Judge

2017/HPC/ARB/0187

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

IN THE MATTER OF: Rule 23 of the Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001
Regulation 3 of Part 1 of Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 200.
Regulations 5 (1) (a) and (c) of part 1 of Arbitration (Count Proceedings) Rules, Statutory Instrument No.75 of 2001
Regulation 12 of part 1 of Arbitration (court proceedings) Rules, statutory Instrument No. 75 of 2001
Regulation 13 (1) of part 1 of Arbitration (Court proceedings) Rules, statutory Instrument No. 75 of 2001

AND

IN THE MATTER OF: Section 17(2) (ii) (iii) and IV of the Arbitration Act, No.19 OF 2001

AND

IN THE MATTER OF: An Arbitration Award dated 20th March, 2017

BETWEEN:

SUPPLY CONNECTION LIMITED **APPLICANT**

AND

NDILILA ASSOCIATES **RESPONDENT**

Before Lady Justice B.G. Shonga this 3rd day of June 2022

For the Plaintiff, *Ms. D. Nundwe and Mr. E. Sakala Messrs. Ranchhod & chungu*

For the Defendant, Mr. E. Zimba and Ms. B. Nachimba Messrs. Fraser Associates

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JUDGMENT

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. ***Arbitration Act, 2000: s. 17 (2)***
2. ***The Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007: R. 15.***

1.0 NATURE OF ACTION

By originating summons filed on 13th April, 2017, the Applicant claims, against the Respondent, for an order that the Arbitration Award delivered by Prof. Muya Mundia on 20th March, 2017, be set aside on the grounds that the composition of the arbitral tribunal was not in accordance with the agreement of the parties; the procedure employed by the arbitrator was not in conformity with the ***Arbitration Act, 2000***; and the award contained decisions on matters beyond the scope of arbitration.

2.0 THE EVIDENCE

2.1 Evidence in support

The summons is supported by an affidavit deposed by Sundeep Kantilal Ranchhod, a director in the Applicant company.

Mr. Ranchhod attests that the Applicant, Respondent and three other parties entered into an agreement of association sometime in 2012. In furtherance of the agreement, the parties collaborated and submitted a bid in response to the tender for the design, delivery and installation of the Warehouse Racking System and installation for Fire Detectors at Churches Association of Zambia (CHAZ) Warehouse. The affiant identified Civilstruts Consulting Engineering, North Atlantic Engineering Consultants, and JDN Associates as the other three parties to the agreement.

According to Mr. Ranchhod, the agreement contained an arbitration agreement in relation to the resolution of disputes. In support of his deposition, he adduced exhibit marked ***"SKR1"*** a copy of the agreement. Mr. Ranchhod attested that a dispute arose and the parties requested the Chartered Institute of Arbitrators to appoint an arbitrator. On 8th December, 2015, the Chartered Institute of Arbitrators appointed Prof. Muya as the arbitrator. Exhibit marked

"SKR2" to the affidavit is the letter of appointment of the arbitrator.

Mr. Ranchhod also deposed that the arbitration commenced on 4th February, 2016, at a preliminary meeting where the arbitrator informed the parties that he had engaged Dr. Lungowe Matakala as his assistant arbitrator. According to Mr. Ranchhod, the assistant arbitrator actively participated and rendered decisions in the arbitration proceedings, without the consent of the parties.

It was Mr. Ranchhold's testament that sometime in 2016, after the arbitral proceedings commenced, the Applicant perceived that the arbitrator demonstrated bias and impartiality in the conduct of the arbitral proceedings. He pointed out, for example, that on 7th September, 2016, the arbitrator, his assistant and the Respondent conducted a site visit to CHAZ in the absence of the Applicant and without due notice to the Applicant. The Applicant took issue with the site visit and on the same date, through electronic communication, registered its disquiet regarding the manner the dispute resolution process was being conducted.

It was Mr. Ranchhold's deposition that the Applicant's opinion of bias was initially communicated to the arbitrator by dint of the Applicant's letter of 5th September, 2016. Subsequently, on 9th November, 2016, the Applicant requested the arbitrator to recuse himself on the ground of bias, impartiality and prejudice. The deponent referred me to exhibit marked ***"SKR9"***, the letter of demand of recusal. The demand was met with Interim Award No.1 of 31st January, 2017, exhibit marked ***"SKR6"***, the arbitrator's decision dismissing the application for recusal.

Mr. Ranchhod also attested that on 12th February, 2017, the arbitrator made an interim award in which he directed that the advocates for the Applicant (Respondent in the arbitral proceedings), Messrs. Ranchhod I Chungu, should cease to act as counsel in the arbitral proceedings because a conflict of interest. It was deposed that notwithstanding that interim award, the arbitrator continued to correspond with Messrs. Ranchhod I Chungu as the Respondent's advocates in the arbitral proceedings. A copy of Interim Award No. 2 is exhibited, marked ***"SKR6"***.

Ultimately, the affiant avowed that the arbitration process was supposed to be concluded within four (4) months from 18th May, 2016, being no later than 18th September, 2016. However, that a final award was made on 20th March, 2017. The Applicant drew my attention to exhibit marked "***SKR3***", the Arbitrator's Final Award.

2.2 Evidence in opposition

In opposing the summons, the Respondent filed an affidavit in opposition deposed by Francis Mwape Ndilila, a principal at the Respondent firm.

Mr. Ndilila admits that the arbitrator appointed an assistant arbitrator at the preliminary meeting, but denies that the said assistant arbitrator actively participated and deliberated over the arbitration proceedings. He avows that all awards were signed by a single arbitrator.

As regards the site visit of 7th September, 2016, Mr. Ndilila avers that the Applicant was aware of the scheduled visit because their lawyers were aware. To evidence their

knowledge, the affiant adduced correspondence in which the parties set the dates and communicated with counsel for the Applicant during the period 1st to 6th September, 2016, relating to the site visit in contention.

Finally, the affiant rejected that the arbitration process was time bound to a defined period. He counters that the process or mandate was to conclude upon the making of a final award.

3.0 LEGAL ARGUMENTS

3.1 Arguments presented by the Applicant

The Application is anchored on ***section 17(2) of the Arbitration Act, of 2000*** (the "Act") which lays down the grounds on which an award passed by the arbitral tribunal can be set aside. In particular, the Applicant cited section 17 (2) (a) (ii), (iii) and (iv) which read as follows:

"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 tribunal 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..."

3.2 *Arguments presented by the Respondent*

In responding to the Applicant's arguments, the Respondent advances that ***Rule 15 of the Arbitration (Code of Conduct and Standards) Regulations, SI No. 12 of 2007*** (the "Standards") permits an arbitrator to use assistants.

4.0 DETERMINATION

I accept that an arbitration award may be set aside, in accordance with section 17 (2) (a) (ii) if the applicant furnishes proof that it was not given proper notice of the appointment of an arbitral tribunal. If not this, the award can be set aside under that same section, if the evidence adduced by the applicant demonstrates that the applicant was given inadequate notice of the arbitral proceedings. The third door which opens to an award being set aside under s. 17 (2) (a)

(ii) is proof that the applicant was otherwise unable to present his case.

In this case, the Applicant alleges that improper notice of the site visit was given to it. My scrutiny of the affidavit evidence before me reveals that counsel for the Applicant were in the know about the date of the site visits because they were in copy in the email correspondence which communicated the dates. This evidence is presented through exhibit marked ***"FMN1"*** to the affidavit in opposition. As a result, I find as a matter of fact that counsel for the Applicant, and in turn, the Applicant, were given proper notice of the site visit. Consequently, I find that the circumstances of this case do not fall within the scope of section 17 (2) (a) (ii) of the Act.

The second arm of the Applicant's disquiet is that the arbitrator made decisions on matters beyond the scope of the submission to arbitration. However, the Applicant neglected to illuminate the actual scope that was submitted to arbitration. In this regard, apart from the Award itself, neither party adduced a copy of the claim or other document which set out the scope or parameters of the dispute. The

affidavit evidence merely reveals that a dispute between the Applicant and Respondent arose and it was submitted to arbitration. Without a definitive scope before me, it is difficult assess what can be regarded as transcending the indeterminate scope. Nonetheless, I have examined the Award itself, which outlines the claim.

From the Final Award, I discern that the Respondent (Claimant in the arbitral proceedings) claimed K372, 205.00 being a share of the sum of K2, 808, 550.29 plus K3,722,050.00 which was allegedly paid to the Applicant herein by CHAZ and which was due to it from the Applicant for the share of work the Respondent did for CHAZ as part of the Consortium.

The Applicant illuminates a portion of the Final Award, on p. 24 of the said Award, in which the arbitrator uttered the following finding:

> *"From the preceding discussion and reasons given, I find the respondent liable for breach of contract as well as trust vested in them via the power of attorney assigned to them by the other consortium partners."*

Below the above finding, the arbitrator proceeded to make his Final Award, in which the Applicant was directed to pay the Respondent the sum of K196,598.52 being a percentage of the amount that the arbitrator found to have been paid by CHAZ to the Applicant, together with interest and costs.

I observe that the arbitrator did not make any award in favour of the other consortium members. Similarly, there was no award in respect of damages for breach of contract or breach of trust. In my view, the absence of the grant of reliefs relating to damages for breach of contract or trust strongly suggests that the utterance made by the arbitrator constituted babble as he meandered his way to determining the actual issues before him. Consequently, I am not persuaded that the arbitrator went outside the scope of the submission to arbitration. Relief under section 17 (2) (a) (iii) is, therefore, not tenable.

I now turn to the allegation that the appointment of the assistant arbitrator compromised the composition of the arbitral tribunal. I have ruminated upon Regulation 15 of the Standards. It reads as follows:

> *"An arbitrator shall not delegate any decision-making functions to another person without the consent of the parties."*

My interpretation of Regulation 15 is that the arbitrator is prohibited from assigning decision-making functions to another person without the parties' consent. Simply put, the subject of the prohibition is the delegation of decision making functions. As I see it, the question that falls for determination is whether a decision making function was delegated to the appointed assistant arbitrator. I have traversed the affidavit evidence before Court in search of an indication of the decision-making function which may have been delegated. I see none. The Applicant elected not to assist the Court by pinpointing the decision-making function that was delegated without the consent of the parties. That being the case, I find that this allegation also lacks merit. As such, I determine that the Applicant has not demonstrated that the composition of the arbitral tribunal or procedure was not in accordance with the agreement of the parties or the Act. Resultantly, relief under s. 17 (2) (a) (iv) is not available.

In light of the above, I hold that the Applicant has failed to furnish proof that it was not given proper notice of the arbitral proceedings; or that the Award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration; or that the composition of the arbitral tribunal fell afoul of the agreement between the parties.

In light of the foregoing, I do not consider this to be an appropriate case in which to set aside the Final Arbitral Award. Therefore, the application is unsuccessful and is dismissed, with costs. Costs are awarded in favour of the Respondent, to be taxed in default of agreement.

Dated this 3rd day of June, 2022.

JUSTICE B.G. SHONGA
HIGH COURT JUDGE