IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0183**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: **Arbitration Act No.19 of 2000**

and

IN THE MATTER OF: **Section 17 of the Arbitration Act No.19 of 2000**

and

IN THE MATTER OF: **A Joint Venture Agreement Between Zamastone Limited and Saving Wealth Limited dated 12th September 2014**

and

IN THE MATTER OF: **An Addendum to the Joint Venture Agreement Between Zamastone Limited and Saving Wealth Limited dated 12th September 2014.**

BETWEEN:

SAVING WEALTH LIMITED **APPLICANT**

AND

ZAMASTONE LIMITED **RESPONDENT**

Before the Honourable Justice Irene Zeko Mbewe in Chambers

For the Applicant:	*Ms. M. Mwanawasa & Mr. J. Katati of Messrs Dove Chambers*
For the Respondent:	*Mr. P. Chungu of Messrs Ranchhod, Chungu Advocates*

RULING

Cases Referred to:

1. *Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd (1915) AC 79*
2. *Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited (1995-97) ZR 207*
3. *Cash Crusaders Franchising (PTY) Limited v Shakers and Movers Zambia Limited (2008/HP/ARB/NO.001) [2012]*
4. *Westland Helicopters Ltd v Sheikh Sala Al-Hejalian [2004] EWHC 1625 (Comm)*
5. *Westcare Investment Ltd v Jugoimport and Others (1999) QB 74*
6. *Richardson v Mellish [1824] 2 Bing 229*
7. *Martin Misheck Simpemba, Rose Domingo Kakompe v Nonde Mukanta Zambia Industrial Minerals Limited (2008/HP/268)*
8. *Zambia Revenue Authority v Tiger Limited and Zambia Development Agency No 11 of 2006*
9. *Zimbabwe Electricity Supply Authority v Maposa [1992] 2 ZLR 452*

Legislation and Other Works Referred to:

1. *Constitution of Zambia Act No 2 of 2016*
2. *Arbitration Act, No.19 of 2000*
3. *High Court Rules, Cap 27 of the Laws of Zambia*
4. *Treitels the Law of Contract, 13th Edition*

5. *Black's Law Dictionary. Ninth Edition, (West Publishing Company 1990)*

The Applicant by way Originating Summons dated 10th April, 2017 commenced this action against the Respondent seeking the following reliefs:

1. *An order to set aside the Arbitral award rendered by the Arbitrator, Mr. Justice Nigel Kalonde Mutuna on 23rd day of March 2017.*
2. *Costs of and incidental to this action.*
3. *Any other relief that the Court may deem fit.*

The supporting affidavit dated 10th April, 2017 is deposed to by Mr. Xie Jian Liang Director of the Applicant Company. The salient facts are that the parties herein entered into a Joint Venture Agreement on 9th September, 2014 for the production and sell of limestone (Exhibits "XJL1-2"). That disputes later arose pertaining to the obligations of the parties and operations under the joint venture resulting in the parties submitting to arbitration as per provision of the Joint Venture Agreement. That Hon. Mr. Justice Nigel Kalonde Mutuna was appointed as Arbitrator. It is deposed that the Applicant made a counterclaim against the Respondent for amounts in excess of ZMW13,450,000.00 (Exhibit "XJL3"). However, on 3rd

March, 2017, at the arbitration hearing there was no appearance by the Applicant as the deponent had travelled to China to attend to his ailing mother who later died (Exhibits "XJL4-5"). That the Applicant's then Advocates Messrs Dove Chambers withdrew their representation on grounds that they were finding it difficult to obtain instructions from the deponent. That the Arbitrator proceeded to hear the matter in the absence of the Applicant and subsequently rendered an Award on 23rd March, 2017 in which he awarded the Respondent's counterclaims against the Applicant and dismissed the Applicant's claim forthwith including the admitted issues on the ground that the Applicant failed to prosecute its claims (Exhibit "XJL6").

According to the Applicant, instead of paying heed to the provisions of the Agreement as to the remedies available for breaches and other default, the Arbitrator allowed claims that are contrary to law in respect to penalties of ZMW50,000.00 per day for non-production at the quarry and attendant products by the Applicant and forfeiture of the Applicant's property by the Respondent. It is deposed that the arbitral award herein contains matters beyond the

scope of arbitration. The deponent urges this Court to set aside the whole arbitral award as it will cause grave injustice to the Applicant.

In the skeleton arguments filed on 10th April, 2017, the Applicant referred me to section 17 of the Arbitration Act and section 23 of the **Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001.** The Applicant contends that the learned Arbitrator did not consider that clause 18 of the Joint Venture Agreement was invalid. The Applicant argues that the Respondent and the Arbitrator construed the words *"All disputes, differences and questions arising out...."* as contained in clause 18 of the Agreement to mean any breach of contract, deficiency in achieving production targets and any interruption to the mining operations. Counsel for the Applicant contends that the Arbitrator in awarding the penalties and forfeiture for the Applicant's property did not consider the provisions of the Joint Venture Agreement. Counsel submits that the Applicant was not given an opportunity to be heard and that the Arbitrator was under a duty to treat the parties with equality in line with Article 18 of the First Schedule to the

Arbitration Act No 19 of 2000. Counsel submits that the arbitral award in question contains decisions on matters beyond the scope of the submissions to arbitration.

Counsel for the Applicant argues that the arbitral award is in conflict with public policy as the claims are in conflict with the law as applied in this country. That the demand for ZMW50,000.00 per day for non-production cannot be considered as liquidated damages, neither can the forfeiture of property be regarded as fair compensation for breach of contract. To support this proposition, I was referred to the learned authors of **Treitels the Law of Contract, 13th Edition** where it states that:

> *"A contract may provide for payment of a fixed sum on breach. Such a provision may serve the perfectly proper purpose of enabling a party to know in advance what his liability will be; and of avoiding difficult questions of qualification. On the other hand, the courts are reluctant to allow a party, under such a provision, to recover a sum which is obviously and considerably greater than his loss. They have therefore, divided such provisions into two categories: penalty clauses, which are*

invalid and liquidated damages clauses, which will generally be upheld. It will be seen below that while the court have formulated a number of rules to determine whether a clause is penal, the current approach is to regard this as "a comparatively broad and simple question that will normally call for detailed analysis of the contractual background."

Based on the foregoing, Counsel for the Applicant submits that the clause to pay ZMW50,000.00 per day for non-production is penal and illegal and should not have been upheld by the Arbitrator. The Court's attention was drawn to the case of **Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd (1915) AC 79**[1] where it was held that:

"It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."

The case of **Union Bank Zambia Limited v Southern Province Co-operative Marketing Union Limited (1995-97) ZR 207**[2] was cited where the imposition and recovery of penalties or the enforcement

of penal clauses in contractual transactions is not allowed. The Applicant contends that the machinery and equipment forfeited was acquired without any consideration. Counsel for the Applicant contends that the contractual promises are not supported by consideration moving from the promise and are not enforceable under common law. Based on the foregoing, the Court is urged to set aside the arbitral award rendered by the Arbitrator on the ground that it offends public policy.

The Respondent filed an opposing affidavit dated 26th May, 2017 deposed to by Hachem Ezzedine the Managing Director and a Shareholder in the Respondent Company. It is deposed that the parties herein entered into a Joint Venture Agreement on 12th September, 2014 and that a dispute arose which was referred to arbitration for settlement. That the Zambia Association of Arbitrators appointed Honorable Justice N. K. Mutuna on 19th August, 2016. The deponent avers that the parties prepared and filed the necessary pleadings (Exhibits "HE 29-36"). That on 1st March, 2017 the Applicant's Advocates sent an email to the Respondent's Advocates and the Arbitrator indicating that they

were withdrawing from representing the Applicant in the proceedings due to the Applicant's none responsiveness. The deponent avers that when the matter came up for hearing on 2nd March 2017, the Applicant's Advocates were in attendance and withdrew from representing the Applicant, and accordingly filed a Notice of Withdrawal. That the Applicant's Accounts Clerk was present at the hearing but was notified by the Arbitrator that she was not competent to represent the Applicant and proceeded to hear the matter in the absence of the Applicant. On 23rd March, 2017 an arbitral award was delivered (Exhibit "XJL 6").

It is deposed that there are other persons in the country who would have represented the Applicant in the absence of Mr. Xie Jian Liang. That communications that took place between the parties indicate that there was someone within the country who was issuing instructions and in control of the Applicant's affairs (Exhibit "HE-132"). According to the deponent, the Applicant was not prevented from being heard in the proceedings as alleged but that the failure to put its case across was caused by its own neglect and fault. He further avers that several opportunities were given to the

Applicant to comply with the directions for the hearing but they failed to do so. That the arbitral award herein did not deal with any matters outside the reference to arbitration, and that the ZMW50,000.00 penalty was specifically pleaded at paragraph 39 of the Defence to counter-claim which is also contained in the last paragraph at page 3 of the Addendum to the Joint Venture Agreement.

In the skeleton arguments dated 26th May 2017, Counsel for the Respondent submits that the Applicant appears to be making this application based on several grounds when the originating summons does not disclose those grounds. Counsel for the Respondent argues that the right to make an application such as the one before Court does not imply that the dispute should be reopened for reconsideration, and to support this the case of **Cash Crusaders Franchising (PTY) Limited v Shakers and Movers Zambia Limited (2008/HP/ARB/NO.001)**[3] was cited where the learned Trial Judge said:

> *"The complimentary role the Courts play in the arbitral process means that the Courts merely assist the arbitral process to be*

effective because, since it is manned by private citizens and not the State, there are no systems put in place to make it effective such as those available to the Courts. It is inter alia in the form of providing a forum for registering Awards and setting aside of Awards.

The registration of an Award by the court is for purposes of giving it an official seal for enforcement purposes and not for purposes of bringing it into the realms of a judgment and therefore subject to the dictates of a Court."

Counsel for the Respondent argues that the Applicant's attempt to reopen the case should not be allowed as the role the Court plays is complimentary and supervisory. In respect to the issue of submission to arbitration, Counsel for the Respondent submits that the respective parties' Advocates signed a confirmation of submission to Arbitration and no objection to the appointment of the Arbitrator was made by the Applicant. That the parties agreed on the following matters to be dealt with in the submission to arbitration:

a) *the failure to meet production obligations and agreed standards of quality;*

b) *breach of the legal requirements under the Mines and Minerals Regulations;*

c) *the termination of the Joint Venture Agreement;*

d) *the forfeiture of the equipment and machinery of the joint venture as consequence of termination;*

e) *damages, loss of earnings, interest and costs.*

Counsel for the Respondent argues that the issue of penalties and forfeiture were both consequences of breach of the terms of the Joint Venture Agreement, and as such the Applicant's contention that these issues were not pleaded and outside the matters submitted for Arbitration, is flawed. Counsel argues that the question of production targets was properly within the ambit of the matters that were submitted for arbitration and that the Applicant did not raise any challenges as to the competence of these questions during the proceedings, nor did it respond to the Respondent's claim in its defence and counter-claim. Counsel for the Respondent submits that matters of excess use of the

Arbitrator's powers do not form a basis for setting aside an arbitral award where ample opportunity has been given to an aggrieved party to raise objection. In aid of this argument, Counsel cited the case of **Westland Helicopters Ltd v Sheikh Sala Al-Hejalian [2004] EWHC 1625 (Comm).**[4]

On the allegation that the Applicant was not given an opportunity to be heard, Counsel for the Respondent contends that the Applicant was engaged at all stages of the arbitral proceedings. That the Applicant failed to file witness statements despite being granted permissions and extensions to do so. Counsel contends that the Applicant was represented by two law firms namely Messrs Dove Chambers and Messrs. H. M. Mulunda & Company and that, when the former withdrew its representation, the latter remained as Advocates for the Applicant but were absent without explanation. Further, that the obligation to give a fair hearing should be construed in tandem with the need for expediency and finality.

Counsel for the Respondent submits that no portion of the arbitral award directs anything to the payment of ZMW50,000.00 for every day that production may have ceased. In the alternative, the

Respondent concedes that any payment to a party must only be compensation for loss and that the sum of ZMW50,000.00 was intended as compensation for loss of production and it is neither extravagant nor unconscionable. Counsel for the Respondent submits that the principle in the case of **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Limited**[1] is distinguishable with the circumstances of the parties in these proceedings. Counsel for the Respondent further disagrees that the arbitral award of forfeiture of the equipment and machinery of the joint venture was a term for which consideration was not furnished. Counsel argues that clause 13.1 of the Joint Venture Agreement shows forfeiture of equipment and machinery as a consequence for breach. Counsel submits that the Applicant did not impugn the validity of the said Agreement as its counter-claim was based on the same, as such it was a valid Agreement for which consideration was properly furnished. Based on the foregoing, the Court is urged to dismiss the application as the Applicant failed to show any of the circumstances for setting aside an Arbitral award as stipulated under section 17 of the **Arbitration Act No 19 of 2000**.

At the hearing of the application, the Applicant was represented by Ms. M. Mwanawasa and Mr. J. Katati. Ms. M. Mwanawasa submits that the gist of the matter emanates from the arbitral award rendered by the Arbitrator Hon Justice Mutuna on 23rd March 2017. Counsel placed reliance on the affidavit in support and skeleton arguments filed on 10th April 2017, as well as the affidavit in reply to the Respondent's affidavit in opposition dated 26th May, 2017. Counsel submits that the application is based on the fact that the Applicant was not given an opportunity to be heard on its counter-claim as well as give evidence in respect to its defence. According to Counsel, the affidavit evidence indicates that the Arbitrator proceeded to hear the matter in the Applicant's absence and that he refused to hear the Applicant's employee who was present at the said hearing. She reiterated that the deponent of the Applicant's affidavit is the director in charge of operations in the Applicant Company and that the deponent did not deliberately stay away from the proceedings as stated in the affidavits. Counsel submits that section 17 of the **Arbitration Act No 19 of 2000** gives circumstances the Court can set aside an arbitral award and that

this application is made with reference to section 17 (2)(b) (ii) of the **Arbitration Act No 19 of 2000.**

Mr. J. Katati submits that there was no representation from the Applicant at the arbitration as its then Advocates withdrew and contends that justice delayed is justice denied, and justice hurried is still justice denied. Counsel argues that the arbitral award in issue was rendered contrary to public policy as the Arbitrator ordered for forfeiture of the Applicant's equipment and machinery without any form of consideration. Counsel submits that the award of ZMW50,000.00 per day as a penalty for non-production without any reason is contrary to public policy. Based on the foregoing it is prayed that the arbitral award be set aside with costs.

On behalf of the Respondent Mr. P. Chungu placed reliance on the affidavit in opposition filed herein and the skeleton arguments. Counsel contends that the Applicant was not denied the opportunity to be heard as alleged and was in fact in default of the directions in respect to the filing of witness statements. Counsel contends that the Applicant had on three occasions requested for an adjournment to enable it comply with directions given and on

the third application, the Arbitrator proceeded with the hearing in default of the Applicant's compliance. As regards the withdrawal of the Applicant's Advocates, Counsel submits that the reasons given in the Applicant's affidavit in support of this application is that its director in charge of operations had travelled to tend to his sick mother and stayed on after her demise. Counsel argues that this reason was not given to the Arbitrator as the Applicant's then Advocates simply said they could not get instructions from their client. Counsel contends that the Applicant's employee who was present at the hearing was an Accounts Clerk as shown in the affidavit, a fact which the Arbitrator noted and indicated that the said employee was not competent to represent the Applicant, and as such, it cannot be said that the said person was prevented from representing the Applicant.

Counsel submits that the Applicant is a limited liability company and not a sole trader as such the argument that the deponent was the only person who could represent it cannot stand. Counsel argues that the arbitral award did not grant any penalties as alleged by the Applicant and that if this arose, it would be brought up in

damages. In relation to the argument that the transfer of the property was without consideration, Counsel argues that the remedy is in the Addendum to the Joint Venture Agreement as an agreed term, and that the exchange of several promises constitutes consideration.

Counsel contends that by delving into the question of consideration, this Court will be acting as an Appellate Court. In light of the foregoing it is prayed that this application lacks merit and be dismissed with costs due its failure to satisfy section 17 of the **Arbitration Act No 19 of 2000**.

In reply, Ms. Mwanawasa concedes that the Applicant did not file witness statements and that the Arbitrator was aware that the deponent of the Applicant's affidavit had travelled to attend to his ailing mother. Counsel submits that it is trite that a trial is the only opportunity that parties are given an opportunity to bring factual issues or rebut claims made against them. Counsel contends that witnesses are not only limited to directors of the Company but that any employee who is well versed with the facts of the case is competent to bring out the factual issues. It was

Counsel's submission that the Arbitrator granted reliefs and remedies which were not part of the claims made before him.

Mr. Katati submits that this Court has power to consider whether or not there was consideration on the equipment and machinery, and that if it is found that there was no consideration that would be against public policy. On the issue of persons to represent the Applicant, Counsel argues that the Applicant's affidavit in reply shows that Mr. Xie Liang was the only person involved in the matters between the parties, and that the Accounts Clerk was a mere employee who could not represent the company in serious matters.

I have considered the affidavit evidence, skeleton arguments and the rival oral submission advanced by the parties herein.

Emanating from the facts presented by both parties, it is not in dispute that the parties entered into a Joint Venture Agreement for purposes of mining, processing and crushing of limestone. It is common cause that according to the terms of the Joint Venture Agreement, if a dispute arose it was to be referred to arbitration for resolution. It is common cause that a dispute arose and the parties

submitted to arbitration before Hon. Justice Nigel Kalonde Mutuna, who was appointed as Arbitrator by the President of the Zambia Association of Arbitrators.

The application foe setting aside the Arbitral award is made pursuant to section 17 of the **Arbitration Act No.19 of 2000** which provides that:

(1) Recourse to a court against an Arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).

(2) An Arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity; or the said Agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;

(ii) the party making the application was not given proper notice of the appointment of an arbitral or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the Award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decision on matters not submitted to Arbitration may be set aside;

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

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

(b) If the court finds that –

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

(ii) the recognition or enforcement of the award would be contrary to 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.

In addition to this, section 23 of the **Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001** was cited which provides as follows:

"(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 a 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 matters referred to in subsection (2) of section seventeen of the Act, as may be necessary to support the application.

(4) On an application to set aside an Award, the court may direct that an issue between the parties shall be stated and tried and may give such direction in relation to the trial of such

issue as may be necessary, to make any other considered necessary in the circumstances.

From the cited law, the jurisdiction of this Court in setting aside an arbitral award is a strict one. Before I proceed to determine the issue, in putting arbitration into perspective as an alternative dispute resolution mechanism, it is trite that the Court should respect the will and desire of the parties to arbitration. In the case of **Westcare Investment Ltd v Jugoimport and Others (1999) QB 74[5],** the approach used by the Court was for preserving the primacy and authority given to arbitral awards and upholding the finality of arbitral awards. The setting aside of an arbitral award can negate the benefits desired from the arbitral process and undermine the efficacy of the parties' agreement to pursue arbitration, and therefore an arbitral award will only be set aside where it meets the requirements of Section 17 of the **Arbitration Act, No 19 of 2000**.

Right to be heard

In determining the aspect on the right to be heard, I will look at the parties arguments to see if they fall within the ambit of section 17

(2) (a) (ii) of the **Arbitration Act No 19 of 2000** which states as follows:

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

I am alive to the right to be heard which embodies the right of audience and this right is jealously guarded by the **Constitution of Zambia Act No 2 of 2016** and is a cornerstone of the rule of law. The Applicant's contention is that it was not given an opportunity to be heard by the Arbitrator and that the Arbitrator is under an obligation to treat parties equally. The Respondent on the other hand avers that the Applicant did not comply with orders for direction of filing witness statements, and that its then Advocates

were present at the hearing but informed the Arbitrator that they were withdrawing their representation. That the Applicant's accounts clerk although present at the hearing was not competent to represent it, a fact that the Arbitrator noted, refuting the allegation that the said employee was prevented from representing the Applicant. The record shows that the hearing proceeded in the absence of the Respondent's representatives as no sufficient cause had been shown as to their absence and the Arbitrator proceeded to determine the matter. The deponent alleges that he was the only one conversant with the matter at hand. The deponent exhibited his passport showing that he was outside the country at the material time and a certificate confirming the demise of his mother (Exhibit XJL4-5").

I disagree with the notion that the Applicant was not heard because despite its representatives not being present, the record shows that the Arbitrator considered the Applicant's pleadings that were filed before him. Therefore, the Arbitrator cannot be faulted for proceeding with the hearing in the absence of the Applicant's representatives because the hearing date was known to them and

opportunities to be heard were given to the Applicant by the Arbitrator. In my considered view, the fact that the Applicant is not happy with the outcome does not entitle them to have a second bite at the cherry.

Public Policy

An arbitral award may be set aside by the Court only if it finds that the recognition or enforcement of the award would be contrary to public policy as set out in Section 17 (2) (b) (ii) of the **Arbitration Act No 19 of 2000**. The concept of public policy can be narrowly or broadly construed. Bryan A Garner, in **Black's Law Dictionary. Ninth Edition, (West Publishing Company 1990)** laconically defines public policy at page 1351 as follows:

> *"Broadly principles and standards regarded by the legislature or by the Courts as being of fundamental concern to the State and the whole of society."*

In contextualising the term public policy, I am persuaded by Burrough J in **Richardson v Mellish (1824) 2 Bing 229**[6] who famously noted that public policy is a very unruly horse. Once you get astride it, he warned, you never know where it will carry you. In

the present case, the defence of public policy is narrowly construed in a bid to preserve, and recognize the goal of finality in all arbitration proceedings. The concept of public policy should therefore only operate in instances where the upholding of an arbitral award is clearly injurious to the public good or that it violates the most basic notions of morality and justice such as where a decision is taunted by a breach of natural justice. It follows that the threshold to establish a public policy exception is therefore high and the party seeking it must show an unacceptable violation of the principles of justice or rule of law. Thus, an arbitral award is not liable to be struck down on allegations that it is premised on incorrect grounds whether of fact or law. This is so because an application to set aside an arbitral award is not an appeal on the merits. The Court weighed in on this principle in the case of **Martin Misheck Simpemba Rose Domingo Kakompe v Nonde Mukanta Zambia Industrial Minerals Limited (2008/HP/268)**[7] where it held that:

> *"On application to set aside awards, arbitration awards are not approached with a view to discern the legal weaknesses, inconsistencies, or faults in the application of the law. The task*

of 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 test to be applied in setting aside an award that offends public policy for purposes of an application to set aside an arbitral award using section 17 (2) (b) (ii) **Arbitration Act No 19 of 2000** was set out by the Supreme Court in the case of Zambia **Revenue Authority v Tiger Limited and Zambia Development Agency No 11 of 2016**[8] where it made reference to the case of Zimbabwe **Electricity Supply Authority v Maposa (1992) 2 ZLR 452**[9]**.** In that case, the Zimbabwean Chief Justice Gubbay held that:

"Where, however, the reasons or conclusion of 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".

I adopt the above legal position and principles as my own. The Applicant argues that the arbitral award is contrary to law in respect to penalties of ZMW50,000.00 per day for non production of quarry and attendant products by the Applicant, and forfeiture of the Applicant's property without consideration. The Applicant further contends that the arbitral award contains decisions on matters beyond the scope of the submission to arbitration. The Applicant argues that there was no consideration for the equipment which is contrary to law. Conversely, the Respondent's contends that the issue of transfer of property was expressly agreed upon by the parties in the Joint Venture Agreement which in itself constitutes consideration. The Court will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their disputes.

After a careful consideration of the record, I do not see any impropriety on the part of the Arbitrator as all matters dealt with

were within the ambit of issues submitted for arbitration. I find that there is no evidence of a great inequity that was so far reaching and outrageous in its defiance of accepted standards that a fair-minded person would consider as being contrary to public policy. In the absence of any fundamental substantial procedural, or substantive error in the making of the arbitral award, I see no basis to warrant the setting aside of the arbitral award herein.

The sum total is that the Applicant's application to set aside the arbitral award lacks merit and is accordingly dismissed.

Costs awarded to the Respondent which costs are to be taxed in default of Agreement.

Leave to appeal is hereby granted.

Delivered at Lusaka this 22nd day of January, 2018.

HON IRENE ZEKO MBEWE
HIGH COURT JUDGE.