IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HPC/ARB/0493

IN THE MATTER OF	:	**AN APPLICATION TO PARTIALLY SET ASIDE AN ARBITRAL AWARD**
AND		
IN THE MATTER OF	:	**SECTION 17 OF THE ARBITRATION ACT, 2000**
AND		
IN THE MATTER OF	:	**RULE 23 OF THE ARBITRATION (COURT PROCEEDINGS) RULES STATUTORY INSTRUMENT NO. 75 OF 2001**
AND		
IN THE MATTER OF	:	**AN ARBITRAL AWARD DATED 14th JULY 2016**

BETWEEN:

FRATELLI LOCCI SRI ESTRAZION MINERARIE **APPLICANT**

AND

ROAD DEVELOPMENT AGENCY **RESPONDENT**

Before Lady Justice B.G Lungu on 15th February, 2017 in chambers at Lusaka.

For the Applicant	:	*Mr. M. Haimbe, Messrs Malambo & Co.*
For the Respondent	:	*Mr. Ngulube, Messrs Ngulube & Associates*

J U D G M E N T

Cases referred to:

1. ***Zambia Revenue Authority vs. Tiger Limited and Zambia Development Agency, Selected Judgment No. 11 of 2016***
2. ***Zimbabwe Electricity Supply Authority vs. Maposa, (1992)2ZLR 452(S)***

Legislation and Other Materials referred to:

1. Section 17(2)(a)(iv), Arbitration Act, 2000;
2. Section 17(2)(b)(ii), Arbitration Act, 2000;
3. **Black's Law Dictionary, 10th Edition, Bryan A. Garner, Thomson Reuters**

The Applicant commenced this action against the Respondent on 13th October, 2016 by way of Originating Summons. The suit seeks to set aside an Arbitral Award that was handed down and amended on 14th July, 2016 and 8th August, 2016, respectively

The Originating Summons was supported by an Affidavit in Support of even date; a Further Affidavit in Support filed with leave of Court on 20th January, 2017; Skeleton Arguments in Support; Skeleton Arguments in Reply filed on 10th February 2017; the Applicant's List of Authorities filed on 10th February 2017; and written submissions filed on 2nd March 2017.

The undisputed facts leading up to this application, which I have derived from the Affidavit evidence on record, are that in 2011 the Parties entered into three contracts that were collectively referred to as "the Contracts", by which the Applicant contracted to undertake specific works on behalf of the Respondent. The Contracts were (i) Contract Number RDA/CE/014/011 dated 14th May, 2011; (ii) Contract Number RDA/CE/017/011 dated 14th May, 2011; and (iii)

Contract Number RDA/CE/004 and RDA/SP/005/011 dated 5th August, 2011;

The said Contracts were terminated by the Respondent by separate letters dated 18th September, 2012. The termination ensued in a dispute, which dispute was submitted to arbitration by the Parties pursuant to an Arbitration Agreement dated 8th July, 2013. The said Agreement was exhibited in the Applicant's Affidavit in Support as "GD1".

The arbitration resulted in an Arbitration Award dated 14th July, 2016, exhibit "GD2" to the Applicant's Affidavit in Support. The Award was subsequently substituted by a Corrected Final Award dated 8th August, 2016, exhibit "GD1" to the Further Affidavit in Support.

The Affidavit evidence reveals that the Arbitral Award was in favour of the Applicant in that it was determined that the Contracts were wrongly terminated. However, the Applicant's claim for damages was disallowed or declined.

According to the Affidavit evidence tendered on behalf of the Applicant, the understanding of the Parties was that the Arbitral Tribunal would, inter alia, conclusively determine whether or not the Applicant was entitled to the damages claimed. A copy of the bundle of pleadings was exhibited as "GD2" to the Further Affidavit in Support. Also exhibited were the submissions of the parties before the Arbitral Tribunal, marked as exhibits "GD4" and "GD5".

The deponent of the Further Affidavit in Support, Mr Gianfranco Demuro, attested that the Applicant's plead damages and that the Respondent opposed the Applicant's claim for damages.

The deponent also deposed that the procedure in any dispute resolution processes demanded that where damages were claimed, the question of entitlement to damages needed to be determined before any question as to quantum of such damages could be determined.

Ultimately, it was attested that the Arbitral Tribunal never addressed its mind to the evidence on damages and that in disallowing the Applicant claim for damages where the contracts were found to have been wrongfully terminated, the Arbitral Tribunal did not proceed in accordance with the procedure prescribed in its mandate in the Contracts, the Arbitration Agreement, the Arbitration Act and generally the laws of Zambia.

The Applicant anchored its application on two grounds, particularly:

1. That the procedure adopted by the Arbitral Tribunal in arriving at its decision to disallow the Applicant's claim for damages was not in accordance with the Agreement of the Parties, or with the Arbitration Act or with Zambian Law and

that it was therefore in contravention of section 17 (2)(a)(iv) of the Arbitration Act; and

2. That the Arbitral Tribunal's decision to disallow the Applicant's claim for damages was not consistent with its finding that the agreement subject of the dispute in the arbitration were wrongfully terminated; consequently that the decision was in conflict with public policy and thus amenable to being set aside pursuant to section 17(2)(b)(ii) of the Arbitration Act.

The Respondent opposed the application by way of Affidavit in Opposition, sworn by the Director of Legal Services in the Respondent establishment.

The most prominent deposition in the Affidavit in Opposition is that the Applicant omitted to lead evidence relating to damages.

Although I will not recount all that has been submitted, I assure the Parties that I have deliberately and thoroughly studied the prolix Affidavit evidence and vivacious arguments on record. I must say, though, that a good part of the well researched arguments gave the real issues that I must decide upon a wide berth. As I see it, my role is not to reopen the arbitration and pit my mind against that of the Arbitral Tribunal regarding interrogation of the issues that were in dispute at the arbitration. It is, instead, simply to determine

whether the Award was arrived at devoid of adherence to rules of procedure and whether it offends public policy.

I now move to consider the first and second grounds, in turn.

The Applicant's first ground rides on the back of section 17(2)(a)(iv) of the Arbitration Act, which gives the Court authority to set aside an arbitral award if the party making the application ***"furnishes proof that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the law of the country where the arbitration took place".*** *(court emphasis)*

My interpretation of the aforementioned section, in so far as it concerns arbitral procedure, is that for an Award to be set aside by the Court, an applicant must satisfy or pass the prescribed litmus test of furnishing proof that the arbitral procedure:

i. was not in accordance with the agreement of the parties; or
ii. was not in accordance with the Arbitration Act; or
iii. was not in accordance with Zambian law.

In view of the prescribed threshold, it is imperative, at this stage, to identify the arbitral procedure that was applicable *in casu*, in order to determine whether or not the Applicant has adduced proof that the procedure that was actually adopted was at odds with the applicable procedure.

I must also, in genesis, elucidate that the term arbitral procedure refers to the manner or mode of conducting arbitral proceedings. That is, the procedural steps or rules of procedure of the Arbitral Tribunal which are set by the Arbitration Agreement, the Arbitration Act or a duly appointed Tribunal. My elucidation is inspired by Article 19 of the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law, which is applicable in Zambia by virtue of section 8 of the Arbitration Act.

Article 19 reads as follows:

> ***"ARTICLE 19***
> ***Determination of rules of procedure***
>
> 1. ***Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.***
> 2. ***Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."***

In this regard, I revisited the Arbitration Agreement executed by the Parties and conclusively confirmed that the Agreement merely provided procedure for the appointment of the Arbitral Tribunal and

gave the parties liberty to call witnesses. No other procedural requirements were contained in the Arbitration Agreement.

Aside the Agreement, the Respondent perilously elected not to furnish the Court with or highlight any particular document which was adopted by the Parties or the appointed Tribunal that set out the applicable arbitral procedure. In my view, the failure to adduce any evidence of applicable procedure is rebarbative in that it not only undermines a ground premised on procedural impropriety under section 17(2)(a) of the Arbitration Act but also flies in the face of regulation 23 (3) of the Arbitration (Court Proceedings) rules, SI No. 75 of 2001.

Regulation 23 (3) of SI No. 75 of 2001 makes it mandatory for an application to set aside an arbitral award to "***be accompanied by such other evidence with respect to the matters referred to in subsection (2) of section seventeen of the Act, as may be necessary to support the application.***"

My examination of the Applicant's Affidavit evidence to verify whether the Respondent took issue or presented evidence that challenged the arbitral procedure stipulated in the Agreement yielded no results. I say this whilst taking cognisance of clause 4 of the Arbitral Award which contains a chronology of the arbitral proceedings, including the Orders for Directions to the Parties. The

Orders do not, however, interface with substantive matters such as the award of damages.

My interrogation of the Affidavit evidence further reveals that the deponent of the Affidavits in Support does not depose to any specific procedural impropriety but volubly delves into the Tribunal's determination with respect to the award of damages. The Respondent's dissatisfaction with the award of damages, or failure thereof, clearly veers into the substance of the Award and manifestly falls outside the ambit of section 17(2) (a)(iv) which is confined to want of compliance with respect to the composition of the arbitral tribunal or arbitral procedure. Consequently, I take the view that delving into issues of substance under this limb would be steering the efficacy of Alternative Dispute Resolutions, such as arbitration, towards an ominous trajectory; an eventuality not encouraged by this Court

Bearing in mind the absence of any tangible contention, or evidence relating to want of procedural aptness, I am of the settled mind that the Applicant has misconceived section 17(2) (a) (iv) of the Arbitration Act, which misconception has led to the failure to satisfy the threshold of adducing proof of procedural impropriety. As a result, I can-not yield to the Applicant's invitation to set aside any portion of the Arbitral Award on the basis of section 17(2) (a) (iv) of the Arbitration Act.

The second limb of the Applicant's application was that the Arbitral Tribunal's decision to disallow the Applicant's claim for damages was not consistent with its findings that the Contracts subject of the dispute were wrongfully terminated, thereby contravening public policy, rendering it amenable to being set aside pursuant to section 17(2)(b)(ii) of the Arbitration Act.

Section 17(2)(b)(ii) of the Arbitration Act empowers the Court to set aside an arbitral award if the Court finds that the award is in conflict with public policy.

As the term public policy has not been defined in the Arbitration Act, I find it is desirable to begin by ascertaining what constitutes public policy. This will facilitate a framework within which to consider this ground.

In this regard, I am bound by the decision in the case of ***Zambia Revenue Authority vs. Tiger Limited and Zambia Development Agency, Selected Judgment No. 11 of 2016***[1], where the Supreme Court had occasion to consider the test to be applied in determining an award that offends public policy for purposes of an application to set aside an award using section 17(2)(b)(ii). In so doing, the Supreme Court adopted the ratiocination of Gubbay CJ, in the Zimbabwean

Supreme Court case of ***Zimbabwe Electricity Supply Authority vs. Maposa, (1992)2ZLR 452(S)***[2] where it was reasoned as follows:

> ***" where, however, 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 and fair minded person would consider that the concept of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it"***

The aforesaid test that was adopted by the Supreme Court aligns with both the general and narrow definitions of public policy that are ascribed in ***Blank's Law Dictionary, 10th Edition, Bryan A. Garner, Thomson Reuters.*** In its general form, the term is defined as ***"collective principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."*** The narrower definition is ***"the principle that a person should not be allowed to do anything that would tend to injure the public at large.***

Clearly, although the term public policy appears somewhat nebulous, it is in fact translucent in that it consists of a set of rules, principles or standards which the Courts consider to be for the wellbeing of the public at large, which consideration is premised on the state's concerns, whether written or unwritten. Additionally, in order to offend it, there must be some inequity that that transcends

an individual interest but is portentous to the concept of justice in Zambia.

With that framework in mind, it is with alacrity that I bring to light paragraphs 154.1 to 161 of the Arbitral Award in which the Arbitral Tribunal expressly considers, analyses and addresses their minds to the Applicant's claim for damages. In particular, paragraph 156 states

> ***" As we have pointed out, it is a recognised principle of law in Zambian jurisprudence that each party bears the burden of proving the facts relied on to support a claim or defence. During the hearing, no evidence was led to prove the claims that have been particularized in paragraph 16 of the Statement of claim with respect to general damages...."***

The quoted text reveals that the Arbitral Tribunal's decision to decline the Applicant's claim for damages was reasoned in such a manner which exposed the Applicant's own lapses in the prosecution of its claim. I cannot, therefore, see how one can sustain an argument that the Tribunal did not address their minds to the issue of damages. Such an argument appears to me, rather *Non-sequitur.*

Further, no evidence was furnished to this Court to show that by denying the Applicant any damages, the Award created an inequity that was so far reaching and outrageous that it defied logic or accepted standards that a sensible and fair minded person would

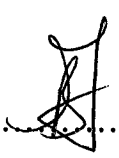
consider that the concept of justice in Zambia has been intolerably hurt by the Award. That being the case, That being the case, there is no basis upon which I can make a finding that the Award offends public policy.

In view of the Applicant's dearth in satisfying the prescribed threshold for setting aside an arbitral award pursuant to section 17(2)(a) of the Arbitration Act, and in view of the absence of any finding that the Award offends public policy, the Applicant's application to partially set aside the Arbitral Award of 14th July, 2016 as corrected on 8th August, 2016 is dismissed, with costs to the Respondent.

Cost shall be taxed in default of Agreement.

Leave to appeal is granted.

Dated the 30th day of June, 2017



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Justice B.G.Lungu

HIGH COURT JUDGE