IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 002/2015**
HOLDEN AT KABWE
(CIVIL JURISDICTION)

B E T W E E N:

SAVENDA MANAGEMENT SERVICES LIMITED **APPELLANT**

AND

STANBIC BANK ZAMBIA LIMITED **RESPONDENT**

CORAM: MAMBILIMA, CJ, MALILA AND KAOMA, JJS
On 1st August, 2017 and 31st August, 2017

For the Appellant: **Mr. M. Mutemwa, SC of Mutemwa Chambers, appearing with Mr. K. Nchito of Messrs. Bunting and Associates and Mr. M. Sinyangwe, of Messrs. Willa Mutofwe and Associates.**

For the Respondent: **Mr. J. Jalasi, Jr. of Messrs. Erick Silwamba, Jalasi and Linyama Legal Practitioners**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

AUTHORITIES REFERRED TO:

1. **YOUGO LIMITED V. PEGASUS ENERGY (ZAMBIA) LIMITED, CAUSE NO. 2008/HPC/0299**
2. **HISCOX V. OUTWAITE (1991) 3 WLR 1321**
3. **CASH CRUSADERS FRANCHISING PTY LTD V. SHAKERS AND MOVERS (ZAMBIA) LIMITED (2012) 3 ZR 174**
4. **PAOLO MARANDOLO AND 2 OTHERS V. GIANPIETRO MILANESE AND 4 OTHERS – SCZ/8/248/2007**

SUPREME COURT
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5. ATTORNEY-GENERAL AND ANOTHER V. LEWANIKA AND OTHERS (1993-1994) ZR 164.

LEGISLATION REFERRED TO:

a. RULES OF THE SUPREME COURT, 1999 EDITION (WHITE BOOK)
b. HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA
c. ARBITRATION ACT, NO. 19 OF 2000
d. ARBITRATION (COURT PROCEEDINGS) RULES, STATUTORY INSTRUMENT NO. 75 OF 2001.

OTHER AUTHORITIES REFERRED TO:

(i) ROBERT MERKIN, "ARBITRATION LAW", 2004 EDITION
(ii) "THE HANDBOOK OF ARBITRATION PRACTICE", Second Edition, by Robert BERNSTAIN and DEREK WOOD
(iii) SIR MICHAEL MUSTILL AND STEWART BOYD, "COMMERCIAL ARBITRATION", 1982 EDITION
(iv) FRANCIS BENNION, "STATUTORY INTERPRETATION", 3RD EDITION.

This is an appeal from a Ruling of the High Court, delivered on 7th November, 2014. The Ruling followed a Notice to Raise Preliminary Issues on Points of Law, filed by the Respondent pursuant to Order 18, Rule 11 and Order 33, Rule 3 of the **RULES OF THE SUPREME COURT, 1999 EDITION**[a]. To put the said application by the Respondent into its proper context, we will briefly outline the facts of this case.

The Respondent gave the Appellant banking facilities which were secured by, among other things, legal mortgages over Stand Number 25595, Woodlands, Lusaka and Stand Number 1534, Woodlands, Lusaka. The banking facilities were contained in two facility letters both dated 20th November, 2009. Under clause 14 of the facility letters, the parties agreed to refer to arbitration any dispute that may arise between them in connection with the banking facilities. The said Clause 14.1 provided that-

> **"14.1 Any dispute between the Parties arising out of or in connection with this Facility, including, without derogating from the generality hereof, its application, breach, interpretation, validity, termination or cancellation, or any matter arising out of its application, breach, interpretation, validity, termination or cancellation, shall be submitted to and decided by arbitration in terms of The Arbitration Act No. 19 of 2000 of the Laws of Zambia and shall be conducted in Lusaka, Zambia."**

A dispute arose between the parties and on 29th June, 2010, they appointed an Arbitrator pursuant to Clause 14.1 of the facility letters. The Arbitrator delivered his Final Award on 23rd May, 2012. On 24th May, 2013, the Arbitrator went on to deliver an Additional Award on Assessment. In sum, the Arbitrator ordered the Appellant to pay the Respondent a total amount of US$ 1,363,850.49 with interest at the rate of 12% per annum from the date the dispute was declared by the parties, to the date of reconciliation. The Arbitrator directed that the Appellant should pay the total amount due to the Respondent within sixty days from the date of assessment and that, in default, the Respondent should be at liberty to foreclose on the mortgaged properties and exercise its powers of sale.

On 15th August, 2013, the Arbitral Award was registered in the High Court and leave for its enforcement was granted. On 5th September, 2013, the Appellant made an application before the Deputy Registrar for an Order to pay the judgment debt in installments pursuant to Order 36, Rule 9 of the **HIGH COURT RULES**[b]. The learned Deputy Registrar ordered that the debt be paid in 12 equal monthly installments. The Respondent appealed against the Ruling of the Deputy Registrar to the lower Court.

While the appeal was pending before the lower Court, the Respondent filed a Notice to Raise Preliminary Issues on Points of Law, pursuant to Order 18, Rule 11 and Order 33, Rule 3 of the **RULES OF THE SUPREME COURT, 1999 EDITION**[a]. The preliminary issues on points of law were as follows:

1. **That the proceedings instituted in the High Court by the Respondent following an Award made by the Arbitral Tribunal on 23rd May, 2012 and an Additional Award on 24th May, 2013 and the reliefs sought and/or being sought under these proceedings are improperly before the High Court for lack or want of jurisdiction as under Section 20(1) of the Arbitration Act No. 19 of 2000, an Award**

made by an Arbitral Tribunal pursuant to an arbitration agreement is final and binding on the parties.

2. **That under Section 20(2) of the Arbitration Act, the Respondent can only challenge the Awards made by the Arbitral Tribunal in the High Court on the grounds provided under Section 17(2) of the said Act.**

3. **That the reliefs sought and/or being sought by the Respondent before the High Court are not provided for under Section 17(2) aforesaid or under any other provision of the Arbitration Act rendering these proceedings improperly before the High Court for lack or want of jurisdiction.**

After considering the Ruling of the Deputy Registrar and the submissions of Counsel, the lower Court expressed the opinion that Section 20 of the **ARBITRATION ACT**[c] (hereinafter referred to as "the Act") is categorical that an arbitral award is final and binding both on the parties and on any person claiming through or under them. She stated that arbitral awards are subject to the High Court supervision only in respect of registration and enforcement. The Court accordingly held that the proceedings before the Deputy Registrar were irregular as the High Court lacked jurisdiction to grant the reliefs sought by the Appellant. The Court consequently dismissed the appeal that was pending before it.

The Appellant has appealed against the above decision of the lower Court on only one ground of appeal, namely, that-

"The learned trial Judge in the Court below erred both in law and in fact, when she held that it had no jurisdiction to hear and determine an appeal from the learned Deputy Registrar for an application by the Appellant to pay an arbitral amount in installments."

In support of this ground of appeal, the learned Counsel for the Appellant filed written heads of argument. Counsel presented two separate arguments in support of this ground of appeal. Counsel contended that the Appellant was on firm ground when it made an application to pay the amount awarded in the arbitral award in installments. That the Appellant was not applying to set aside the arbitral award but was instead asking the Court to allow it to pay the arbitral award in installments. Counsel expressed the view that after the expiry of three months, an arbitral award is deemed to be a court order. That once the arbitral award is deemed to be a court order it can be enforced like a court order and it becomes susceptible to all the rules of procedure that apply to court orders. In support of these submissions, Counsel relied on Rule 38 of the **ARBITRATION (COURT PROCEEDINGS) RULES**[d], which provides that-

"38. (1) Where these Rules do not provide for any particular matter or do not make sufficient provision enabling a court to dispose of a

matter before it or to enable a party to prosecute its case, the Rules of the High Court or of the Subordinate Court, as the case may be, relating to civil proceedings shall apply, except in so far as they are not inconsistent with these Rules.
(2) Parties to legal proceedings shall also be entitled to make ancillary and incidental applications and to invoke other necessary court processes, available under the High Court Rules, in dealing with applications under these Rules."

Counsel submitted that Rule 38 makes it clear that High Court Rules are applicable to matters relating to arbitration. That, therefore, the lower Court had jurisdiction to hear and determine the Appellant's application to pay the arbitral award in installments pursuant to Order 36, Rule 9 of the **HIGH COURT RULES**[b], which provides that-

"36(9) Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by installments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any installment, the whole amount remaining unpaid shall forthwith become due:

Provided that where there is a default in paying any one installment, there shall be no order for stay of execution on the balance."

Counsel went on to refer us to a High Court decision in the case of **YOUGO LIMITED V. PEGASUS ENERGY (ZAMBIA) LIMITED**[1], where KAJIMANGA, J (as he then was) stated that-

> **"In relation to the third ground of appeal, I cannot fault the learned Deputy Registrar in concluding that the law provides for invoking of the court's jurisdiction to settle matters arising out of the arbitration process such as taxation of costs. Other circumstances include applications for the recognition and enforcement of awards under Section 18 of the Act and interim measures of protection under Article 9 of the first schedule to the Act. The third ground of appeal is also unsuccessful."**

It was Counsel's further submission that the act of registering an arbitral award with the High Court makes the award a court proceeding and consequently amenable to court rules as envisaged in Rule 38 of the **ARBITRATION (COURT PROCEEDINGS) RULES**[d].

Counsel conceded that an arbitral award is final and binding. They, however, quickly added that the finality of an arbitral award only bars a party from appealing or asking for review of the award. According to them, Section 17 of the Act was not applicable to this case because the application by the Appellant was for payment in installments and not a challenge to the finality of the award. Counsel argued that in fact, the application by the Appellant to pay the award in installments was an admission of liability, as opposed to a denial of liability.

Coming to the second argument, Counsel submitted that the Respondent was estopped from challenging the application by the

Appellant because under Clause 14.3 of the Facility Letters, the parties agreed that they would not be precluded from seeking an urgent relief in a Court. The said Clause 14.3 provided that-

> **"14.3 This arbitration clause shall not preclude a party from seeking an urgent relief in a court of appropriate jurisdiction, where grounds for urgency exist."**

According to Counsel, an application to pay the arbitral award in installments was one of the reliefs envisaged by the parties in Clause 14.3.

On the principle of estoppel, Counsel referred us to the case of **HISCOX V. OUTWAITE**[2], where Lord Donaldson, MR, said the following:

> **"This form of estoppel is founded not on a representation of fact made by a representor and believed by a convention of the parties as the basis of the transaction into which they are about to enter. When the parties have acted in that transaction upon the agreed assumption that a given state of facts is to be accepted between them as true then, as regards that transaction, each will be estopped against the other from questioning the truth from the statement of facts assumed."**

Counsel argued that, in view of Clause 14.3, the Respondent was estopped from challenging the application by the Appellant to pay the award in installments. That the Ruling of the lower Court was an assault on freedom of the parties to contract as the parties chose arbitration and the court as concurrent fora for resolution of their disputes.

In conclusion, Counsel prayed that this Court allows the appeal and permits the Appellant to pay the arbitral award in monthly installments of ZMK110,000.00.

In response, the learned Counsel for the Respondent, Mr. JALASI, filed written heads of argument. Counsel submitted that once an arbitral award is delivered it is final and a party cannot make an application to pay in installments. In support of his arguments, Counsel referred us to a book by Robert MERKIN entitled **"ARBITRATION LAW (2004 EDITION)"**[i], where the author has said the following at paragraph 18.44:

> **"The precise obligation imposed upon the losing party must be clear: the award should specify, as the case may be, the amount payable by the losing party, a time within which performance is due, the form....**
>
> **Most awards involve an order for the payment of money. Arbitrators have the power to make such an award -under the Arbitration Act, Section 48 (3) – unless it has been excluded by the agreement of the parties. If the amount to be paid, and the time at which payment is to be made, is not specified the award runs the risk of being challenged on the basis of uncertainty. It follows from the rule that there is a presumption that arbitrators have the power to direct when and how payment is to be made."**

Counsel submitted that the Arbitral Tribunal clearly stated that the amount of the debt that was found to have been due to the Appellant should be paid within 60 days from the date of assessment, that is 24th May, 2013.

Counsel contended that since the Arbitral Award was clear on the time of payment of the debt, the Appellant is estopped from re-opening the arbitral award by arguing that Section 20(3) of the Act allows it to apply for payment in installments. To reinforce his contention, Counsel cited a passage from a book entitled **"THE HANDBOOK OF ARBITRATION PRACTICE"**[ii], Second Edition, by Robert BERNSTAIN and DEREK WOOD, in which they have said at paragraph 23.7.1 that-

> **"It is a principle of English Law (known as the Principle of res judicata) that there should be an end to litigation, so that no one should be harassed twice for the same cause. Thus, where a Court of competent jurisdiction has made a final and conclusive decision on the merits of an issue between two parties, each party is "estopped" (i.e precluded) from litigating the same issue against the other in subsequent proceedings."**

Counsel stated that the Appellant has been denied the fruits of the arbitral award for over 4 years. In Counsel's view, this is contrary to the purpose of arbitration which is designed to offer litigants a voluntary speedy option for the resolution of their disputes. For this view, Counsel referred us to our decision in the case of **PAOLO MARANDOLO AND 2 OTHERS V. GIANPIETRO MILANESE AND 4 OTHERS[4],** where we said that-

> **"We note that the issue that brought about arbitration in the case before us is a commercial issue. We believe that Arbitration is used in commercial matters to resolve matters speedily. The parties in this case agreed to proceed through arbitration so that the matter can be disposed of quickly. The application to set aside the arbitral award was made 2 years 5 months after the additional award. We believe that allowing the application would seriously defeat the whole intention of parliament in coming up with Arbitration Act."**

Counsel argued that it could never have been the intention of the drafters of Section 20(3) of the Act to permit a party to reroute arbitration proceedings back in the normal court system which arbitration proceedings were designed to avoid. To buttress his argument, Counsel again referred us to the book entitled **"THE HANDBOOK OF ARBITRATION PRACTICE"**[ii], where the authors have said at paragraph 27.2 that-

> **"It has been said that the Award of an Arbitrator:**
> **'...represents an agreement made between the parties, and is no more and no less enforceable than any agreement made between parties.'**
> **But most of the objects of Arbitration would be defeated if a Claimant who had succeeded in an Arbitration then had to take his place in the queue of litigants seeking to enforce their agreement."**

Counsel argued that the provisions of Section 20(3) of the Act are simply for enforcement of arbitration awards. For an explanation of what is meant by enforcement of an award, Counsel relied on a book titled **"COMMERCIAL ARBITRATION", 1982 EDITION**[iii] by Sir Michael MUSTILL and Stewart BOYD, where they have said the following at page 367:

> **"An Arbitrator's, award unlike an Order or Judgment of the Court, does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party or to apply to have him committed for contempt. It is first necessary to convert the award into a Judgment or Order of the Court. Only then can the successful party levy execution."**

From the above, Counsel submitted that the intention of the award being converted into an order of the Court under Section 20(3) of the Act is purely for purposes of enforcement. That if Section 20(3) implies that the award becomes a court order or judgment that would mean it would be appealable to the Court of Appeal and it would also be subject to review under Order 39 of the **HIGH COURT RULES**[b]. Counsel urged us not to adopt the literal meaning of the words "court order" but to use the purposive approach which, according to him, would give what the actual legislative purpose of Section 20(3) of the Act is. In support of his arguments, He referred us to the case of **ATTORNEY-GENERAL AND ANOTHER V. LEWANIKA AND OTHERS**[5], where this Court stated that-

> **"In the instant case, we have studied the Judgment of the Court below, and we find it sound and correct by applying the literal interpretation. However, it is clear from the Shartz and Northman cases that the present trend is to move away from the rule of literal interpretation to 'purposive approach' in order to promote the general legislative purpose underlying the provisions. Had the learned trial Judge adopted the purposive approach, she should undoubtedly have come to a different conclusion. It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable and an unjust situation, it is our view that Judges can and should use their good common sense to remedy it-that is by reading words in if necessary so as to do what parliament would have done had they had the situation in mind."**

With regard to the reliance by Counsel for the Appellant on Rule 38 of the **ARBITRATION (COURT PROCEEDINGS) RULES**[d], Mr. JALASI submitted that the said Rules are only to be applied when the Court properly exercises its powers of assistance in Arbitration. That judicial control of arbitration proceedings is limited to court assistance in the enforcement of the award.

Counsel further submitted that the **YOUGO LIMITED**[1] case, which was relied on by the Appellant, is not binding on this Court. Counsel added that the said case was quoted out of context and did not support the argument that one can use Section 20(3) of the Act to convert an arbitral award into a court order for any purpose other than enforcement.

Coming to the argument on estoppel with respect to clause 14.3 of the Facility Letter dated the 20th day of November, 2009, which made provision for a party to seek urgent relief, Counsel argued that the urgent relief referred to should be read together with Section 11 of the Act which gives power to the High Court before or during arbitral proceedings to seek an interim measure of protection such as orders for preservation and injunctions.

Counsel submitted that Section 20 of the Act bars any further proceedings after publication of an Award other than an application to set aside the Award under Section 17 of the Act.

When the matter came before us for hearing, Counsel for the Appellant augmented their filed heads of argument. Mr. MUTEMWA, SC, conceded that the decision of an Arbitrator is final and binding on the parties. He, however, stated that the issue in this matter is the interpretation of Section 20(3) of the Act. He questioned whether the role of the Court in the enforcement of an arbitral award implies that the Court only has the mechanical function of receiving execution documents in the Registry. He invited this Court to use the common sense approach to statutory interpretation. For this approach he referred us to a Book by Francis BENNION entitled **"STATUTORY INTERPRETATION", 3RD EDITION**[iv] where, according to Counsel, the author has written that in construing statutes, Courts should also use common sense to determine the intention of the Legislature. He submitted that the application which was made before the lower Court for payment in installments was properly before that Court.

According to State Counsel, the Appellant could not have gone to the Arbitrator to make the application to pay in installments because the Arbitrator became *functus officio* after he rendered his award. He told this Court that the order for directions before the Arbitrator did not provide for liberty to apply. Mr. JALASI, however, rose and referred this Court to a portion of the record of appeal which showed that in fact the order for directions given by the Arbitrator made provision for liberty by either party to apply. Mr. MUTEMWA maintained that the Appellant could not apply before the Arbitrator to pay in installments because the Arbitrator had become *functus officio* after rendering the award.

State Counsel went on to submit that a distinction should be drawn between fundamental and collateral matters in the award. According to him, a fundamental matter is one on which the foundation of liability is based while a collateral matter is subsidiary. He stated that the application to pay in installments would not amount to a review of the award but simply an extension of the period within which the payment should be made.

Counsel went on to submit that after registration, the award was deemed to be a court order. That using the common sense approach to statutory interpretation of Section 20(3) the award, like an order of the High Court, could be stayed and a party could apply to pay the amount due in installments. That Section 20(3) should be interpreted widely because the Legislature has not said that the High Court should just be a bystander in the enforcement process.

In the alternative, State Counsel contended that under Clause 14.3 of the Arbitration Agreement, the parties did not exclude the jurisdiction of the Court from entertaining an application for urgent relief. He stated that after the award was registered the Appellant could not have gone to the Arbitrator to apply to pay in installments because the matter was now under the jurisdiction of the Court.

Mr. SINYANGWE concurred with State Counsel that the Appellant was not challenging the finality of the arbitral award but was simply asking the Court to allow it to pay the award in installments. Counsel said that this Court should bear in mind the fact that the issues in this appeal emanated from a mortgage and that, following the expiry of the 60 days given for the settlement of the award, the mortgagee had lost the right of redemption at law. Counsel advanced the view that the Appellant has come to the Court as a Court of equity.

Mr. NCHITO essentially reiterated what State Counsel and Mr. SINYANGWE had submitted. He emphasised that once the Arbitrator had rendered his arbitral award, he became *functus officio*. That this was why the Appellant went to the High Court pursuant to Section 20(3) of the Act.

In response, Mr. JALASI submitted that his understanding of Section 20(3) was that the award is registered for purposes of enforcement on the basis that the arbitral tribunal does not have an enforcement mechanism. He stated that Counsel for the Appellant did not understand that Arbitration is a self-contained alternative dispute resolution process. That every application that a party needed to make had to be made to the Arbitrator including an application as to how and within what timeframe a sum decided in the award should be paid. That the role of the High Court is left purely to that of assistance to the arbitral proceedings for purposes of taking evidence and enforcement of the arbitral award. In his view, the application to pay in installments is a backdoor attempt to reroute the arbitral proceedings to the court processes.

Mr. JALASI went on to submit that if the contention by Counsel for the Appellant, that an arbitral award becomes a court order, is allowed the implication would be that one can appeal against an arbitral award to the High Court and then to the Court of Appeal and, with special leave, to the Supreme Court. According to him, this would defeat the essence of arbitration. In his view, the common sense approach to statutory interpretation was just what it is, common sense. Counsel, therefore, urged us to employ the traditional cannons of statutory interpretation instead of the common sense approach.

Mr. JALASI further submitted that Rule 38 of the **ARBITRATION (COURT PROCEEDINGS) RULES**[d] must be read in the context of what the said Rules are designed to achieve, namely, to facilitate court assistance to the arbitral proceedings where there is a lacuna in the said Rules.

In reply, State Counsel argued that the argument by Mr. JALASI, that if the award is deemed to be a court order it would open it to being appealable through the court system up to the Supreme Court, was farfetched and exaggerated. According to him, Section 20(3) of the Act does not provide for an appellate procedure. He stated that, in any case, this Court should not view an arbitral award as one which must in all circumstances be rapidly fulfilled. He maintained that Section 20(3) of the Act does not create a bar for a losing party from seeking the relief of paying the debt in installments.

We have carefully considered the evidence on record, the submissions of Counsel and the Ruling appealed against. This appeal has raised only one issue, namely, **"whether the High Court had jurisdiction to adjudicate on the application by the Appellant to pay, in installments, the amount due to the Respondent under the Final Arbitral Award of 23rd May, 2012 and the Additional Award on Assessment dated 24th May, 2013."**

Counsel for the Appellant has argued that the High Court had jurisdiction to deal with the said application by the Appellant. That the arbitral award had become like a court order after the expiry of three months from the date on which it was made. That the award had, therefore, become subject to all the rules of procedure that apply to court orders. They have heavily relied on Section 20(3) of the Act which we have reproduced later in this Judgment.

On the other hand, Mr. JALASI has maintained that the arbitral award decided that the sum due should be paid within 60 days of the date of assessment. That, therefore, allowing the application to pay in installment would in effect be a review of the arbitral award which, according to Section 20 of the Act, is final and binding on the parties.

We have painstakingly studied the relevant sections of the Act, Rule 38 of the **ARBITRATION (COURT PROCEEDINGS) RULES**[d] and Rule 36, sub-rule 9 of the **HIGH COURT RULES**[b]**.** We do not agree with Counsel for the Appellant that these provisions of the law give the High Court jurisdiction to allow a party to arbitration to pay the sum decided in that arbitral award in installments. This is so because Section 20 of the Act clearly provides that an award made by an arbitral tribunal is final and binding on the parties.

In this case, the Arbitrator decided on the period within which the arbitral award was supposed to be settled. This is clear from the Arbitrator's Final Award where he said, at paragraph 78(d), that-

> **"<u>The Respondent shall pay the assessed amount to the Claimant within sixty (60) days from the date of assessment</u>. In default the Claimant shall be at liberty to take possession of and foreclose on the mortgaged properties and exercise its powers of sale."** (Emphasis by underlining is ours)

In paragraph 12(b) of his Additional Award on Assessment, the Arbitrator repeated that-

> **"As already directed in paragraph 78(d) of my Final Award, <u>the Respondent shall pay the said amount to the Claimant within sixty (60) days from date of assessment</u>, that is to say, the date of this ADDITIONAL AWARD. In default, the Claimant shall be at liberty to foreclose on the mortgaged properties and exercise its powers of sale."** (Emphasis by underlining is ours)

It is evident from the above provisions, that the issue of the period within which the amount awarded to the Respondent in the arbitral award was supposed to be settled was decided upon by the Arbitrator. We, therefore, are of the considered opinion that, in view of the provisions of Section 20(1) of the Act, the Award of the Arbitrator, on the period within which the Appellant was required to settle the full amount, is final and binding on the Appellant.

For the sake of clarity, we hereby reproduce the whole of Section 20 of the Act. It states that-

> **"20. (1) Subject to subsections (2) and (3), an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.**
> **(2) Subsection (1) shall not affect the right of a person to challenge the award by any available process provided for in this act.**
> **(3) Where the time for making an application to set aside an arbitration award has expired or where the application has been refused by a court, the award shall be deemed to be, and shall be enforceable in the same manner as, an order of the court."**

It is very clear from Section 20(1) that the finality and binding effect of an arbitration award is only subject to subsections (2) and (3) of that Section. Subsection (2) preserves the right of a person to challenge an arbitral award under the avenues provided in the Act. As for subsection (3), our understanding is that, although it provides for enforcement of an arbitration award in the same manner as an order of the Court, it does not give the Court jurisdiction to alter the arbitral award in any way. Subsection (3) does not say that the arbitration award will become a court order; but that it will be deemed to be an order of the Court for purposes of enforcement, so that it can be enforced using the court enforcement mechanisms available for the enforcement of court orders. It is our view, therefore, that subsection (3) relates purely to procedural aspects of enforcement of an arbitration award.

For the above reasons, we do not agree with Counsel for the Appellant that allowing the Appellant's application to pay in installments falls under the umbrella of enforcement of the arbitration award. As we have already stated in this judgment, allowing the said application would amount to changing the decision of the Arbitrator with regard to the period within which the payment should have been made. In our view, the Courts do not have jurisdiction to sit as appellate courts to review and alter arbitral decisions. The jurisdiction to decide on how the amount should be paid lies with the arbitral tribunal. To this effect, we agree with the statement of Robert MERKIN, in his book, **ARBITRATION LAW (2004 EDITION)**[i], that-

> **"If the amount to be paid, and the time at which payment is to be made, is not specified the award runs the risk of being challenged on the basis of uncertainty. It follows from this rule that there is a presumption that arbitrators have the power to direct when and how payment is to be made."**

If the Appellant saw that it could not manage to make the payment within the 60 days ordered by the Arbitrator it should have applied to the Arbitrator for the review of that period. The Appellant did not have to wait for the 60 days to expire for it to realize that it had no capacity to settle the full amount in that period. We do not agree with Counsel for the Appellant, therefore, that it was not tenable for the Appellant to make that application to the Arbitrator because the Arbitrator had become *functus officio* after rendering his award. A cursory study of the record establishes that in his order for directions issued on 27th September, 2010, the Arbitrator directed that **"there shall be liberty to either party to apply."** The Appellant could have, therefore, validly applied to the Arbitrator to vary the period for paying the sum awarded in the arbitration award.

Further, we do not think that **RULE 38 OF THE ARBITRATION (COURT PROCEEDINGS) RULES**[d], gives the High Court jurisdiction to order the payment of an arbitral award in installments. Rule 38(1) deals with application of rules of the High Court and the Subordinate Court where the Arbitration Rules do not provide for a particular issue. Rule 38(2) relates only to ancillary and incidental applications and does not cloth the High Court with jurisdiction to entertain an application that would effectively review and alter the decision of the Arbitrator.

We, therefore, hold that the High Court had no jurisdiction to entertain the application by the Appellant to pay the arbitral award in installments.

In our view, allowing the application by the Appellant to pay the arbitral award in installments would defeat the very essence of arbitration. Arbitration is resorted to where the parties do not want to subject the resolution of their dispute to the Court process. In this regard, we agree with the pronouncements by MUTUNA, J (as he then was), in the case of **CASH CRUSADERS FRANCHISING PTY LTD V. SHAKERS AND MOVERS (ZAMBIA) LIMITED**[3], that-

"The starting point is to recognize that once the parties have decided to have their dispute adjudicated upon by way of arbitration, they are in fact saying that they do not wish to avail themselves of the Courts save in the limited circumstances provided by the law. Further, once an award is rendered, it is binding and enforceable upon the parties pursuant to Section 20 of the Arbitration Act...."

We, therefore, find no merit in this appeal and we dismiss it with costs, here and below, to be taxed if not agreed.

I.C. Mambilima
CHIEF JUSTICE

M. Malila
SUPREME COURT JUDGE

R.M.C. Kaoma
SUPREME COURT