(573)

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

SCZ JUDGMENT NO. 26 OF 2010
APPEAL NO. 68 OF 2008

B E T W E E N:

ZUFIAW	APPELLANT
AND	
RODTECH LIMITED	RESPONDENT

CORAM: **Sakala, CJ, Chibesakunda and Silomba, JJS.**
On the 4th November, 2008 and 12th October, 2010

For the Appellant: Mr. N. Mutuna, then of NK Mutuna and Associates representing Mr. G. Simukoko of G.W. Simukoko And Company

For the Respondent: Mr. G. Chibangula of G.C. Chibangula and Company

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J U D G M E N T

SILOMBA, JS, delivered the judgment of the Court.

Case referred to:-

1. **The Attorney-General -Vs- Marcus Achiume (1983) ZR. 1.**

This appeal is against the ruling of the High Court dated the 7th day of January, 2008 in which the learned trial Judge refused to grant an order to set aside an award under Section 17(2) (a) (1) - (v) and (b) (i) - (iii) of the Arbitration Act No. 19 of 2000 (hereinafter to be called "the Act").

(574)

The history of the case is like this: The Appellant and the Respondent entered into a contract dated the 7th of January, 2004 under which a building belonging to the Appellant was to be converted into a training centre as per specifications and in the manner agreed by the parties. The consideration for the exercise was K180,119,632. As the Respondent set about to execute the works, a dispute arose and as per agreement the parties referred the dispute to an arbitrator agreed upon by consent.

At arbitration, the Appellant sought to repudiate the contract and recover from the Respondent the sum of K22,629,069.58, being the difference between the sum of K47,481,000.00 paid to the Respondent for roofing works and K70,110,069.58 paid to another party for the completion of roofing works. The Appellant also claimed special damages and a refund of K47,481,000.00 for roofing works, interest and costs.

On the other hand, the Respondent denied having caused any delay in the construction works; it also denied the Appellant's claims and counterclaimed for the completion of the contractual works at the site; payment of the sum of K87,405,373.74 for the contractual works so far done on the site premises, as well as additional sums for additional works yet to be done; damages for breach and/or repudiation of the contract; interest on the amount found to be due and costs.

Both parties tendered evidence before the arbitrator, an architect by profession, and referred to various documents, such as the bundle of documents produced by the Appellant and the Respondent, the memorandum of

understanding signed by both parties and the drawing showing the works that were to be executed by the Respondent.

From the evidence tendered by the parties, the issues the arbitrator set out to resolve were:-

(i) **What caused the works not to be completed up to the date of hearing;**

(ii) **Contract was mutually revised to include additional roof works and a new completion date as 30th of June, 2004;**

(iii) **Another contractor appointed to complete the roof, work completed on the 9th of November, 2004;**

(iv) **Poor workmanship and finishing;**

(v) **Delayed or non-payment of claims; and**

(vi) **Termination of contract.**

After due consideration of the evidence before him, the arbitrator made observations as contained in the Final Award that is reproduced in the ruling of the learned trial Judge, the subject of this appeal. On the cause of the delay in completing the works, the arbitrator found that the contract between the parties had been extended four times, the last extension was to end on the 20th of December, 2004. At the expiry of the contract and before it could be extended, the contractor (Respondent) was evicted from the site via an injunction. In the view of the Arbitrator, the eviction from the site without the mandatory notice as provided for under Clause 25 of the Articles of Agreement entitled the contractor to claim for direct loss of business and to all other remedies.

(576)

On the mode of payment, the arbitrator ruled that the period in which the total payment was to be made was 14 days from the date of presentation of the claim or invoices. Because of the various claims that had remained unpaid, and in some cases unverified, the arbitrator ruled that it was necessary that an independent and registered quantity surveyor be appointed to value the work done and compare with the works done in order to prepare a final account from which payments to the contractor and refunds to the Appellant could be determined.

On issues relating to the extension of time, the arbitrator found that the contract, having been substantially altered by the changes to the roof and by extension of time granted by the Appellant, the Respondent was fairly entitled to claim increased preliminary and general items, increased cost in materials and labour to 14th of February, 2005. With the extension of time given by the Appellant to the Respondent, the arbitrator ruled that claims for special damages could not be allowed.

In dealing with the completion of the roof by another contractor, the arbitrator noted that the works on the roof were not in the original contract but the variation was sanctioned by the client. He ruled that the cost of the variation, which had been incurred, could be fairly valued by the quantity surveyor and the figure arrived at should be part of the contract sum; that any monies paid for the work to the main contractor should be refunded as the work was done by another contractor.

(577)

On the quality of work, the arbitrator ruled that in the absence of the specifications of the materials to be used and the method of construction, the general specifications produced by the Government's Director of Building would be the basis for the standards and that any standards or materials that did not comply with the general specifications ought to be removed from both the building and site at the contractor's expense.

The Appellant, not being satisfied with the Award, applied to the High Court by Originating Summons to set aside the Award pursuant to Sections 16(2) and 17(2) (a) (iii) of the Act. The arguments of the parties before the trial Court are well outlined in the ruling appealed against.

The gist of the Appellant's argument, through counsel, was that the Arbitrator did not decide on the matters submitted to him by the parties; that he did not give reasons for his Award as per Section 16(2) of the Act. It was argued that it was wrong for the arbitrator to rely on the articles of agreement, which were not among documents referred to him by the parties.

The Appellant further argued that the arbitrator did not review the evidence and submissions for both sides and did not state his determination on specific issues submitted by the parties; that the form and content of the Award did not meet the requirements of the Act as the Award was wrongly titled - The Final Claim - and that it did not state the place of arbitration as per Section 16(3) of the Act.

It was argued in the alternative that even if the "final claim" were to be held to mean "The Final Award" the determination itself was not final as it delegated the determination of money Awards due to either the Appellant or

Respondent to a third party i.e. an independent and registered quantity surveyor. It was also argued that the Award dealt with matters beyond the scope of the submission contrary to Section 17(2) (a) (iii) of the Act; that the matters in question were whether the Appellant should have appointed an Architect and whether the general specifications produced by the Director of Buildings and the articles of agreement were applicable to the contract. As far as the Appellant was concerned, since the determination was not final the Award was not cogent, complete and enforceable as required by the Law of arbitration.

The Appellant was not in favour of invoking Section 17(4) of the Arbitration Act to allow the arbitral tribunal to resume the arbitral proceedings because the mistakes made by the arbitrator were not merely clerical but were mistakes that went to the root of the process. As far as the Appellant was concerned, the mistakes reflected adversely on the competency and fairness of the arbitrator.

The gist of the Respondent's response, through counsel, was that an arbitral Award could only be set aside under the terms of Section 17 of the Act where the Applicant showed exceptional and compelling reasons. It was submitted that the parties did not present to the arbitrator a "submission to arbitration" defining specific issues to be determined by him; that in the absence of such submission, the arbitrator was left at large to resolve all matters in dispute from pleadings submitted to him.

On the reference to articles of agreement, the Respondent submitted that the arbitrator did not, by so doing, introduce evidence on his own because the articles of agreement were a standard form of contract governing all building and

civil engineering works; that the memorandum of understanding signed by the parties to cover the project was a shortened form of the articles of agreement.

On the form and content of the Award, the Respondent argued before the trial Court that it met the requirements of the Act; that the use of the words **"final claim"** and not **"final Award"** and the failure to state the place of arbitration were clerical mistakes which were curable and as such did not go to the root of the substance of the Award. Further, that referral of money awards to a registered quantity surveyor did not amount to a delegation of power but simply to enable the quantity surveyor to prepare the final account.

The Respondent urged the trial Court, as an alternative remedy, to invoke Section 17(4) of the Act and suspend the proceedings in order to give the arbitrator an opportunity to resume arbitral proceedings and correct clerical errors or mistakes; that since the arbitrator was chosen by consent of the parties, there was no reason of him being biased against the Appellant.

The learned trial Judge examined the parties' pleadings and affidavits on record and considered their submissions in relation to the application before him and opined that an arbitral award could only be set aside under the terms stated by Section 17 of the Act. The learned trial Judge reproduced the entire Section 17 and with regard to the application before him, which was made specifically under Section 17(2) (a) (iii), the learned trial Judge outlined three areas from which proof of anyone of them could entitle the Appellant to the grant of an order to set aside the arbitral award. These were:-

1. **That the award complained of dealt with a dispute not contemplated in the submission to arbitration; or**

2. **That the award dealt with the dispute not falling within the submission to arbitration; or**

3. **That the award contains decisions on matters beyond the scope of the submission to arbitration.**

The learned trial Judge then set out to examine the Appellant's claims, the Respondent's counter-claims and the arbitrator's award in relation to Section 17(2) (a) (iii) of the Act. After going through the competing claims of the Appellant and the Respondent and the arbitrator's award, the learned trial Judge found that the arbitrator determined the claims and counter-claims before him and made verdicts on them. The learned trial Judge reasoned that the correctness or otherwise of the verdicts of the arbitrator on those claims and counter-claims was not the subject of the application before him as it was not an appeal against the arbitrator's award.

As far as the learned trial Judge was aware, the Court's concern was whether the arbitrator determined the issues placed before him by the parties, which he so found. He accordingly held that the Appellant had not established that the award dealt with a dispute not contemplated by the submission to arbitration or further that the award contained decisions on matters beyond the scope of the submission to arbitration.

On the form and content of the award, as governed by Section 16 of the Arbitration Act, the learned trial Judge found that the award was in writing and was signed by the Arbitrator. He was satisfied that the arbitrator gave reasons for every award he made and that the award stated the place and dates of arbitration. On the title of the award, the learned trial Judge found that it was a

misnomer to entitle the award as **"Final Claim."** Since the title of the award related to form only, it did not affect the substance of the award and further held that since the content of the award satisfied Section 16 of the Act a mere misnomer, in the form of a typing error, was not a ground for setting aside the award under Section 17(2) of the Act.

On the totality of the issues raised, the learned trial Judge found that the Appellant had not established any of the grounds specified under Section 17(2) (a) (i) - (v) and (b) (i) - (iii) and refused the application, hence this appeal.

There are four grounds of appeal and these are as follows:-

1. **The Court below misdirected itself when it decided that the decision by the arbitrator, to delegate the determination of the money awards to the parties, to a third party, "an independent and registered Quantity Surveyor" to be agreed by the parties, satisfied the requirements of an enforceable award.**

2. **The Court below misdirected itself when it decided, contrary to the rules of natural justice, that the decision of the arbitrator, based entirely on the "articles of agreement" which were not part of the Memorandum of Agreement between the parties and which were not tendered as evidence by the parties did not amount to self introduced evidence by the arbitrator and was sound at law.**

3. **The Court below misdirected itself when it decided that the form and content of the arbitrator's decision, which he titled the Final Claim, meets the requirements of Section 16 of the Arbitration Act No. 19 of 2000 that an award shall state its date and place of arbitration.**

4. **The Court below misdirected itself when it did not make a decision on the evidence before it and accepted the Defendant's submissions 3 months after the date ordered for the submission and allowed the Defendant unlimited time in which to furnish the Court with the articles of agreement relied upon in its submissions, for the Court to read before finalizing its decision.**

(582)

Both parties in this appeal have filed their written heads of argument on which they relied upon. The written heads of argument were re-enforced by oral arguments of counsel.

The summary of the written heads of argument of the Appellant, under ground one, took issue with the holding by the learned trial Judge that the arbitrator was in order to make an interlocutory award to refer the assessment of the money awards to the parties to a quantity surveyor. It was submitted that the foregoing finding of fact was only sustainable if the parties themselves had agreed or directed the arbitrator to render an interlocutory award. In the absence of such an agreement or directive, it was the Appellant's position that the finding of fact by the trial Court was a wrong finding of fact which was perverse and made in the absence of any relevant evidence. We were asked to reverse the finding and the case of ***The Attorney General -Vs- Marcus Achiume*** [1] was cited in aid.

The Appellant admitted that under Section 16(7) of the Act an arbitrator can make provision for interim, interlocutory and partial awards. The Appellant, however, contended that an interlocutory award was an award on an interlocutory application; that in this particular case, there was no interlocutory application before the arbitrator for him to make an interlocutory award. As far as the Appellant was concerned, the award was not an interlocutory award and that even if it were so the award would fail the substantive requirements of an award. The Appellant contended that all the three types of awards referred to under Section 16(7) of the Act were subject to the substantive requirements of an award under the common law and practice of arbitration that an award should be cogent, complete, certain, final and enforceable.

(583)

Referring to Section 20(1) of the Act, the Appellant submitted that every award, irrespective of its classification, was final unless the arbitral tribunal, with the consent of the parties, reserved an aspect of it, such as to quantum or costs, for his future consideration. As far as the Appellant was concerned, an arbitrator could not delegate to a third party who did not have the mandate of the parties to make a determination; that in delegating to a third party, the arbitrator departed from the agreement of the parties in adopting a procedure which was not in accordance with the agreement. In the circumstances, the Appellant submitted that the award was liable to be set aside pursuant to Section 17(2) (iv) of the Act.

It was contended that by delegating the determination of a money award to a third party, the award was not final. The Appellant posed the question or questions on the delegation that what would happen if the parties were unable to agree on the third party and if the third party was unable to determine the amount? Further, would the parties revert to the arbitrator who became *functus officio* after rendering his award?

With regard to ground two, the Appellant, at the very outset, referred us to the submissions made in the Court below to illustrate the point that what guided the parties in the contract to undertake construction works was the memorandum of understanding, which the parties signed and not the articles of agreement; that by basing his decision entirely on the articles of agreement, which were not mentioned anywhere in the memorandum of understanding and were not documents submitted by either party to arbitration as evidence at the hearing and neither were they documents pleaded in the statement of claim or

defence and counter-claim, the arbitrator was guilty of having self-introduced the evidence.

In consequence thereof, the Appellant contended that according to the rules of natural justice the arbitrator was not supposed to rely on the evidence introduced by himself without first giving the parties an opportunity to address him on the evidence. It was submitted that while the contractor might be familiar with the articles of agreement, which guide the construction industry, the Appellant was definitely not. It was submitted that the Appellant was a client of the construction industry and it was unreasonable to assume that it (Appellant) was conversant with the customs of that industry.

The Appellant was of the firm view that on the basis of the evidence introduced by the arbitrator the Award could be set aside under Section 17(2) contrary to the finding of the learned trial Judge as the Appellant was unable to present its case on the applicability of the articles of agreement to the case before the arbitrator.

On ground three, the Appellant briefly submitted that the requirement that the award must state the place of arbitration was not as held by the trial Court; that the place where the hearing was conducted was not always the seat of the arbitration. After quoting from Article 20(1) and (2) to the First Schedule as read with Section 16(3) of the Act, the Appellant submitted that the place where evidence was heard was not necessarily the place of arbitration. It was submitted that stating the seat of arbitration was a significant and important requirement as to form, especially in international arbitration.

(585)

On ground four, the last ground of appeal, the Appellant submitted that the trial Court failed to deliver the ruling on the appointed day, as admitted by the Court, because the Respondent did not exhibit the articles of agreement on which they relied on in their submission. Besides, the articles of agreement were never served on the Appellant. The Appellant submitted that it was gross injustice to it (Appellant) for not delivering the ruling on the appointed date based on the evidence before it. As far as the Appellant was concerned, the trial Court breached the rules of natural justice.

We were urged to quash the ruling on the totality of the entire submission and grant the application to set aside the award under Section 17 of the Act. In the alternative, we were urged to suspend the setting aside of the award and allow the arbitration proceedings to resume in order for the arbitrator to correct the award by rectifying the mistakes in the procedure highlighted hereinbefore under Section 17(4) of the Act.

In his oral submission, counsel for the Appellant merely emphasized, by way of reply, what was already highlighted in the heads of argument.

In its heads of argument in response, the Respondent chose to deal with the four grounds of appeal as one ground of appeal because, in its view, the four grounds were inter-connected or related. Besides, the Respondent adopted and repeated what was submitted in the Court below as well as the contents of the affidavit in opposition to the Originating Summons to set aside the award filed before the learned trial Judge.

(586)

The Respondent's written heads of argument, opened with an attack on the Appellant for introducing an additional ground of appeal in its written heads of argument. The Respondent took issue with that part of the submission that read "...The arbitrator departed from the agreement of the parties because he adopted a procedure which was not in accordance with the agreement. The award is, therefore, liable to be set aside pursuant to section 17(2) (a) (iv) of the Act."

We note that the Respondent took issue with the introduction of Section 17(2) (a) (iv) of the Act when the application to set aside the award had all along been pursuant to Sections 16(2) and 17(2) (a) (iii) of the Act. We also note that the reference to Section 17(2) (a) (iv) of the Act by the Appellant came under ground one. As we pointed out during the oral submissions of counsel for the Respondent, the reference to sub-section (2) (a) (iv) of Section 17 of the Act was part of the arguments in the submissions of the Appellant in support of ground one and it was never intended to be a fresh ground of appeal.

It was submitted in the written heads of argument that the learned trial Judge correctly stated that an arbitral award could only be set aside under the terms stated by Section 17(2) and (3) of the Act and on proof of one of the three elements we have already referred to when dealing with the findings of the lower Court contained in its ruling that is the subject of this appeal. Further, the Respondent submitted that after carefully examining and analysing Appellant's claims, the Respondent's counter-claims and the arbitrators award, in relation to Section 17(2) (a) (iii) of the Act, the learned trial Judge found, as a fact that the arbitrator determined the claims and the counter-claims before him and made verdicts on them.

(587)

The Respondent further submitted, in support of the ruling of the lower Court in relation to Section 17(2) (a) (iii) of the Act, that after it had analysed the claims and counter-claims and the arbitrator's award it (the lower Court) found that the Appellant had miserably failed to establish that the award dealt with a dispute not contemplated by or that the award contained decisions on matters beyond the scope of the submissions to arbitration. The Respondent submitted that in consequence of the foregoing, the lower Court was perfectly in order when it found that the award contained decisions on matters purely within the ambit and scope of the submission to arbitration by both parties, and in particular in relation to whether the architect should have been appointed by the Appellant or not.

In dealing with the articles of agreement and the general specifications of the Government's Director of Buildings as self-introduced evidence by the arbitrator, the Respondent referred us to paragraph 6 of its affidavit in opposition to the Originating Summons; that in referring to the specifications in item 1.2 of the award the arbitrator was simply alluding to the fact that in the absence of specific or standard specifications in the memorandum of agreement signed by the parties the only measure of quality of workmanship and finishing was the standard or general specifications produced by the Ministry of Works and Supply's Director of Buildings.

From the foregoing submission, the Respondent pointed out that the drawings produced before the arbitrator lacked any specifications and standards because the parties did not agree on specific standards and specifications for the building materials and the method of construction under Clause 4.0 of the

memorandum of agreement. In consequence thereof, the Respondent agreed with the finding of the learned trial Judge that the Government general specifications did not constitute evidence in that the same were mere reference guidelines in the form of usage in the construction trade or industry and that the arbitrator did not rely on the evidence introduced by himself.

The Respondent, in the alternative, supported the finding of the lower Court that the (alleged) reliance by the arbitrator on the evidence (allegedly) introduced by himself was not one of the grounds upon which an arbitral award could be set aside under Section 17(2) (a) (iii) of the Act. The Respondent submitted that contrary to the Appellant's submission there was no breach of the rules of natural justice by the arbitrator and the trial Court by making reference to the Government general specifications, which were simply general reference guidelines in the form of usage or custom in the construction trade or industry.

It was also submitted that the articles of agreement were simply general reference guidelines in the form of a standard contract or usage in the construction trade or industry, governing all building and civil engineering works and that the memorandum of agreement signed by the parties was simply a shortened form of the articles of agreement. We were, in the circumstances, urged to uphold the finding of the lower Court that the articles of agreement and Government general specifications did not constitute evidence in that they were simply general reference guidelines in the form of usage or standard form contract in the construction trade or industry and that the arbitrator did not rely on self-introduced evidence by merely referring to them under items 1.1 and 1.3 of the award.

(589)

On the decision of the arbitrator to leave the quantification of the sum due to the parties to be assessed by an independent and registered quantity surveyor, the Respondent submitted that the decision satisfied the requirements of a valid interlocutory award under Section 16(7) of the Act and did not amount to a delegation of power or mandate on his part (as canvassed by the Appellant) but that the decision under items 2.2 and 2.4 of the award was made to enable a quantity surveyor to prepare the final account which would normally include omissions and make additions to the original contract arising from the variation of works.

The Respondent further submitted that the decision of the arbitrator to make an interlocutory, interim or partial award and leave the quantification of the sum due to the parties to be assessed by a quantity surveyor was based on the fact that a quantity surveyor was, according to the applicable usage, custom and practice in the construction trade or industry in Zambia, a qualified and skilled professional well vested and better placed to undertake proper valuation of the construction works done and compare with the amounts paid as a basis for preparing a final account of the money due to the parties for the construction works done. We were referred to paragraph 20 of the defence and counter-claim in which the Appellant informed the Respondent about the proposal to engage a quantity surveyor for the purpose of valuing the works thus far done by the Respondent.

On the submission that the arbitrator could only make an interlocutory award on an application of either of the parties, the Respondent's response was that there was no where in Section 16(7) of the Act for the parties to agree and

direct the arbitrator to render an interim, interlocutory or partial award or make an interlocutory application to empower the arbitrator to render an interim, interlocutory or partial award.

Contrary to the submission of the Appellant, the Respondent pointed out that the said section empowered the arbitrator to make an interim, interlocutory or partial award where there was no agreement between the parties precluding the arbitrator from making such an award. We were urged to uphold the lower Court that it was in order and in accordance with Section 16(7) of the Act for the arbitrator to make an interlocutory award and leave the quantification of the sum due to be assessed by an independent and registered quantity surveyor.

On the form and content of the arbitrator's award, the Respondent submitted that the award met the requirements of Section 16 of the Act in that it gave reasons on which the award was based and stated the place and date(s) of the arbitration. We were referred to paragraph 9 of the affidavit of the Appellant in support of the Originating Summons, where it was mutually agreed by the parties that Longacres Lodge in Lusaka would be the seat of arbitration proceedings; that the failure by the arbitrator to state the place and date of arbitration was, at law, not one of the grounds upon which an award can be set aside.

On the delay in filing the Respondent's submission and the articles of agreement before the lower Court, the Respondent deeply regretted the incident and submitted that the learned trial Judge's comments were in passing to explain the delay in the delivery of the ruling and as such the remarks could not be the

(591)

subject of appeal. As an Appellate Court, we agree with the Respondent especially that no grave injustice or prejudice suffered by the Appellant has been shown.

On the alternative prayer for the suspension of the setting aside of the proceedings under Section 17(4) of the Act, the Respondent submitted that the Appellant's prayer was tantamount to gross abuse of the Court process; that it was the Appellant that argued very strongly against the same before the lower Court to the effect that the suspension of the proceedings to allow the arbitrator to cure his mistakes under Section 17(4) of the Act would not, in the circumstances of the case, serve the purpose of justice. It was submitted that the sudden change in position meant that the Appellant had conceded, though impliedly or indirectly, that the alleged mistakes made by the arbitrator, if any, were clerical, curable and did not go to the root of the arbitration proceedings; that the Appellant was estopped from alleging or submitting otherwise (i.e. different from its submission in the Court below) or turning hot and cold as when things please them.

In his oral submission, the Respondent's counsel merely emphasized what was already in the written heads of argument. We were urged to dismiss the appeal in its entirety with costs to the Respondent both on appeal and in the Court below, including the costs of the tribunal proceedings.

We have carefully considered the oral and written submissions of the parties in this appeal in relation to the ruling appealed against, as well as the arbitral award that was the subject of an application to have it set aside by the High Court. In a nutshell, the Appellant's argument, in relation to ground one, is that **the learned trial Judge was wrong in holding that the Arbitrator was in**

(592)

order to make an interlocutory award in referring the assessment of the money awards due to the parties to a quantity surveyor. The position of the Appellant is that such a finding of fact was only sustainable if the parties themselves had agreed or directed the arbitrator to render such an interlocutory award.

Since there was no prior agreement or directive, it was contended that the trial Court made a wrong finding of fact which was perverse and made in the absence of any relevant evidence. As far as the Appellant was concerned, the third party had no mandate of the parties to make a determination and by delegating to him the arbitrator departed from the agreement of the parties and adopted a procedure that was not agreed upon, thereby making the award not final and liable to be set aside pursuant to Section 17(2) (iv) of the Act.

On the other hand, the Respondent's argument is that the decision of the arbitrator to leave the quantification of the sums due to the parties to be assessed by an independent and registered quantity surveyor satisfied the requirement of a valid interlocutory award under Section 16(7) of the Act. Further, that the decision to leave the quantification of the sum due to a quantity surveyor was based on the fact that he was, according to the applicable usage, custom and practice in the construction trade or industry in Zambia, a qualified and skilled professional well vested and better placed to undertake proper valuation of the construction works done and compare with the amounts paid as a basis for preparing a final account of the money due to the parties for the construction works done.

From the two opposing views of the parties, it is not disputed that the arbitrator, an architect by profession, was appointed to arbitrate in the dispute

with the consent of the parties. The arbitrator agreed upon was, in terms of the agreement of the parties of the 7th of January, 2004, to be a neutral person. By his training and qualification, the parties ought to have known from the outset that an architect could not, undertake the business of evaluating or assessing construction works already done and existing on the ground. We say so because it was pleaded and acknowledged in paragraph 20 of the defence and counter-claim that there was an arrangement whereby the Appellant had proposed to the Respondent to engage a quantity surveyor for the purpose of valuing the works so far done by the Respondent. Since the allegation by the Respondent was not denied or specifically traversed by the Appellant, by way of reply, we take it that the limitations of the arbitrator were well known to the parties. With that kind of knowledge, the parties chose not to include a quantity surveyor as one of the arbitrators.

It is apparent to us that a professionally qualified quantity surveyor is the irresistible panacea when an issue has arisen regarding the evaluation or assessment of construction works already done. The engagement of such personnel is, apparently, a matter of course according to the applicable usage, custom and practice in the construction trade or industry in this country. So, when the arbitrator was faced with such a problem he had no choice but to make an interlocutory award and leave the quantification of the sum due to be assessed by an independent and registered quantity surveyor.

Whether the arbitrator had power or not to make an interim interlocutory or partial award, is a matter that can be resolved by reference to and interpretation of Section 16(7) of the Act. The section reads:-

(594)

"16(7): Unless otherwise agreed by the parties, an arbitral tribunal shall have the power to make an interim, interlocutory or partial award."

Our understanding of the above subsection is that an arbitrator is always clothed with power to make an interim, interlocutory or partial award unless the parties themselves have agreed otherwise to limit his power to do so. We have re-read the agreement and no provision to that effect was made. In the absence of the limitation in the agreement, we agree with the argument of the Respondent that under Section 16(7) of the Act there was no need for the parties to make a formal application for an interim, interlocutory or partial award as the law empowered the arbitrator to act on his own volition as a means of achieving an end. In our view, ground one cannot be sustained and it is accordingly dismissed.

Coming to ground two, the contention of the Appellant is that **the arbitrator was guilty of having self-introduced the evidence when he based his decision entirely on the articles of agreement which were not mentioned anywhere in the memorandum of understanding of the parties and were not documents submitted by either party to arbitration as evidence at the hearing and neither were they documents pleaded by either party.** As far as the Appellant is concerned, the arbitrator was not supposed to rely on the evidence introduced by himself without first giving the parties, in accordance with the rules of natural justice, an opportunity to address him on the evidence. On the basis that the Appellant was not accorded an opportunity to be heard on the self

introduced evidence, the award was liable to be set aside vide Section 17(2) of the Act.

To counteract the position of the Appellant as afore-stated, the Respondent has submitted that the articles of agreement were general reference guidelines in the form of a standard contract or usage in the construction trade or industry governing all building and civil engineering works. According to the Respondent, the memorandum of agreement signed by the parties was simply a shortened form of the articles of agreement.

The Respondent supported the finding of the lower Court that the reliance by the arbitrator on the evidence purportedly introduced by himself was not one of the grounds upon which an arbitral award could be set aside under Section 17(2) (a) (iii) of the Act. In the premises, we were urged to uphold the finding of the lower Court that the articles of agreement (including Government general specifications) did not constitute fresh evidence in that it was simply general reference guidelines in the form of usage or standard contract in the construction trade or industry and that the arbitrator did not rely on self introduced evidence by merely referring to articles of agreement.

After carefully considering the two positions advanced by the parties, our view is that there is no serious issue to resolve here. In the first place, the Appellant has not hidden its frustration that it is not familiar with the usage or trade in the construction industry and we think that such ignorance cannot be blamed on anyone else but itself. The lack of knowledge of what goes on in the construction industry should have, in our view, made the Appellant to consult

widely, mobilize the necessary witnesses, including expert witnesses, to assist it at arbitration. This was not done.

We have perused through the arbitrator's final claim (or is it the final award) and we can see the problems he had in restricting himself to the memorandum of understanding, which lacked detail. The Respondent has advanced the point that the memorandum of understanding is a shortened version of the articles of agreement and this fact has not been seriously challenged. The arbitrator, in his final claim at paragraph 1.3, and others, does not hide the fact that the articles of agreement are generally used in the construction industry to resolve issues.

To us, therefore, this means that the articles of agreement can be resorted to as a reference guide when there is a lacuna in the agreement entered into by contending parties. In the circumstances, we are firmly of the view that by referring to the articles of agreement, which are a guide in the usage or trade in the construction industry, the arbitrator was not guilty of introducing his own evidence. He was neither guilty of breaching the rules of natural justice as the articles are, by custom, or usage in the construction industry, standard reference guidelines.

In the circumstances, the arbitral award cannot be set aside under any of the sub-sections of Section 17(2) of the Act simply because reference was made to the articles of agreement without the Appellant being alerted. There was no need to give an opportunity to the Appellant to comment on the articles of agreement as it was presumed to know. Ground two is dismissed as well.

(597)

On ground three, the position of the Appellant is that **the requirement that the award must state the place of arbitration was not as found by the arbitrator. In other words, the Appellant is saying that the place where the hearing is conducted is, as stated in the award, not always the seat of the arbitration**. The Appellant argued that stating the seat of arbitration was a significant and important requirement as to form, especially in international arbitration.

From the side of the Respondent, it is contended that the award met the requirements of Section 16 of the Act, in that it stated the place and dates of the arbitration. It is submitted that Longacres Lodge in Lusaka was designated and agreed upon by the parties as the seat of the arbitral proceedings; that this was at the instance of the Appellant itself. As to whether failure by the arbitrator to state the place and dates of arbitration was one of the grounds under the Act upon which the award would be set aside, the Respondent submitted in the negative.

At the outset, we wish to observe that the arbitration herein was not an international arbitration as it was held in Zambia and involved parties who are based within Zambia. So, the requirements the Appellant is talking about as to venue and dates of arbitration may not be applied with rigidity. We note that the venue in the final claim or award is confirmed to be Longacres Lodge in Lusaka and the hearing of evidence is stated to have been on the 7th, 16th and 23rd September, 2005. In our considered view, we think that we cannot fault the learned trial Judge for coming to the conclusion that the form and content of the arbitrator's decision met the requirements of the law in stating that the place of

arbitration as Longacres Lodge and the dates on which the evidence was received as 7th, 16th and 23rd September, 2005. Ground three is dismissed for lack of merit.

Coming to ground four, the last ground of appeal, the complaint of the Appellant against the ruling of the trial Court is **that the learned trial Judge failed to deliver his ruling on the appointed day, as admitted, because the Respondent did not exhibit the articles of the agreement on which it (Respondent) relied on in its submission**. In addition, the Appellant has complained that the said articles of agreement were never served on it. The Appellant argued that the failure to deliver the ruling based on the evidence before the Court on the appointed date was gross injustice to it and a breach of the rules of natural justice.

The Appellant wants the Court to set aside the award under Section 17 of the Act or in the alternative suspend the setting aside of the award to allow the arbitral proceedings to resume in order for the arbitrator to correct the award by rectifying the mistakes in the procedure highlighted in its submission.

The Respondent, in its response, regretted the delay in filing its submission and the articles of agreement. On the alternative prayer for the suspension of the setting aside of the proceedings under Section 17(4) of the Act, the Respondent found the submission to be an abuse of the Court process, especially that it was the Appellant which argued very strongly against the same before the learned trial Judge.

The view we take of this ground of appeal is that it should never have arisen in the form it is couched. We say so because the arbitral award the Appellant is seeking to set aside alluded to the contents or provisions of the articles of agreement as we have shown in this judgment. In essence, therefore,

the articles of agreement formed part of the proceedings at arbitration and the learned trial Judge thought it imperative to have sight of them in order to have a complete picture of what the case before him was all about.

Once the articles of agreement were alluded to in the arbitral award, there was no need to have them served on the Appellant when the matter was before the High Court. Instead, it became the duty of the Appellant to look for them especially that it was contemplating an application to have the award set aside under the Act. In the circumstances, we do not agree with the Appellant that the rules of natural justice were breached resulting in gross injustice to it. If anything the injustice complained of was self inflicted.

With the foregoing observations, we do not find merit in the entire appeal as well as in the alternative prayer for the suspension of the setting aside of the proceedings. We dismiss the appeal and order that the Appellant pays the costs of the appeal to be taxed in default of agreement.

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E. L. Sakala,
CHIEF JUSTICE

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L. P. Chibesakunda,
SUPREME COURT JUDGE

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S. S. Silomba,
SUPREME COURT JUDGE