(768)

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO.90 of 2006

HOLDEN AT NDOLA
SCZ Judgment No.34 of 2008

(CRIMINAL JURISDICTION)

BETWEEN:

ZAMBIA TELECOMMUNICATIONS CO. LIMITED APPELLANT

AND

CELTEL ZAMBIA LIMITED
RESPONDENT

CORAM : Mumba, Chitengi and Mushabati, JJS.

On 5th December 2007 and 14th May, 2008

For the Appellant : Mr. S.C. Malama, SC. of Jacques and Partners and Mr.M.M.

Mundashi of Mulenga Mundahsi and Company

For the Respondent: Mr. N. Nchito of MNB

JUDGMENT

Mushabati, JS., delivered the judgment of the Court.

Cases referred to:

1. ***Commonwealth Coating Corporation Vs Continental Casualty Corporation and Others(1968)U.S.145***

Legislation referred to:

The Arbitration Act No. 19 of 2000 – S. 17(2)(b)(ii)

(769)

This is an appeal against the High Court Judgment of 10th March, 2005 setting aside an arbitral award made by an Arbitral Tribunal on 28th May, 2004.

The grounds for the application to set aside the said award were that;

1. ***The Arbitral Award is in breach of public policy contrary to Section 17(2)(b)(ii) of the Arbitration Act.***

   The Arbitral Award is in breach of the procedure and the law of Zambia in Section 17(2)(a)(iv) of the Arbitration Act.

   The Arbitral Award is in excess of the jurisdiction of the Tribunal contrary to Section 17(2)(a)(iii) of the Arbitration Act

This application was supported by an affidavit. The gist of this affidavit was that the Arbitral Tribunal was constituted to consider the interpretation of paragraph **2.1 of Appendix B of the Inter Connection Agreement** between the plaintiff and the defendant. The said paragraph is herein referred to as the "Disputed Clause". This clause reads as follows: ***Zamtel shall pay the operator for calls terminating into the operator's cellular network at 20% of the prevailing PSTN to MTS collection***

rates.

The Arbitral Tribunal was chaired by Hon. Mr Justice C. Kajimanga, a High Court Judge. Prior to the awarding of the Arbitral Award the Chairman accepted an appointment to serve as a member of another Tribunal at the request of the

(770)

defendant's advocate. The acceptance of the appointment was perceived to have had an influence on the decision of the Tribunal, more so that the Chairman never disclosed his acceptance of that appointment which was at the request of the defendant's advocate and another. The Chairman's acceptance was further perceived as having compromised his impartiality, thus creating a notion that justice may not have been seen to have been done because it was irregular, illegal and repugnant to the Zambian principles of justice.

The defendant filed two affidavits in opposition to the plaintiff's originating summons. In the first affidavit it was deposed by one Linire Mulima that the grounds advanced in the plaintiff's affidavit in support of the originating summons were a mere attempt to indirectly appeal against the award that was made by the Arbitral Tribunal because the award itself could not be impugned on its own merits. The award itself was made on facts, as proved by the evidence on record. The second affidavit in opposition was sworn by

one Sibanze Simuchoba, an advocate. In this affidavit Mr Simuchoba deposed that Hon. Mr Justice Charles Kajimanga was not appointed by Michael Musonda Mundashi alone to serve on the Arbitral Tribunal between Seedco and ZESCO. Mr Simuchoba himself was also appointed as an arbitrator on the said Tribunal. Kajimanga, J's name was proposed, from among others, by himself and Mr

(771)

Mundashi of which the latter did not have any objection at all. Mr Simuchoba then drafted the letter which was sent to the Judge. This letter was first sent to Mr Mundashi to sign after which it was delivered to the Honourable Judge. After some discussions between Mr Simuchoba and Hon. Mr Justice Kajimanga, the latter accepted to chair the panel in the Seedco and ZESCO Arbitration Tribunal. Mr Mundashi himself did not have any discussions with the Hon. Judge. Both Mr Mundashi and Mr Justice Kajimanga have since withdrawn from the Seedco and ZESCO Arbitration Tribunal.

These are the brief relevant evidence adduced before the trial court. At the end of the trial the learned trial judge, though not impugning the Hon. Mr Justice Kajimanga's integrity as a High Court Judge, found for the plaintiff that the Hon. Judge Kajimanga ought to have disclosed his interest that he had been appointed to sit on another Arbitration Tribunal at the instance of the plaintiff's advocate Mr Mundashi and another. The learned Judge's failure to declare his interest rendered the award to be set aside hence this appeal

before us.

Three grounds of appeal were filed and they are as follows;

1. ***The Arbitral Award is in breach of public policy contrary to Section 17(2)(b)(ii) of the Arbitration Act.***

(772)

2. ***The Arbitral Award is in breach of the procedure and the law of Zambia in Section 17(2)(a)(iv) of the Arbitration Act.***

The Arbitral Award is in excess of the jurisdiction of the Tribunal contrary to Section 17(2)(a)(iii) of the Arbitration Act

These grounds were supported by written heads of argument and spirited oral submission by Mr Malama,Sc.

The three grounds were argued together as though they were one, of which in our opinion, they were.

Basically it was argued that the award was set aside because of the alleged bias by the Chairman of the Tribunal because he had accepted an appointment to sit on another tribunal, as co-arbitrator, with one counsel that represented the defendant in this case. It was further argued that the learned trial Judge arrived at the decision she did because the Chairman's failure to disclose his appointment created an impression of possible bias

which the learned trial Judge said was sufficient to set aside the award. It was conceded, on behalf of the defendant, that one ground upon which an arbitral award may be set aside is that **“it is in conflict with the public policy of the state”.** The argument of possible bias was carried further that a misconduct by an arbitrator raised the issue of public policy based on the natural rules of justice. An example

(773)

is where an “arbitrator or umpire” acts unfairly and in breach of the rules of natural justice by, for example, hearing only one party but refusing to hear the other or even talking to one of parties in the absence of the other.

It was submitted that the notion of bias on the part of the Chairman, arising out of his accepting the appointment by two lawyers to co-arbitrate in a different matter, would have influenced him in the matter at hand, was fanciful, contrived and capricirous. It was therefore, unreasonable to hold the view or suspicion that the award which was made on 28th May, 2004 (now in contention) in favour of the appellant was biased because Kajimanga, J., was one of the three Arbitrators in this case.

The perceived bias argued here was against or in favour of a litigant and not in fovour of the advocate who appointed him to sit on another tribunal. This appointment had nothing to do with the parties in the arbitration

proceedings which were before him. It was finally submitted that the setting aside of the award on the perception of possible bias on the part of the Chairman, a High Court Judge, who was only one of the three arbitrators, was contrary to the majority of the cases cited herein. In buttressing the above arguments counsel for the plaintiff cited a number of authorities, which we shall be referring to later on in this judgment.

(774)

In his oral submission Mr Malama, SC. addressed the court at length on the alleged bias alleged in this case. He addressed us on the rules of natural justice which we do not intend to repeat here. He argued that bias has two limbs namely actual and perceived. The end result of the two requires that **“a person shall be tried by an impartial tribunal”.** In the instant case the issue was really of perceived bias. When an allegation of perceived bias is alleged and proved then the decision is rendered a nullity. Public confidence in which judges are held should not be allowed to derail men and women in charge of dispensing justice. Mr Malama further argued that the accusation of bias was raised after the award was made and not before or during the proceedings. It cannot be argued that there was apparent bias on the part of Kajimanga, J simply because he was to appear with one of the advocates in some other arbitral proceedings. The appointment, itself, was not made by one advocate but by two of them. The question of bias should seriously be looked into by this court to avoid uncertainty in the legal

fraternity.

The respondent also filed detailed heads of argument and supplemented them with oral submissions. In the written submission Mr Nchito argued that the appointment of Kajimanga,J. to another arbitral tribunal by Messrs M. Mundashi and S. Simuchoba was on 26th May, 2004 and not 2nd June, 2004 when he wrote

(775)

his letter of acceptance, as an arbitrator, addressed to the Company Secretary, ZESCO and Mr Stanley Malikani of Seedco. The learned judge did not disclose this fact. The Arbitral Award now being challenged was made on 28th May, 2004, two days after he was asked to sit on another arbitral tribunal.

Mr Nchito continued to argue that in fact the judgment of the court below was not only based on perceived bias but also on the failure of the Arbitral tribunal to employ the purposive rule of interpretations. The plaintiff merely appealed against one finding i.e of perceived bias. So even if the appeal was to succeed on the first limb, it must fail on the second reason given by the trial court for allowing the appeal because this was not appealed against. Perceived or possible bias was what was necessary to have the arbitral award set aside. So the question that ought to be resolved is what would a fair minded and informed person have concluded, upon considering the fact

that an arbitrator, whether judge or not, had been appointed by counsel for one of the litigants to co-arbitrate in some other arbitral proceedings, before such arbitrator was **“functus officio** in this case**?”** The test to be used therefore, must be the objective test. Given the facts of this case any reasonable person would justifiably and reasonally hold the view that an arbitrator in the circumstances above would be biased. An arbitrator, unlike a judge, finds himself in a peculiar position because he derives his remuneration from the parties. So if an arbitrator

(776)

fails to disclose a fact like the one Kajimanga, J. found himself of accepting an appointment, he is likely to have his integrity as an arbitrator blemished.

In the circumstances the trial court was justified in finding that an impression of apparent bias was proved and the setting aside of the arbitral award was justified.

On the second ground of appeal Mr. Nchito’s argument was more or less similar to the arguments advanced on the first ground, in fact this is true of the remaining grounds namely three and four except to add that Kajimanga, J. should not have accepted the appointment before the earlier arbitral proceedings had been completed and that it is clear from **Section 17(2)(b)(ii) of the Arbitration Act No. 19 of 2000** that the arbitral award under

review was against public policy.

In his oral submission Mr. Nchito argued that what was before the court was not the interpretation of a document but a prayer to set aside the arbitral award on the ground of public policy.

He submitted that the four grounds, which were argued as one, were in fact contradictory of each other and ought to have been argued in the alternative.

(777)

The argument that there was no ground for the finding of perceived bias under the first ground, they accepted under the second and third grounds that there was a perception of bias.

It was not the conduct of the Chairman as a Judge which was under attack but as a Chairman of an Arbitral Tribunal. The two positions should not be mixed together.

The Judge's appointment was made on 26th May, 2004 and the award was given on 28th May, 2004. The Judge wrote his letter of acceptance on 2nd June, 2004. The court below found that the issue of public policy was established so it was proper to have the award set aside. He further argued

that the **Pinochet case** could be distinguished from the case at hand in that in the former case the person at the centre was a judicial officer whereas in the instant case it is an arbitrator who derives his remuneration from the parties.

In reply Mr Malama, urged this court to look at the circumstances that happened on 26th May, 2004 and 2nd June, 2004. He argued that an award made on 28th May, 2004 must have been be ready before the date of appointment i.e. 26th May, 2004 and so it could not have influenced the out

(778)

come of the Arbitral Tribunal's award in this matter. Further his appointment was made by two people and not one.

We have carefully considered the submissions by both Learned Counsel, the affidavit evidence on record and judgment appealed against.

We have no doubt that initially there was a matter that was brought for consideration before the Arbitral Tribunal chaired by Kajimanga,J. The matter was one of interpreting a clause in agreement document between the two parties in this case. The clause in issue was 2.1 which read: ***Zamtel shall pay the operator for calls terminating into the operator's cellular***

network at 20% of the prevailing PSTN to MTS collection rates.

This clause is contained in the document at page 120 of the record of appeal entitled: ***MOBILE CELLULAR TELEPHONE SYSTEM (C3) INTER CONNECTION AGREEMENT TERMS OF PAYMENT FOR INTER CONNECTION.***

We are also satisfied that before the award was made on 28th May, 2004 the Chairman of the Arbitral Tribunal Hon. Mr Justice Charles Kajimanga was appointed to another Arbitral Tribunal as an Arbitrator. Among the people who signed the letter in which he was so appointed was Mr Michael Musonda

(779)

Mundashi, an advocate of the defendant in this case. The date of the letter was 26th May, 2004.

It is also common cause that the award was made two days after the date of the letter of appointment was written.

The allegation against the Chairman is that of perceived bias and not that he was actually baised.

In setting aside the award the learned Judge in the court below said at page 27 third paragraph, **“As correctly pointed out by the learned advocates**

for the plaintiff, the question in such cases is not whether there was actual bias or that the Tribunal was impartial or that there was actual conflict of interest, but that where (sic) (whether) there is created an apparent perception of bias or possible bias or likely conflict of interest, then there is a genuine concern or suspicions of a real possibility of bias."

She further said: **In this case, there was this appointment. There was no disclosure of the appointment. It was this failure to disclose the appointment that created the impression of bias.**

(780)

In support of this conclusion she cited the case of ***Commonwealth Coatings Corporation Vs Continental Casualty Corporation and another*** ***(1)***. This is what was said; ***we can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.***

In arguing the appeal Mr Malama, strongly felt that the test that should be used in this case should be the objective one, taking into account the position of the Chairman as a High Court Judge. He went on to say public

confidence in men and women dispensing justice should not be derailed by such accusations, like the one directed at the chairman in this case. He admitted that one of the rules of natural justice requires that **“No one should be a judge in his own cause”** which, when expanded it compasses the constitutional provision which demands that **“a person shall be tried by an impartial tribunal”.** The fact that one of the two advocates, Mr Mundashi, who appointed Hon. Mr Justice Kajimanga, was one of the members to sit on that Tribunal should not be taken as having influenced the Tribunal’s award in this case, more so he (Kajimanga,J.,) was a High Court Judge whose integrity and impartiality should not lightly be questioned. The accusation ought to have been made before the award was granted, unlike here where it came after the award was already made.

(781)

In reply Mr Nchito said, in a nutshell, the attack on the decision of the tribunal was not in the light of the fact that Kajimanga,J., was a High Court Judge because he was not sitting as such.

We have carefully considered the arguments above in light of the findings of the court below.

The action was commenced in the court below on the ground that the failure by the Chairman to disclose his interest in the other matter rendered the award in this case to be **“in conflict with public policy”.**

The issue really is not that Kajimanga, J., who was sitting as the Chairman in this matter, was biased or that his impartiality was compromised. The matter was looked into from an objective position i.e how reasonable people would have viewed the Chairman's involvement in both cases without him disclosing this fact to all the parties.

The perception would have been that because of his failure to disclose his interest in the other matter in which one of the advocates appearing before this Tribunal, was one of the two advocates who appointed him and the fact that the advocate, namely Mr Mundashi, was also a member of the Tribunal to

(782)

which Kajimanga, J. was appointed, his possible conflict of interest could not be ruled out.

Public Policy has not been defined in the **Arbitration Act 19 of 2000**. It is however, public policy that a person ought to be tried by an impartial tribunal. In this case the learned Chairman's involvement in this case without disclosing his interest in the other arbitral tribunal could easily be perceived as being contrary to public policy because the perceptions from the objective test, would have been that a likelihood of bias or possible conflict of interest could not be ruled out. It was on this ground that the award was set aside.

We, ourselves, have considered the facts of this case, as proved by the evidence on record. We cannot find any ground upon which we can fault the decision of the learned judge in the court below. We have considered the authorities cited to us but found them not to be persuasive enough to us as to up-set the lower court's judgment.

We totally agree that the learned Chairman's failure to disclose the fact that he had been appointed to another arbitral award by one of advocates in the proceedings under review, raised the question of perceived bias against him. The same advocate was to sit with him in that other arbitral tribunal. Admittedly, the letter appointing him to that arbitral tribunal was written two days before the

(783)

award in the matter before was made. The possibility, however, was that before the Chairman was formally written to on 26th May, 2004 to notify him of his appointment, he must have been earlier on approached over the same.

The challenge of the Arbitral Tribunal's award made on 28th May, 2004 based on perceived bias on the part of the Chairman was reasonable.

We up-hold the lower court's judgment in full. The appeal has therefore, no merit and it is dismissed with costs which shall be agreed by both parties. In default of agreement they shall be taxed.

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F.N.M Mumba

SUPREME COURT JUDGE

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P. Chitengi

SUPREME COURT JUDGE

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C.S. Mushabati

SUPREME COURT JUDGE