that the variation was not approved by the Attorney General.

8.3 According to counsel, the appellant is claiming that the variation of the contract was valid and did not require approval from the Attorney General and in the same breath suggesting that the lack of approval by the Attorney General though necessary and absent is not fatal to their claim as this was a procedural and internal issue of the respondent.

8.4 Counsel further submitted that in the event that this court takes the view that it was erroneous for the lower court to apply the above mentioned constitutional provision to the facts of this matter, that should have no bearing on the fate of this ground as the same would still be destined to fail considering that the court also took into account **section 54 (2) (e) and 3 of the Public Procurement Act, No.12 of 2008 and Regulation 149 and 150 of the Public Procurement Regulations, S.I No. 63 of 2011** in arriving at its decision. Counsel submitted that section **52 (2) (e) and 3 of Public Procurement Act** provides that the Attorney General's approval is mandatory and in the absence of the same, the contract is void. That a variation of a contract is an agreement and as such must meet the elements of a valid contract. Moreover, there was evidence in form of a letter in which the appellant was informed that approval was spending clearance

by the Attorney General's chambers which was acknowledged by the arbitrator. It is therefore clear that the public policy issue that the lower court identified bordered on willful disregard of the legislative provisions stated above and was not limited to the constitutional provisions as suggested by the appellant.

8.5 On ground 2, counsel contended that the arguments by the appellant under this ground reveal a lack of appreciation of the distinction between a public body and a private company. That the authorities cited relating to the indoor management policy and internal procedures in the management of a company do not apply as they do not relate to public bodies which are a creature of statute unlike private or public companies which are governed by the **Companies Act No. 10 of 2017**.

8.6 Counsel further submitted that the appellant is essentially asking this court to endorse an illegality on the basis that it was perpetrated by the respondent. That in line with the case of **Valsamos Koufou v Anthon Greenberg**[10], parties cannot contract outside the law.

8.7 The respondent's counsel further submitted that the distinction between variation and amendment is misplaced

as it was not raised in the court below. That there is no alternative to obtaining approval from the Attorney General as the law is couched in mandatory terms. This is because public bodies such as the respondent administer public funds and as such it is important for the chief legal advisor of the government to view and consider the proposed variation of the contracts so as to satisfy himself on the exposure and liability of the government. Failure to obtain approval, renders the contract void. Thus, any argument by the appellant, to suggest that the absence of approval should not matter in the present case must be disregarded.

8.8 In response to ground 3, counsel for the respondent disputed the submission by the appellant that the arbitral tribunal was called upon to determine 10 claims out of which only one related to the issue of what transpired after the contract sum was revised. That the issue was whether the appellant was entitled to damages for loss of profits. Counsel reproduced a portion of the lower court's judgment at page J25 where the court held that;

> ***"In view of the above, I am satisfied that the Award was made on the basis of the validity of the***

extension of the contract, absent the approval of the Attorney General offends public policy."

8.9 On the basis of the above passage, counsel argued that it was misleading to state that only one of the ten claims related to events that transpired after the alleged variation of the contract. Further that the lower court did not go into the merits of the case in line with the case of **Light Weight Body Armour v Sri Lanka Army**[9].

8.10 On ground 4, in response to the appellant's contention that all the facts and evidence relied on by the respondent in its originating court action to set aside the award should have been contained in the affidavit and not skeleton arguments, counsel for the respondent stated that paragraph 15 of the affidavit in support of the originating summons for an order to set aside the award, did mention the award being contrary to public policy. That the skeleton arguments filed together with the affidavit, detailed the public policy grounds upon which the respondent sought to challenge the award. If the respondent had included all the evidence demonstrating how the award offended public policy in the affidavit and not skeleton arguments, it would have gone against the rules on drafting affidavits as contained in **order 5 rule 15 of the**

High Court Rules, **Cap 27 of the Laws of Zambia**. In any case, **Rule 23 (3) of the Arbitration (Court Proceedings) Rules, 2001** does not suggest that the affidavit in support of the application to set aside an award differs from other affidavits. It only emphasizes the mandatory inclusions therein, all of which were complied with by the respondent.

8.11 Counsel for the respondent was of the view that ground 5 is similar to ground 4 and as a result placed reliance on the arguments canvassed in ground 4. He simply added that no evidence was adduced from the bar by the respondent's counsel.

8.12 On the 6th ground, counsel submitted that upon considering the grounds raised by the respondent in the application to set aside the award, the court found that the public policy ground was proved. He pointed out that the lower court did not gloss over any issue raised by the appellant's counsel in their submissions.

8.13 On ground 7, it was submitted that one of the grounds upon which the award was challenged was that; *"The award consists of mistakes of law apparent from the face of the award."* In considering whether the said ground had been proved, the court was entitled to consider whether the

contract between the parties was varied in accordance with the law. This does not mean that the relief granted was volunteered.

8.14 The essence of the submissions on ground 8 is that it was not the duty of the court to chart the way forward for the parties following the setting aside of the arbitral award.

8.15 On ground 9, counsel submitted that the judgment of the lower court did not fall short of the required standard of judgment writing as envisaged in **Savenda Management Services v Stanbic Bank Zambia Limited**[11].

8.16 Further, that the court below clearly wrestled with the issues before arriving at its decision. That the appellant's actually attack the reasoning of the lower court rather than the form of the judgment.

8.17 The gist of the argument on ground 10 is that the issues raised on this ground were not raised in the court below. Further that the appellant seeks to rely on fresh evidence in form of interim payment certificates which evidence has not been permitted to be adduced on appeal.

8.18 On ground 11, counsel contended that the court below based its decision on the fact that the arbitrator actually acknowledged that there was no approval from the Attorney

General to sanction the variation. The mere fact that the lower court did not point out the exact page from where she derived the arbitrator's holding stated above, has no effect on the judgment.

8.19 The arbitrator did not deny the fact that there exists a legal requirement for the Attorney General's approval for variations of contracts but he simply took the view that since the parties had previously varied the contract without approval from the Attorney General, that requirement was not mandatory in the present case.

8.20 In opposition to ground 12, it was contended that the issues of drawings that the appellant raised are novel, as they were not considered by the arbitrator neither were they considered by the court below. Therefore, whether or not they were added to the contract is of no consequence as the issue for determination in the court below was whether the arbitral award was contrary to public policy.

8.21 Counsel further pointed out that **Regulations 132 (1) to (6), and Regulation 138 (1) (3) of the Public Procurement Regulations**, were never canvassed by either the lower court or the arbitral tribunal and they offer no help to the appellant.

8.22 Grounds 13, 14 and 15 were argued together as follows: the statement by the appellant's counsel that the trial judge reproduced the respondent's arguments in its judgment was misleading because the trial court merely considered the arguments under the heading "Arguments in support of setting the award". The passage reproduced by the appellant under this ground was not taken from the determination portion of the judgment showing that it was not a basis of the court's decision.

8.23 It was further submitted that the court below did not delve into the merits of the arbitral award but confined itself to the grounds put forth for setting aside the award in accordance with the law. The fact that the trial judge acknowledged that the arbitrator applied his mind to the issues is of no consequence. That the learned trial judge properly exercised her duty and did not in any way exceed her jurisdiction.

8.24 Finally, counsel prayed that the appeal be dismissed with costs.

9.0 OUR ANALYSIS AND DECISION

9.1 We have looked at the record of appeal and the arguments made on behalf of both parties.

9.2 The grounds of appeal are so linked to each other so that both parties kept on repeating themselves in their submissions. Nevertheless, the issues as we see them, can be classified in three (3) categories:

1. The procedure to be followed by a court dealing with an application to set aside an arbitral award. The grounds of appeal falling under this head are 4,5,6 and 7.
2. Merits of the arbitral award and the lower court's findings. The grounds of appeal relating to this part are 1 to 3, and 10 to 15.
3. Tenets of judgment writing – grounds 8 and 9

9.3 We shall therefore proceed to tackle the grounds according to the said classification.

9.4 **GROUNDS 4-7**

The case of **Light Weight Body Armour v Sri Lanka Army**[9] relied upon by the appellant on how courts should deal with applications to set aside arbitral awards is a foreign judgment which is merely of persuasive value to us. In that case, it was aptly held that the court faced with such an application should not examine the merits of the case by re-analyzing the evidence or conclusions of the arbitral tribunal.

9.5 There are numerous Zambian cases which show that Zambian jurisprudence in this area of the law is well developed. Settled law in this country is briefly that courts faced with applications to set aside arbitral awards do not have the jurisdiction to sit as appellate courts to review and alter arbitral awards. Some of the cases on this point are namely:

1. Fratelli Locci SRI Estrazion Minerarie v Road Development Agency[12]
2. Knox Magugu Mbazima v Tobbaco Association of Zambia[13]
3. ZCCM Investment Holdings PLC v Vedanta Resources Holdings Limited and Konkola Copper Mines PLC[14]

9.6 In **ZCCM Investment Holdings Plc v Vedanta Resources Limited and Konkola Copper Mines**[14], the Honorable Chief Justice Mumba Malila stated inter alia that:

> **"In keeping with the spirit of Article 5 of the Model Law, our courts are enjoined to embrace the principle of limited court intervention in arbitration....obviously, a principal rationale for the non-interventionist stance is respect for the party choice and autonomy."**

9.7 The above authorities are crystal clear and profound. It is common ground in this case that the respondent made its application to set aside the arbitral award pursuant to **Section 17(2) (b)(2) of the Arbitration Act** which empowers the court to set aside an arbitral award which is found to be in conflict with public policy. This leads us to address the crucial question raised by the appellant under the 4th ground of appeal which is whether the respondent had complied with Rule 23 of the Arbitration (Court Proceedings) Rules, 2001 which reads as follows:

> **"23 (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 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; and

(d) stating the date of receipt of the award by the party applying to set aside the award.

(3) The affidavit shall be accompanied by such other evidence with respect to the matter referred to in subsection (2) of section *seventeen* of the Act, as may be necessary to support the application.

9.8 In the affidavit in support of the application to set aside the arbitral award filed by the respondent in the court below on 31st December, 2020, the deponent gave the background of the case in paragraphs 3 to 13 and in paragraph 15 stated that he was advised by the in-house counsel that the award was contrary to public policy.

9.9 We hold that the affidavit was not in compliance with Rule 23 (c) of the Arbitration Court Proceedings Rules 2001 because the facts relied upon in support of the application were not included.

9.10 We are of the view that the rationale behind the said rule is that the other party should be given enough details of the

facts relied on in support of the application in order for it to respond meaningfully. The respondent herein only raised the issue of lack of approval of the variations or extensions of contract by the Attorney General in its submissions before the lower court and not in the affidavit.

9.11 In paragraph 11 of the affidavit in opposition to the application to set aside the award, the question of lack of evidence to prove that the award was contrary to public policy was raised. We note that the respondent did not file an affidavit in reply to buttress its claim. It follows that subrule 3 of the said Rule 23 was also breached.

9.12 Rule 23 is clearly couched in mandatory terms as the word "shall" is used several times. However, no punishment is prescribed for the defaulter. In the case of **Access Bank (Zambia) Limited And Group Five /Zcon Business Park Joint Venture (Suing As A Firm)**[15], the Supreme Court stated as follows:

> "***While we agree that rules of procedure are meant to facilitate proper administration of justice, we do not accept that in all cases rules cannot be made mandatory, and that their breach cannot be visited by unpleasant sanctions against a party who***

breaches them. It is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to other parties."

9.13 In the case of **Pule Elias Mwila and others v Zambia State Insurance Corporation Limited**[16] we held that courts will not condone apathetic attitude by litigants towards their cases marked by breach of court rules, and that litigants should not expect the court to assist them by correcting their mistakes.

9.14 Arbitration has its own special rules that must be obeyed by those who opt for it. Following the above authorities, we hold that breach of the said Rule 23 should have been held against the respondent by the lower court as the respondent breached the rule at its own peril. The court misdirected itself by dealing with issues which were not raised by the respondent in the affidavit in support of the originating summons to set aside the arbitral award.

9.15 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 issue of non-approval of extensions or

variations of the contract by the Attorney General arising from the respondent's submission, 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** which provides 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."***

9.16 In our view, it was a travesty of justice for the lower court to set aside the arbitral award on the basis of the spirited arguments by the respondent or evidence from the bar on the alleged lack of written approval by the Attorney General. We are fortified by the case of **Zambia Revenue Authority v Hitech Trading Company Limited** [3] where it was held that evidence from the bar no matter how spirited is inadmissible.

9.17 For the foregoing reasons, we find grounds 4 to 7 with merit and they are allowed.

9.18 **GROUNDS 1 TO 3 AND 10 TO 15**

According to the case of **ZCCM Investments Holdings PLC v Vedanta Resources Holdings Limited and Konkola Copper Mines PLC**[14], a court should not delve into the merits of the case that was before the arbitral tribunal in order to review the award.

9.19 It is apparent from grounds 1 to 3 and 10 to 15 and the submissions made by the parties that the lower court dealt with factual and substantive questions which the arbitral tribunal had already determined. For example, on the issue of approval of extensions by the Attorney General, the arbitrator at page 316 of the record of appeal (page 21 of the final Award) stated that:

> ***"Notwithstanding that the approval was pending clearance by the Attorney General, increases in contract sum and extensions of the completion date had previously been granted by the 1st respondent by either a letter or addendum (see items 2.7 and 2.12 above) without apparent clearance from the Attorney General."***

9.20 As earlier stated, the respondent did not state in the affidavit in support of the summons to set aside the arbitral award that

the Attorney General had withheld the approval or refused to approve the extensions or variations. Therefore, the lower court's finding that there was no approval of the extensions or variations of contract was baseless.

9.21 The learned Judge at pages J37 and J38 of the judgment, considered **Article 177(5)(d) of the Constitution (Amendment) 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 NO. 63 of 2011**.

9.22 The Judge pointed out what she had discovered as a fundamental flaw which she considered as an assault to public policy in Zambia; *"the arbitrators total and accepted disregard of the laws."*

9.23 In the case of **Martin Misheck Simpemba, Rose Domingo Kakompe v Nonde Munkanta, Zambia Industrial Mineral Limited**[17], Justice Matibini of the High Court, as he then was, held as follows:

> **"At the substantive level, the Courts aim at upholding arbitral awards. On application to set aside awards, arbitration awards are not approached with a view to discern the legal weakness,**

inconsistencies or faults in the application of the law. The task of the court is not to upset or frustrate the arbitral process. Rather, the objective is to read an award in a reasonable and commercial sense assuming that there is no fundamental or substantial procedural or substantive error in the making of the award. The defence of public policy is narrowly construed in a bid to preserve and recognize the goal of finality in all arbitrations. Thus an arbitral award is not liable to be strode down on allegations that it is premised on incorrect grounds whether of fact or law. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or law..."

9.24 The preceding authority is not binding on us. Nevertheless, we endorse the holding and take it as our own. We further hold that the lower court erred in that it aimed at identifying weaknesses in the arbitral award. Failure by the arbitrator to apply the procurement laws mentioned in paragraph 7.21 hereof is not a ground for setting aside an arbitral award considering section 17 of the Arbitration Act No. 19 of 2000.

9.25 The Judge in the lower court, in paragraph 41 of the judgment, acknowledged that the arbitrator demonstrated that he had applied his mind to the issues that were before him and reasoned his way to making the award. We cannot fault her for this holding.

9.26 **Article 177(5)(d) of the Constitution (Amendment) Act No. 2 of 2016** provides as follows:

> **"The Attorney General is the Chief Legal adviser to the government and shall:-**
>
> **Give advice on an agreement, treaty or convention to which government intends to become a party or in respect of which the government has an interest before they are concluded, except where the National Assembly otherwise directs, and subject to conditions as prescribed."**

9.27 It is trite that the law does not operate retrospectively, see the case of **Bonar Travel Limited v Lewis Susa**[18]. Considering that the contract variations were made in 2015, it follows that the lower court erred to apply the said constitution amendments of 2016 to this case.

9.28 Coming to the question whether the lower court erred when it held that the arbitral award offended public policy as the

contract variation was made without the approval of the Attorney General, which we consider to be the substance of the appeal, both parties relied on the provisions of the **Public Procurement Act, No. 12 of 2008 and Public Procurement Regulations Statutory Instrument No.63 of 2011** to advance their opposing views.

9.29 In particular, we have considered **Section 54 (2) (e) and 3 of Public Procurement Act** which provides that:

> ***"No contract, purchase order, letter of bid acceptance, or other communications in any form conveyancing acceptance of a bid or award of contract shall be issued prior to-***
>
> ***(e) Any other approvals required, including the approval of the contract by the Attorney General.***
>
> ***(3) Any contract, purchase order, letter of bid acceptance of other communication issued contrary to subsection (2) is void."***

9.30 The appellant argued that, before the constitutional amendment provisions of 2016, the role of the Attorney General was merely to offer advice to the government before a contract could be signed. That it was incumbent on the

respondent to seek such legal advice. It has been further argued that in any case, it is an internal procedure which is not the concern of the appellant, as a third party.

9.31 The appellant further contended that under the Public Procurement Act, the Attorney General is not mandated to approve variations of contracts. That even assuming that the extension was not approved by the Attorney General, the initial contract which required clearance by the Attorney General and was in fact approved was in force until it was terminated.

9.32 The respondent on the other hand argued that it was mandatory to get the Attorney General's approval for any contract and by extension/variation of any contract involving the government.

9.33 Having considered **Section 54 (2) (e) and 3 of Public Procurement Act**, it is clear that the Attorney General's approval of any government contract was required even before the Constitution (Amendment) Act No.2 of 2016 came into effect. Nevertheless, the said provisions do not specify that approvals were required for contract variations or extensions as well. This leads us to the question whether

there was evidence that the arbitral award was contrary to public policy.

9.34 The term public policy has been defined in many cases in this country such as **Zambia Revenue Authority v Tiger Limited & Zambia Development Agency**[19] and **Fratelli Loci SRI Estrazion Minerarie v Road Development Agency**[12].

9.35 In the said **Fratelli Loci** case, we stated at J23 inter alia as follows:

> ***"The definition of public policy adopted in the Tiger Limited Transport case shows that a very high standard of proof is set for a person applying to set aside an award on an allegation that it is contrary to public policy. Our view is that for an award to be set aside on that ground, there must be proof that the arbitral tribunal has done gross injustice."***

9.36 The definition of public policy according to the case of **Zambia Revenue Authority v Tiger Limited and Another**[19] is that where the reasons or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes an inequity that is so far reaching and outrageous, in its defiance of logic or accepted standards that, a sensible or fair minded person would consider that the concept of justice in Zambia would

be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

9.37 According to clauses 38.1 to 38.3 of the contract between the parties changes in the bills of quantities were to be adjusted by the project manager and not the Attorney General. Clauses 39.1 to 40.4 of the same contract, provide for approval of variations and payment for variations by the project manager and not the Attorney General. (See part D of the contract on cost control.)

9.38 We take note that at the beginning of the contract, the Attorney General's approval or clearance was obtained through a letter dated 2nd April, 2013 signed by Dr. Mumba Malila, the then Attorney General. Prior to that, the Road Development Agency Procurement Committee (RDAPC) approved the award of the contract in a letter dated 26th February, 2013. The said letter granted the respondent authority to grant the contract to the appellant. The contract appearing at pages 46 to 77 of the Record of Appeal, is silent on whether approval of the Attorney General was needed for every variation and extension.

9.39 The arbitrator at page 316 of the Record of Appeal(page 21 of the award) noted that: ***"Notwithstanding that the***

approval was pending clearance by the Attorney General, increases in the contract sum and extensions of the completion date had previously been granted by the respondent by either a letter or addendum without apparent clearance from the Attorney General."

9.40 Considering all the circumstances of the appeal, we cannot fault the arbitrator for the above reasoning. The arbitral award was not shown by the respondent to be erroneous, unjust, illogical and unacceptable. In short, it is our firm view that there was no evidence that the award was against public policy as defined by law, and we hold that it was not.

9.41 Even if we were to accept the fault found by the lower court, we would still not uphold the setting aside of the whole award because the lower court has the power to set aside part of an award where other parts are justified. We say so because some of the awards remained unchallenged.

9.42 In light of the foregoing, we hereby set aside the judgment of the court below. The other grounds of appeal become otiose.

10.0 CONCLUSION

10.1 All being said, the appeal succeeds on grounds 1 to 7 and 10 to 15.

10.2 The respondent had breached the mandatory **rule 23(2)(c) and (d) and subrule (3) of the Arbitral (Court proceedings) Rules** and this is held against it. Further the respondent failed to prove that the arbitral award was against public policy as defined by law. Accordingly, the lower court's judgment is set aside. This entails that the arbitral award stands. We award costs to the appellant and the same shall be taxed in default of agreement between the parties.

.....

C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....

P.C.M. NGULUBE
COURT OF APPEAL JUDGE

.....

Y. CHEMBE
COURT OF APPEAL JUDGE