IN THE HIGH COURT FOR ZAMBIA **2015/HP/ARB/009**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

KNOX MAGUGU MBAZIMA **APPLICANT**

AND

TOBACCO ASSOCIATION OF ZAMBIA **RESPONDENT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicant: *In Person*

For the Respondent: Mrs. M. B. Mutuna of Mesdames Mwenshi Banda and Associates

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JUDGMENT

Cases Referred to:

1. *Celtic Bio-energy Limited v Knowles Limited (2017) EWC 472*
2. *Chantiers De I'Atlantique SA v Gazitransport & Technigaz SAS (2011) EWHC 3383*
3. *Sablehand Zambia Limited v Zambia Revenue Authority (2005) Z.R. 109 (S.C)*
4. *Sithole v State Lotteries Board (1975) ZR 106*
5. *Zimbabwe Electricity Supply Authority v Maposa 1999(2) ZLR 452*

Legislation Referred to:

1. The Arbitration Act No. 19 of 2000

The Applicant instituted these proceedings by way of originating summons pursuant to Rule 23 of the Arbitration (Court Proceedings) S.I No. 75 of 2001 and section 17 of the Arbitration Act No. 19 of 2000. The said summons were supported by an affidavit filed into Court on 13th October, 2015. The summons sought that the Court set aside the Arbitral Award of 31st August 2015 on the ground that the evidence tendered by the Respondent in the Arbitration proceedings was fraudulent.

The affidavit in support of the summons was deposed to by one Knox Mbazima, the Applicant herein, who swore that he was employed by the Respondent under various contracts of employment, the most current being dated from 1st July, 2012 to 30th June, 2014. These contracts were exhibited and marked **KW1-1** and **KW1-3**. The agreed dispute resolution mechanism within the contracts of employment was Arbitration as was shown by exhibit **KM2** which was a copy of the said Arbitration clause.

Accordingly, the dispute arising between the Respondent and the deponent was referred to Arbitration and the final Arbitral Award was delivered on 31st August, 2015. The same was produced and marked **"KM3"**.

It was the deponent's contention that the said Arbitral award was delivered by the Arbitrator on the basis of evidence tendered by the Respondent that was fraudulent.

He further contended that the Respondent tendered fraudulent evidence of payment Request Vouchers of 20th June, 2012 and copies of the same were produced and marked **"KM4-1"** and **"KM4-2"**. It was deposed that a report of the fraudulent documents was made with the Zambia Police Service Fraud Department and a preliminary investigation indicated that the said documents appeared fraudulent.

The deponent contended that the Respondent further tendered fraudulent evidence before the Arbitrator when the Respondent adduced evidence of a purported e-mail dated 8th June, 2012 from him which he did not author. A copy of this email was produced and marked **"KM5"**. That a report of the fraudulent email correspondence was made with the Police Cybercrime Department and a preliminary indication was that the documents appeared to be fraudulent.

The deponent stated that the application to set aside the Arbitral Award was timeously made as it was made within three months from the date upon which he received a copy of the Award. It was his contention that it was in the interest of justice that the Respondent should not be allowed to execute the Arbitral award until the contentious issues were determined.

The Respondent filed in an affidavit in opposition to the summons to set aside on 2nd November, 2015 deposed to by one Owen Simukoko, the Finance and Administration Manager of the Respondent. The deponent swore that the contract marked **"KM1-3"** was challenged as being a forged document in the arbitration proceedings which led to the Arbitral Award which the

Applicant sought to set aside in these proceedings. Further, that the Respondent denied that the Arbitral Award delivered on 31st August, 2015 was delivered by the Arbitrator on the basis of evidence tendered by it that was fraudulent.

He swore that the payment vouchers marked as exhibits **"KM4-1"** and **"KM4-2"** which the Applicant alleged were fraudulent evidence were authentic documents.

He stated that during the arbitration proceedings, the Applicant did not challenge the authenticity of the payment vouchers although a precedent had been set by the Respondent when it challenged the admissibility of a transcript the Applicant produced in his Bundle of Documents. A copy of the Respondent's objection to the production into evidence of the transcription was produced and marked exhibit **"OS1"**.

Further, he produced exhibits**"OS2"** to **"OS4"** which were copies of emails dated 22nd January, 2015 and 27th January, 2015and a copy of the Supplementary Bundle of Documents in the payment vouchers were exhibited.

He averred that the Applicant had actually given evidence under cross examination which confirmed that he received payment in the sums of K25,000,000 and K76,650,000 respectively, which payments were reflected in the payment vouchers he was now alleging to be fraudulent documents.

A copy of a letter to the arbitrator dated 4th February, 2015 was produced and marked **"OS5"**.

He averred that the Applicant signed on the payment vouchers he was now challenging as being fraudulent documents and his signature was at the far right hand side on each voucher.

It was his contention that the allegation that the payment vouchers were fraudulent was an afterthought, more so that the Applicant had to date failed to reimburse the Respondent the payments made to him under the alleged fraudulent payment vouchers and he believed that the report by the Applicant of the alleged documents to the Zambia Police Service Fraud Department was in bad faith.

He added that there was currently no report from the Zambia Police Service Fraud Department to support the Applicant's assertions and the Applicant had no guarantee that the police investigations would be in support of his allegation. He further swore that it was incorrect that the email dated 8th June, 2012was fraudulent as the Applicant confirmed in his evidence during the arbitration proceedings that he had authored the said email marked exhibit **"KM5"**.

He deposed that as advised by the Respondent's advocates, the Arbitral Award was delivered on evidence which related to exhibit **"KM1-KM3"** upon which the arbitrator made findings concerning the Applicant's entitlement to gratuity on peripheral income and not the alleged fraudulent payment vouchers and email dated 8th June, 2012. As such the Arbitral Award was not tainted by fraud.

In view of this he believed it was inappropriate in this case to set aside the Arbitral Award as the Applicant's application lacked

merit and should be dismissed with costs to enable the Respondent to enforce the Arbitral Award.

The Applicant filed in his written submissions on 21st November, 2017. He submitted that the position concerning the setting aside an arbitral award set out in section 17 the Arbitration Act No. 19 of 2000 which provides that:

> *Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).*
>
> *(2) An arbitral award may be set aside by the court only if-*
>
> *(a) the party making the application furnishes proof that-*
>
> *(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;*
>
> *(ii) the party making the application was not given proper notice of the appointment of an arbitral or of the arbitral proceedings or was otherwise unable to present his case;*
>
> *(iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of*

the award which contains decision on matters not submitted to arbitration may be set aside;

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

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

(b) if the court finds that -

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

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

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

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request has been made under articles 33 of the First Schedule, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award may, where appropriate and if so requested by a party,

suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

It was the Applicant's submission that the Respondent fraudulently presented payment vouchers in relation to the sum of K25, 000,000 and K76,650,000 as evidence that he had received US$5,000 cash and US$15,000 after the reconciliation exercise conducted by the accountant after he had recalled him from leave on 25th June, 2012.

It was argued that the Respondent purported that upon the completion of the reconciliation exercise occasioned on his account, the witness CW1 submitted evidence on his letter of contract renewal dated 30th June, 2012 where he inscribed instructions to the cashier to pay US$20,000 being US$5,000 and US$15,000 in cheque. The instructions further advised that the balance of US$21,307.76 be paid after reconciliation of outstanding loans and advances.

He noted that during the arbitration hearing he had reported to the Arbitrator on page 31 of the Arbitral Award that he had detected fraud and forgery on the basis that the Renewal of Employment Contract could not have been available for him to endorse any instructions on 20th June, 2012 as indicated as the letter was only typed on 26th June, 2012 and signed by the President on 27th June, 2012.

According to him he observed that the Arbitral Award stated on page 31 as follows:

> *"He stated further that the President only signed the letter in his presence on 27June, 2012 and not on 20 June, 2012 and that the statement made by CW1 was untrue. He went on to state the purported instructions to the cashier on 20 June, 2012 was a fraud of forgery as the letter only came into being on 27 June, 2012."*

It was submitted that no rebuttal or comment to this observation was offered by the Respondent except the Arbitrator who commented that *"if this letter contains fraudulent instructions then any and all payments connected to were fraudulent."*

He argued that it was evident that the Respondent (CW1) provided false evidence that the Arbitral Award relied on when he reported that he had been paid US$ 5,000 cash and US$15,000 cheque as reported on page 22 paragraph 2 of the Arbitral Award as follows:

> *"He stated further that the Respondent then instructed him how to effect the payment of the US$5,000 and US$15,000 in cash and cheque and the balance was to be applied towards recovering the Respondent's outstanding loans and advances that would be found due from the Respondent after reconciliations by the Claimant's accountant, Arnold Chandala. He stated further that the Respondent then instructed the said accountant to report back to work from leave to compute what was due to the Respondent after deductions of loans and advances. The accountant reported*

for work on 25 June, 2012 and carried out the reconciliation exercise. He stated that thereafter he passed on the payment instructions to the said accountant and Nathan Mwanza (cashier)."

It was the Applicant's submission it was worth noting that if indeed instructions to pay him the purported US$ 5,000 and US$15,000 in cheque were genuine the following would have happened:

i. A reconciliation of the Applicant's account would have been done first and thereafter any residual funds would have then been paid to him. Yet it was the fraudulent instruction on his letter of renewal of Employment contract dated 30th June, 2012 that was implied in that it suggested paying him US$5,000 cash and US$15,000 cheque and thereafter consider amortising loans and advances. That this was clearly what would have transpired as the Accountant would have first amortized loans and advances before paying him and money that would be a residue of this process.

ii. That the witness CW1 stated that he had instructed the accountant and the cashier to pay him the purported US$5,000 cash and US$15,000 by cheque yet the purported vouchers do not indicate who checked this transaction meaning that the accountant was not privy to this fraudulent transaction.

The Applicant also submitted that while the Respondent would attempt to show that he received the equivalent of the US$5,000 in cash and US$15,000 in cheque being the figures on the disputed vouchers i.e K76,650,000 and K25,500,000 (old currency). He argued that he that these figures had absolutely no relationship to the purported payments of US$5,000 cash and US$15,000 in cheque as alleged.

He stated that the Respondent would try and argue that he acknowledged receipt of US$41,000 in his email dated 29 June 2012 yet that was simply in the belief that the agreed and bona fide amortization of his loans and advances had been done.

Further, that it was the Respondent who based his evidence of the purported payments being paid on his behest which he disputed. He argued that the Respondent was morally bound to support his claim with a bonafide accounts reconciliation statement he was relying upon as the basis of payment of US$5,000 cash and US$15,000 cheque. He cited various authorities to support his submissions.

The reconciliation statement headed Summary for Gratuity Payment showed no record of any US$5,000 cash nor US$ 15,000 paid after the reconciliation on 25th June, 2012 as purported by the Respondent. It was his submission that this application brought to light a Respondent who came to Court with dirty hands and with a callous intention to defraud him of emoluments he deserved as a consequence of a contract duly approved and executed in writing by the Respondent.

He argued that the evidence presented here clearly proved that such funds were never paid to him. That the arbitral award relied on the witness statements of CW1, CW2, CW3 and CW4 which all purported that the dispute arose as a result of him being paid gratuity on peripheral income which had not been approved by the executive committee nor the council of the Respondent.

He submitted that by relying to a large extent upon the evidence submitted by the three witnesses who all referred to an audit report, the Arbitral award was ruled in favour of the Respondent yet the forensic report which he demanded at the time of resignation was never revealed or submitted at the time of document discovery.

In response the Respondent filed in their submissions on 29th November, 2017. It was submitted on behalf of Respondent that the Arbitral Award ought to be read in the context of the issues in dispute between the parties during the arbitration proceedings and the evidence adduced and produced in relation to such issues.

That the Arbitral Award was delivered in favour of the Respondent on the basis of the evidence given by the parties during the arbitration proceedings and in particular, on the findings the arbitrator made on the alleged contract renewal letter dated 30 June 2012 marked **"KM1-3"** in the Applicant's Affidavit. The relevance of exhibit **"KM1-3"** was that it set out the alleged terms and conditions for renewal of the Applicant's contract of employment for the period 1 July 2012 to June 2014.

It was argued that that according to the award, the Arbitrator narrowed down the issue in dispute between the parties as follows:

"It is clear that the dispute between the parties arises from the negotiations surrounding the renewal of the Respondent's contract of employment for the period 1st July, 2012 to 30th June 2014 and the terms and conditions contained in the purported letter of renewal of 30th June, 2012."

The relevance of the arbitration considering the terms and conditions set out in exhibit "KM1-3" was that the said letter purported that one of the terms of renewal of the Applicant's contract was that he would enjoy a 40% net gratuity on the 15% peripheral income earned in his second contract which ended on 30th June, 2012. This was against the background of the Respondent's allegation that the Applicant had authored the letter himself and included an added benefit in the form of additional peripheral gratuity, knowing well that neither the Executive Committee nor the Council of the Respondent had authorised this benefit. Evidence was led to show how the Applicant used the letter to secure payment to himself for K218, 724.59 being gratuity which he was not entitled to.

The submissions revealed a summary of the Applicant's evidence and it was argued that having found that the renewal letter was not authorised by either the Executive Committee or the Council of the Respondent, the Arbitrator went on to make the following final award:

"As I have already found that the Respondent was not entitled to gratuity on the second contract. I find therefore that he was not entitled to be paid the sum of K218, 724.59. The Respondent is therefore clearly indebted to the Claimant for the said Sums paid to him in June, 2012 in connection with 40% gratuity on the peripheral income in the second contract..."

It was the Respondent's contention that the arbitrator could not be faulted for making the findings that she made in the Arbitral Award as the evidence clearly showed that the Applicant fraudulently procured the execution of the renewal letter dated 30 June, 2012, which purported to renew his contract from 1 July, 2012 to 30 June, 2014 with the added benefit of 40% Peripheral gratuity under his second contract despite his already having been paid peripheral gratuity under the second contract. It was, therefore illogical for the Applicant to challenge the enforcement of the award of K286, 395.53, on the basis of the disputed payment vouchers which only amount to a total of K101, 650,000.

It was submitted on behalf of the Respondent that in order for this Honourable Court to exercise its jurisdiction to set aside the Arbitral Award under section 17(2)(b)(iii) of the Arbitration Act., it was important to consider the meaning of the phrase *"the making of the award was induced or effected by fraud."*

The Respondent cited the Zimbabwean case of ***Zimbabwe Electricity Supply Authority v Maposa 1999(2) ZLR 452*** which was of highly persuasive value in view of the unifying

purpose of the UNCITRAL Model Law upon which the Arbitration Act No. 19 of 2000 is based, with modifications), the Zimbabwean Supreme Court considered the meaning of the highlighted phrase, which is modelled on articles 34 of the Model Law at page 464:

> *"This means that if, for example, the arbitrator was fraudulently misled or bribed by a party, the award, however innocuous facies, would be contaminated in the process of making and contrary to public policy.*

The Respondent's counsel also cited the case of ***Chantiers De I'Atlantique SAS Gazitransport & Technigaz SAS (2011) EWHC 3383*** where the four principles in relation to the English Arbitration Act were laid out and it was held that *an Arbitral award will only be set aside for fraud in extreme cases as section s.68 is designed as a log stop only available in extreme cases. Further, that Fraud is dishonest, reprehensible or unconscionable conduct and it must be distinctly pleaded and proved, to a heightened burden of proof.*

It was submitted that the award itself must have been obtained by fraud. In the same case it was further held that:

> *"the party which has deliberately concealed the document has , as a consequence of that concealment, obtained an award in its favour. The Party rely on s.68(2)(g) must therefore also prove a causative link"*

It was the Respondent's argument that this meant that there has to be fraud in the arbitration. That the evidence of fraud must

not be of such a kind "as could have been obtained or produced at the arbitration hearing with reasonable diligence" and the evidence must be "so material that its production (at trial) would probably have affected the result"

According to the Respondent's Counsel, it had been demonstrated by the Respondent that the reasoning which led to the Arbitral Award was founded upon the arbitrator's analysis of the evidence concerning exhibit "KM1-3", which letter the Respondent, not the Applicant, had alleged from the inception of the arbitral proceedings was a fraudulent document prepared by the Applicant.

That the arbitrator properly considered the evidence before her concerning the preparation of "KM1-3", its execution and the time line for payments made to the Applicant by the Respondent on the basis of "KM1-3" and rightly found in favour of the Respondent that "KM1-3" was a fraudulent document.

That the Applicant had clearly ignored this fact and instead opted to raise issue with the payment vouchers and email dated 8th June, 2012 which were not considerations that weighed heavily on the reasoning of the arbitrator in arriving at the Arbitral Award, as a perusal of the Arbitral Award will reveal.

It was the Respondent's submission that the integrity of the arbitral process in Zambia will only be preserved if applications to set aside, such as the present one, which are frivolous, baseless and clearly an attempt at reviewing or appealing against the decision of the arbitrator, are dismissed. The restrictive approach taken by the English Court's in applications to set

aside should be adopted in Zambia so that only well-meaning applications which are intended to advance the integrity of the arbitral process should be entertained.

Counsel submitted that the Respondent had demonstrated that the Applicant's argument was misleading and misconceived as the decision of the arbitrator in the Arbitral Award was based on evidence relating to exhibit "KM1-3" not the payment vouchers or email dated 8th June, 2012. Accordingly, the Respondent argued that the Applicant had failed to satisfy the requirements of an application under section 17(2)(b)(iii).

It was submitted that the standard of proof when it comes to allegations of fraud is very high as it is greater than a simple prepodance of probabilities. They cited the case of ***Sithole v State Lotteries Board (1975) ZR 106***. It was argued that the award based on a consideration of evidence which does not relate to the alleged fraudulent documents but the affidavit evidence hence the Applicant's application ought to be dismissed with costs.

As regard the Applicant's allegation that the payment vouchers pursuant to which he received the sums of K25,000,000 and 76,650,000 (old currency) respectively were fraudulent documents, it was argued that the Applicant did not raise any objection to the authenticity of the payment vouchers during the arbitral proceedings. The Respondent submitted that the Applicant had ample opportunity to challenge the authenticity of the payment vouchers before the Award was made instead of him waiting for delivery of the Award to make his allegation of fraud.

That at no point during the arbitral proceedings did the Applicant challenge the authenticity of the payment vouchers nor did he attempt to report the issue of the alleged fraud in relation to these documents to the Zambia Police Service Fraud Department in order to obtain a forensic report concerning the authenticity of the payment vouchers.

They added that this was despite the fact that there was inspection and discovery of documents. Further, that the Applicant did not dispute CW1's evidence under cross examination to the effect that the Applicant appended his signature to the payment vouchers to confirm receipt of the payment.

It was further submitted that where a failure to disclose was due to innocence or negligence, the information which was concealed will not establish fraud against the party who failed it. That an innocence failure to disclose documents did not go against public policy. That the fact that there was disclosure and Applicant failed to object to the payment vouchers means that he could not be heard to argue that they were fraudulent documents that offend public policy. They added that the case of ***Celtic Bioenergy Limited v Knowles Limited (2017) EWC 472*** relied on by the Applicant in his submissions filed into Court seemed to support this position.

The Respondent contended that the Applicant had also failed to show how the result would have been different had there been evidence of fraud before the arbitrator.

That there was no causative link between the alleged fraudulent payment vouchers and the Arbitral Award being in favour of the Respondent.

The Respondent further strongly refuted the Applicant's claim that he did not author the email dated 8th June, 2012. It was the Respondent's contention that the Applicant did not challenge the evidence by witnesses who testified on behalf of the Respondent to the effect that the Applicant authored the disputed email. It was further argued that the Applicant testified during the arbitration proceedings that he authored the said email.

It was finally submitted for the Respondent that the Applicant was attempting to use the procedure for setting aside as a means of this Court reviewing the merits of the Arbitral Award or as a direct appeal against the decision of the arbitrator. That the Applicant failed to satisfy the requirement under section 17(2)(b)(iii) of the Arbitration Act which entails establishing that the Arbitral Award was induced or effected by fraud and that as such there was no causative link between the Arbitral Award and the payment vouchers.

In the Applicant's submissions in reply it was argued that fraud lay at the heart of the two payment vouchers number P.V. 09690 and P.V. 09691 being for K25, 500,000 and K76,650,000. He argued that the purported payments were initiated by instructions that were endorsed on his letter of renewal of Employment Contract dated 30th June, 2012. According to him during the arbitration hearing he immediately informed the

Arbitrator that he had detected fraud in the presence of the Respondent's Attorney.

He said he explained that the instructions inscribed in his letter of Renewal of Contract dated 30th June, 2012 were fraudulent in that the letter itself, KM1-3 had not yet come into existence on 20th June, 2012. The as the actions of the Respondent's witness CW1 bordered on criminality, he immediately reported the matter to the Zambia Police Service Fraud Department

That based on the police's investigations CW1, who was the deponent in the affidavit in opposition, and his cashier were arrested and charged with two counts of forgery and two counts of uttering a forged document. That the two had been found with cases to answer before the Subordinate Court at Lusaka.

It was his further submission that it was evident from the handwritten instructions from CW1 noted on his letter of Renewal of Employment Contract as shown on page 10 of the Claimant's Supplementary Bundle of Documents that they were fraudulent. That the reconciliation by the accountant Arnold Chandalala after he returned to work from leave on 25th June, 2012 could not have precipitated in a transaction culminating in financial transactions that arose from instructions from CW1 on 20th June, 2012. It was his argument that this alone indicated that the purported payments of K25,500,000 and K76,650,000 had no relationship with the payments of US$5,000 and US$5,000 by cheque purportedly arising from the condition in the letter of Renewal of Employment contract post-dated to 30th June, 2012.

He contended that the Letter of Renewal of Employment Contract post-dated to 30th June, 2-12 only became alive after the President G. Mbozi of the Respondent acting in his capacity as Council President dictated it to the Applicant on 26th June, 2012 and after studying it overnight signed it in his presence on 27th June, 2012. He therefore argued that it was not possible that anybody, let alone CW1 could have had it in his possession a week before it was even typed or signed on 20th June, when it was only signed on 27th June, 2012.

According to him he acknowledged the full payment in his email of 29th June, 2012 naively believing and trusting the agreement they had to amortize all his loans and advances first and thereafter pay the Applicant any residual amount had been carried out.

He argued that it this Court upheld the execution of this award, a figure of US$20,000 ought not to be included as it was never credited to his account. He submitted that the causative link between the fraud and the Award.

With respect to the fraudulent concealment of evidence it was the Applicant's submission that the merits of the Arbitral Award were not the matter at hand but whether justice was to be done. That it would be important to note that the Arbitral Award was arrived at based on evidence derived from the Forensic Audit report conducted at his behest as a transparent way of separating from the Respondent. The said forensic Audit conducted by Walis Chartered Accountants and availed to the Respondent on 30th

November, 2012 was not before the Arbitration for the Respondent to lead its evidence.

He argued that it could not be denied that the Respondent benefitted from fraudulent concealment of evidence which in itself was treated by Courts as fraud. He sought this Court to determine whether or not this Arbitral award should be set aside on the basis of the reported fraud.

He submitted that it could not be doubted that not only did fraud take place leading to a favourable award to the Respondent but that upholding an award effected by fraud, fraudulent concealment of evidence and misrepresentations would contrary to public policy.

I have considered the submissions by both parties and the affidavit evidence on record. The gist of the application is that the Applicant sought for this Court to set aside the Arbitral Award on ground that the said award was arrived at by the arbitrator relying on information fraudulently generated by the Respondent.

I must note from the onset that the Respondent in its submissions highlighted that the Applicant had filed a further affidavit in support of the originating summons which however was vacated by this Court by a Ruling dated 19th February, 2016. The Supreme Court dismissed the Applicant's appeal against this Court's decision to vacate the further affidavit.

It was further noted that the Applicant however went on to file the said further affidavit in support of the originating summons when the Court ordered that the parties file in the final

submissions for and against this application. I agree with the Respondent's counsel that this is an attempt to introduce new evidence before this Court. The said affidavit will not and has not been considered in any way as the same is improperly before me.

I will now proceed to deal the Application to set aside the arbitral award based on the affidavit evidence properly before me. The principle provision in setting aside an Arbitral award is section 17 of the Arbitration Act no. 19 of 2000.In particular section 17 (2)(b)(iii) provides that:

(2) An arbitral award may be set aside by the court only

(b) if the court finds that -

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

The Applicant in his affidavit has alleged that the Arbitrator relied on fraudulent evidence adduced by the Respondent when it made the Arbitral Award. According to him the payment vouchers which gave payment for the sums of K25, 000,000 and K76,650,000 were fraudulently generated. Further, that the email dated 8th June, 2012 was not authored by him.

The Respondent on the other had contends that, firstly, the Arbitral Award was granted not based on the payment vouchers alluded to by the Applicant but that the Arbitrator relied on the contract renewal letter dated 30th June, 2012 which was alleged to be fraudulent. The Arbitral Award stated that the monies paid to the Applicant on 25th June, 2012 was due to the Applicant's misrepresentation of the truth and induced CW1 to pay him

monies on the basis of the renewal letter of 30th June, 2012 knowing that this was wrong and that he was not entitled to 40% gratuity on peripheral income for the second income. Secondly, that the alleged fraud by the Respondent has not specifically proven that the alleged.

The Supreme Court has given guidance where fraud is alleged. I called in aid the case of ***Sablehand Zambia Limited v Zambia Revenue Authority (2005) Z.R. 109 (S.C)*** where the Court held that

> *"where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, that at the trial of the cause, the party alleging fraud must equally lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved".*

Further, the Supreme Court in the case of ***Sithole v The State Lotteries Board (1975)106 SC*** cited by the Respondent held that if a party alleges fraud the extent of the onus on the party alleging is greater than a simple balance of probabilities.

In the present case, the Applicant has alleged that the evidence relied on by the Arbitrator during the arbitration proceedings was fraudulent. However, nothing has been demonstrated to show that the Arbitral award was in fact based on fraudulently generated evidence by the Respondent. In fact the Applicant admits to having signed the payment vouchers he alleges were fraudulent and he further admits to having authored the email dated 8th June, 2012.

The Applicant has not produced any evidence to show the fraud he is alleging apart from his word. The cases I have referred to are very clear on the standard of proof when one alleges fraud which has not been satisfied by the Applicant before me.

Even if it was assumed that the said payment vouchers were fraudulent and that the email dated 8th June, 2012 was fraudulently generated, the Arbitral Award clearly shows that the issue of contention was that the Applicant made misrepresentations of the truth and induced CW1. This led to him being paid monies on the basis of the renewal letter of 30th June, 2012 which led to the payment of monies he was not entitled to receive. It was not premised on the payment vouchers he is alleging were fraudulent by his conduct. I am further fortified in the submission that the Applicant in the arbitration proceedings did not raise any objections regarding the payment vouchers in issue nor the email dated 8th June, 2012 as being fraudulent.

The case of ***Chantiers De I' Atlantique SA v Gaztransport & Technigaz SAS*** cited by the Respondent is clear that the applicant must show that the evidence of fraud now relied upon was not such as could have been obtained or produced at the arbitration hearing with reasonable diligence and must show that the evidence in question is so material that its production would probably have affected the result. In my opinion, the Applicant had every opportunity to raise objections as to the authenticity of the payment vouchers and the email dated 8th June, 2012 but decided to remain silent.

I endorse the Respondent's argument that the Applicant's action is an attempt to appeal against the Arbitral Award which this Court has no jurisdiction to hear.

I further, find no causative link between the Arbitral Award and the alleged fraudulent evidence. This is because it is clear from the Arbitrator's analysis that the Applicant's Contract Renewal Letter was found to be fraudulent and as such all payments made pursuant to the said letter were erroneously made. Nothing links the alleged fraudulent evidence to the arbitrator's Arbitral Award.

In view of this I find no merit in the Applicant's submissions and find that the Applicant has failed to prove the alleged fraud by the required standard. I accordingly dismiss the action with costs to the Respondent. Leave to Appeal is granted.

Delivered under my hand and seal this 9th day of February, 2018.

Mwila Chitabo, S.C

JUDGE