

**IN THE COURT OF APPEAL OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

Appeal No. 91/2023

BETWEEN:

**LUBAMBE COPPER MINE LIMITED**

**APPELLANT**

AND

27 JUN 2024

**HAMBANI NGWENYA**

**1<sup>ST</sup> RESPONDENT**

**ANNIE MUSONDA KAWANDA-NGULUBE**

**2<sup>ND</sup> RESPONDENT**

**CORAM: Mchenga, DJP, Muzenga and Chembe, JJA**  
**On 16<sup>th</sup> January 2024 and 27<sup>th</sup> June 2024**

For the Appellant: Mr. M. M. Mundashi, SC, Mr. D. M. Chakoleka & Mr. O. Kasalama of Messrs Mulenga Mundashi Legal Practitioners, Mr. M. Sakala & Mr. J. Kawama of Messrs B & M Legal Practitioners

For the Respondents: Mr. R. K. Malipenga of Robson Malipenga & Co & Ms. D. Bunting of D Bunting & Associates

---

## **J U D G M E N T**

---

**MUZENGA JA, delivered the Judgment of the Court.**

Cases referred to:

1. **Antonio Ventriglia and Another v. Finsbury Investments Limited – SCZ Appeal No. 2 of 2019**
2. **Shoprite Holdings Limited and Another v. Lewis Chisanga Mosho and Another – SCZ Judgment No. 40/2014**
3. **Christopher Lubasi Mundia v. Sentor Motors Limited (1982) ZR 66**
4. **CAJ and Another v. CAI and Another – Appeal (2021) SGCA 102 (a decision of the Court of Appeal of the Republic of Singapore)**
5. **Kajimanga v. Chileya – SCZ Appeal No. 50 of 2014**
6. **Zambia Revenue Authority v. T and G Transport (2007) ZR 13**
7. **Savenda Management Services Ltd v. Stanbic Bank (Zambia) Ltd – Selected Judgment No. 39 of 2017**
8. **Konkola Copper Mines v. Copper Fields Mine Service Limited (2010) ZR 156**
9. **M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt Ltd (2004) 9 SCC 619**

Legislation referred to:

1. **The Employment Code Act, No. 3 of 2019.**
2. **The Arbitration Act, No. 19 of 2000.**
3. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**
4. **The Chartered Institute of Arbitration Rules (Clarb Rule).**
5. **The Court of Appeal Act, No. 7 of 2016.**

Other works referred to:

1. **Emilia Onyema, International Commercial Arbitration and the Arbitrator's Contract, Routledge: Oxon, 2010**

## **1.0 INTRODUCTION**

1.1 This is an appeal against the judgment of Kafunda, J, dated 23<sup>rd</sup> December 2022 refusing to set aside an arbitral award made in favour of the respondents.

## **2.0 BACKGROUND**

2.1 The background to this appeal is that the respondents were employed by the appellant on various dates in different capacities. In the course of time, the respondents discovered that they were being paid differently (lower amounts compared to their expatriate colleagues) despite being in the same salary grade and that the expatriates were being paid in US Dollars.

2.2 Their respective contracts of employment had an arbitration clause in the event of dispute. The 1<sup>st</sup> respondent declared a dispute in respect of the differential treatment on 16<sup>th</sup> November 2021 and the parties on 20<sup>th</sup> December 2021 appointed an arbitrator to deal with the 1<sup>st</sup> respondent's claim for equal pay for equal value of work done, a claim for discrimination based on race. The 2<sup>nd</sup> respondent subsequently declared a dispute similar to the 1<sup>st</sup> respondent's and the parties

agreed to have the dispute heard by the same arbitrator appointed in respect of the 1<sup>st</sup> respondent's dispute.

2.3 The 1<sup>st</sup> respondent was on 5<sup>th</sup> January 2022 dismissed from employment, which dismissal was made final after the appeal on 25<sup>th</sup> January 2022.

2.4 The arbitrator heard the parties on 20<sup>th</sup> and 21<sup>st</sup> May 2022, and on the 7<sup>th</sup> September 2022 an award was published wherein the arbitrator found in favour of the respondents.

### **3.0 CASE BEFORE THE HIGH COURT**

3.1 Unsettled by the award, the appellant made an application by way of originating summons to set aside the arbitral award dated 7<sup>th</sup> September 2022 on the following grounds:

- (1) That the Arbitration Award dated 7 September 2022 (the "Award") deals with a matter beyond the submission to arbitration;**
- (2) That the subject matter dealt with in the Award is not capable of settlement by Arbitration under the law of Zambia; and**
- (3) That the Award conflicts with public policy.**

- 3.2 The appellant's main grievance was that the respondents in their claim did not specifically plead or allege breach of **Section 5 of the Employment Code Act No. 3 of 2019** (hereinafter referred to as "**the Code**") and as such the appellant could not raise the objection to the tribunal on time.
- 3.3 The appellant contended that an arbitral tribunal had no jurisdiction to determine a criminal matter, as **Section 5 of the Code** created an offence for its breach. It was contended that an arbitral tribunal could only consider a criminal matter with leave of court, which in this case was not obtained.
- 3.4 It was argued that the arbitrator therefore lacked jurisdiction to determine the matter. Reference was made to the case of **Antonio Ventriglia and Another v. Finsbury Investments Limited**<sup>1</sup> where the Supreme Court when considering the issue of jurisdiction stated that out of nothing comes nothing.
- 3.5 The lower court was urged to set aside the award for offending **Section 17(2)(b)(i) and (ii)** of the **Arbitration Act, No. 19 of 2000** (hereinafter referred to as "**the Act**").

- 3.6 It was further argued that the award issued by the arbitrator is clearly in conflict with public policy in that a private citizen sat to settle matters of a criminal nature using the standard of proof in civil matters.
- 3.7 The respondent submitted that the arbitrator sat to consider the matter as a civil matter and as such he was clothed with jurisdiction.
- 3.8 It was contended that it is not uncommon for civil proceedings to arise from the same law that may create a criminal offence. It was submitted that if the State wanted to commence criminal proceedings arising from **Section 5**, it does not bar the respondents from pursuing a civil cause out of it. Reliance for this was placed on the case of **Shoprite Holdings Limited and Another v. Lewis Chisanga Mosho and Another**<sup>2</sup> where the court held that there is no complete bar to civil and criminal proceedings involving the same parties proceeding concurrently.

#### **4.0 DECISION OF THE HIGH COURT**

- 4.1 The learned court below after considering the application and the arguments by the parties found that the arbitrator had jurisdiction to deal with the question of breach of **Section 5 of the Code** in a civil context and actually did deal with the same in that context. The lower



court went further to hold that the question of breach of **Section 5 of the Code** was dealt with by the arbitrator in furtherance of settling a civil dispute between the parties.

4.2 Consequently, the lower court dismissed the application to set aside the arbitral award with costs.

## **5.0 GROUNDS OF APPEAL**

5.1 Disenchanted with the lower court's decision, the appellant now appealed to this court on the following grounds:

- (1) The learned Puisne Judge erred at law when he did not consider that the Arbitrator exceeded the scope of his authority or jurisdiction when he considered and determined a matter that was beyond the submission of the parties to arbitration.**
- (2) The learned Puisne Judge erred in law when he held that the Arbitrator had jurisdiction to determine breach of Section 5 of the Employment Code Act despite finding that breach of Section 5 of the Employment Code Act is a criminal offence.**
- (3) The learned Puisne Judge erred at law when he held that the Arbitrator properly determined breach of Section 5 of the Employment Code Act in furtherance of settling a civil dispute when the law requires that leave of Court should be obtained before a criminal matter can be settled in a civil manner by way of Arbitration.**

## 6.0 APPELLANT'S ARGUMENTS

- 6.1 In support of ground one, learned counsel submitted that the arbitrator determined a matter that was beyond the submission to arbitration. It was learned counsel's argument that in terms of **Section 17(2)(iii) of the Act**, an arbitral award may be set aside if a party making the application to the court furnishes proof that the award contains decisions on matters beyond the terms of submission to arbitration.
- 6.2 It was submitted that terms of reference define the scope of the dispute which an arbitrator is to resolve and that in its absence, terms of reference can be deciphered from the pleadings. It was counsel's submission that the parties agreed that the Rules of evidence would apply to the arbitration. It was learned counsel's argument that pleadings serve the foundation of drafting the scope of the dispute between the parties. Reliance for this argument was placed on the case of **Christopher Lubasi Mundia v. Sentor Motors Limited**.<sup>3</sup>
- 6.3 Counsel contended therefore that in the respondent's pleadings, **Section 5 of the Code** was not pleaded and as such, the arbitrator was not called upon to determine its breach. We referred a number of cases including the case of **CAJ and Another v. CAI and**



**Another**<sup>4</sup> on the importance of pleadings and the fact that an arbitral tribunal has no jurisdiction to decide on an issue not referred to it.

- 6.4 Counsel concluded this argument by submitting that since the question of breach of **Section 5 of the Code** was not submitted to the arbitrator, he had no jurisdiction to decide on the question in the final arbitral award.
- 6.5 Counsel further drew our attention to **Article 20(2) of the Chartered Institute of Arbitration Rules (Clarb Rules)** which makes it mandatory for a claimant to include in their pleadings among others, legal grounds and arguments supporting the claim and that determination of breach of **Section 5** of the **Code** was not included anywhere in the claim or arguments.
- 6.6 Counsel contended that the learned trial court erred when it did not consider that the arbitrator exceeded the scope of his authority by considering breach of **Section 5** of the **Code**.
- 6.7 We were urged to allow the appeal on this ground.
- 6.8 In support of ground two learned counsel contended that breach of **Section 5 of the Code** is not arbitrable as its breach culminates into a criminal offence as provided in sub-section 5. It was counsel's

submission that parliament intended to create a criminal offence for breach of the obligations under **Section 5 of the Code**.

- 6.9 Learned counsel argued that the standard of proof in criminal matters is beyond all reasonable doubt whereas the standard of proof in civil matters is on the balance of probabilities and that the manner of taking evidence in criminal matters differs from that in civil matters. For this argument we were referred to the case of **Kajimanga v. Chileya**.<sup>5</sup>
- 6.10 It was learned counsel's argument that if the appellant had been accused of breaching **Section 5 of the Code**, proper recourse should have been prosecution under **Section 356 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia**.
- 6.11 Counsel submitted that the arbitrator had no jurisdiction to determine a criminal matter, whether an objection to its jurisdiction was made earlier in time or later, because **Section 16(2)(c) of the Act** specifically excludes criminal matters from settlement by arbitration.
- 6.12 Counsel submitted that in the absence of jurisdiction, whatever is done amounts to nothing. We were referred to the **Antonio Ventriglia** case *supra* among other cases.

- 6.13 Counsel went on to state that the award also offends public policy as a private individual should not settle a criminal matter or any of the matters listed under **Section 6(2) of the Act**. It was learned counsel's contention that the extent of the final arbitral award which condemns the appellant for committing a crime is in conflict with public policy and should be set aside.
- 6.14 We were urged to allow the appeal on this ground.
- 6.15 In support of ground three, counsel submitted that a tribunal has no jurisdiction to deal with a criminal matter without leave of the High Court. It was argued that the arbitrator ought to have sought leave of court in order to determine breach of **Section 5 of the Code**.
- 6.16 Counsel contended that failure to obtain leave renders the final arbitral award a nullity. Counsel contended that the requirement for leave goes to jurisdiction and that it cannot be confirmed by the express consent of the parties. For this argument we were referred to the case of **Zambia Revenue Authority v. T and G Transport**.<sup>6</sup>
- 6.17 Counsel concluded by submitting that the learned trial court erred in law when he held that the arbitrator could determine a criminal matter in furtherance of settling a civil dispute.

6.18 We were urged to allow the appeal.

## **7.0 RESPONDENT'S ARGUMENTS**

7.1 In response to ground one, learned counsel for the respondents submitted that the appellant's claim that **Section 5 of the Code** was not specifically pleaded by the respondents bears reason. Counsel argued that the legal ground in support of the respondent's claim was discrimination.

7.2 It was learned counsel's submission that the pleadings which guide the scope of jurisdiction for an arbitral tribunal clearly stipulated that the respondents were seeking among other things, a declaration that the appellant's conduct was unlawful and discriminatory.

7.3 It was learned counsel's contention that the issue of discrimination was at the centre of the arbitral proceedings and it was common issue that the dispute was an employment law dispute arising from a contract of employment.

7.4 Counsel made reference to **Section 20(1) of the Act** and submitted that an award is final and binding on the parties and that the parties cannot appeal against it as the appellant was attempting to do. For this argument we were referred to several authorities including the

case of **Savenda Management Services Ltd v. Stanbic Bank (Zambia) Ltd.**<sup>7</sup>

- 7.5 We were urged to dismiss ground one as it lacked merit.
- 7.6 In responding to ground two, learned counsel submitted that the issues raised in ground two were aptly dealt with by the arbitrator and the court below. It was counsel's contention that the arbitrator did not deal with the criminal aspects of **Section 5 of the Code**, rather the rights of the respondents abrogated by the appellant.
- 7.7 Counsel contended further that the issue having been raised before the arbitrator and the arbitrator having ruled on the same, the appellant was precluded from raising it on appeal as it would be tantamount to appealing against the Ruling by the arbitrator. Reliance for this submission was placed on the case of **Konkola Copper Mines v. Copper Fields Mine Service Limited**<sup>8</sup> among other cases.
- 7.8 On the issues of the award offending public policy, counsel argued that the case involved private citizens and cannot affect the wellbeing of Zambians at large, as it arises from contract law.
- 7.9 We were urged to dismiss ground two for want of merit.

7.10 In responding to ground three, learned counsel submitted that the genesis of this matter is the contract of employment that was freely and voluntarily executed between the parties, which provided for settlement of disputes by way of arbitration. It was argued that the reliefs sought by the respondents were civil as they had suffered discrepancy in terms and conditions of service for local and expatriate employees implemented by the appellant.

7.11 It was contended the proceedings were civil and no leave was required.

7.12 We were urged to dismiss this ground of appeal. All in all counsel submitted that the entire appeal should be dismissed with costs for being baseless, frivolous and vexatious.

## **8.0 THE HEARING**

8.1 At the hearing of the appeal, learned counsel informed us that they would rely on their respective arguments and briefly augmented.

## **9.0 DECISION OF THE COURT**

9.1 We have carefully considered the record and arguments for and against the appeal. We shall deal with the grounds in the order in which they were argued.



9.2 In support of ground one, learned counsel contended that the arbitrator determined a matter that was beyond the submission to arbitration. It was learned counsel's contention that **Section 5** of the **Code** was not specifically pleaded or raised in the pleadings. Learned counsel for the respondents on the other hand submitted that the appellant's claim that **Section 5 of the Code** was not specifically pleaded by the respondents beats reason as the respondents were seeking among other things, a declaration that the appellant's conduct was unlawful and discriminatory.

9.3 As we see it, ground one raises the issue of whether the matter herein is arbitrable or whether the arbitrator had jurisdiction to deal with it. In arguing this ground, counsel argued that a specific Section must be included in the pleadings, failure to which that law cannot be referred to. In the **Sentor Motors Limited** case *supra*, a High Court decision, it was held that:

**"The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties."**

9.4 In arbitration, what determines the scope of matters subject of the arbitration are the terms of reference, in the absence of which the scope will be deciphered from pleadings or documents submitted to the arbitrator. We agree with the High Court holding that the function of pleadings is to give fair notice to the other party and matters outside pleadings should not ordinarily be adjudicated upon save in exceptional circumstances.

9.5 We however hold the view that there is no requirement that the law must specifically be included in pleadings. We have had sight of **Article 20(2)** of the **Clarb Rules** which provides that:

**“(2) The statement of claim shall include the following particulars:**

- a) The names and contact details at the parties;**
- b) A statement of the facts supporting the claim;**
- c) The points at issue;**
- d) The relief sought;**
- e) The legal grounds or arguments supporting the claim.”**

9.6 **Subsection 2 paragraph (e)** cannot be said to impose an obligation to include all provisions of the law to be relied on, contrary to the argument by learned counsel for the appellant. In any case, there is use of a disjunctive, meaning the statement of the claim is proper as

long as it has legal grounds or arguments. In *casu*, the respondents' statement of claim was compliant as it had arguments.

9.7 In our view, what is expected in pleadings is the inclusion of all relevant facts on which the claims are based. In this case, the respondents alleged discrimination in the manner in which their employer, the appellant, treated expatriates and local employees (i.e. themselves). The law applicable to arbitration was the Laws of Zambia and the **Code** being one of them, as such reference could be made to any of the provisions therein, and especially those brought to the attention of the arbitrator. In order to resolve the dispute, it was expected that the relevant law, which will be referred to and reference to **Section 5** of the **Code** is not unusual or strange as it proscribes discrimination and it was brought to the attention of the arbitrator. This argument therefore, is bereft of merit.

9.8 However, the matter does not end there. **Section 2** of the **Act** defines an arbitration agreement:

**"As an agreement, whether in writing or not, by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."**

9.9 Further, Emilia Onyema in her book entitled **International Commercial Arbitration and the Arbitrator's Contract**, states that:

**"The arbitration agreement may be in the form of a clause in the main contract evidencing the transaction between the parties or as a separate submission agreement. Arbitration clauses evidence the intention of the parties to submit future disputes arising out of the underlying main contract to resolution by means of arbitration, while the submission agreement is a separate document evidencing the intention of the parties to submit existing disputes that have arisen over a defined legal relationship to resolution by means of arbitration. Thus both forms of arbitration agreement have the same primary purpose – that of resolving disputes by means of arbitration."**

9.10 The Supreme Court of India in the case of **M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd<sup>9</sup>** stated that:

**"An arbitrator cannot be equated with a court of law. Whereas court has an inherent power; an arbitrator does not have. It is a tribunal of limited jurisdiction. Its jurisdiction is circumscribed by the terms and reference. An arbitrator can act only within the four corners of the agreement and not beyond thereto."**

- 9.11 What is abundantly clear is that resort to arbitration is a decision of the parties to an agreement, to subject any disputes they have or may have arising from the contract or connected or related to the contract between the parties. Arbitration proceedings therefore being private, must focus on disputes arising from the contract between the parties.
- 9.12 In *casu*, the arbitrator in determining the issue or claim of discrimination veered off the contract in which the arbitration clause was, by considering contracts from other employees. His authority was to determine disputes arising from the contract between the parties to the contract. An arbitral tribunal not being a court and its orders not being judicial orders could not exercise its power *ex debito justitiae*. An arbitrator cannot call in aid other people's contract in order to resolve the dispute. That mandate can only lie with a court.
- 9.13 We further hold the view that the issue of discrimination, based on provisions of the **Code** or any other statutory provision; or The **Constitution of Zambia** lies in the sphere of public law and cannot be resolved through arbitration. Additionally the award arising out of discrimination, seems to offend the sanctity of the well-entrenched principle of freedom of contracts. The respondents negotiated their

terms of employment on which they were employed. Down the line, they discovered their expatriate colleagues earn more than themselves, hence their complaint before the arbitral tribunal. We have already stated that the arbitrator went beyond the scope of the agreement of the parties and as such had no jurisdiction to do so.

9.14 We are alive to the decision of the Apex Court in the case of **Savenda Management Services** *supra* as to the binding nature of an arbitral award and its finality. However, in terms of **Section 17(2)** of the **Act**, we find that the subject-matter of the dispute is not capable of settlement by arbitration and that the award is in conflict with public policy and as such cannot stand.

9.15 **Section 24** of the **Court of Appeal Act**, provides that:

**"24. (1) The Court may, on the hearing of an appeal in a civil matter — (a) confirm, vary, amend, or set aside the judgment appealed against or give judgment as the case may require;"**

9.16 On the strength of the foregoing, the arbitral award in respect of the claim for discrimination is hereby set aside. Had the learned court below properly directed its mind, it would no doubt have reached the



same verdict as ours. We therefore find merit in ground one of the appeal. We find it unnecessary to consider grounds two and three.

## **10.0 CONCLUSION**

10.1 Having found merit in ground one, we allow the appeal. The arbitral award hinging on discrimination is accordingly set aside. The other aspects of the award, which were not a subject of this appeal remain undisturbed.

10.2 Each party will bear its own costs.



.....

C. F. R. MCHENGA

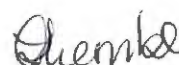
**DEPUTY JUDGE PRESIDENT**



.....

K. MUZENGA

**COURT OF APPEAL JUDGE**



.....

Y. CHEMBE

**COURT OF APPEAL JUDGE**