Library

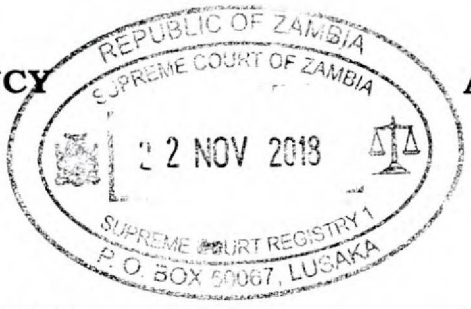
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 34/2016**

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

FOOD RESERVE AGENCY **APPELLANT**



AND

C.B.R. BUSINESS LIMITED **RESPONDENT**

Coram: **Wood, Kaoma and Musonda, JJS**
on 6th November, 2018 and 22nd November, 2018

For the Appellant: Mr. A. Chewe, Assistant Legal Counsel (In-house Counsel)

For the Respondent: Mrs. D. Findlay, D. Findlay & Associates

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Development Bank of Zambia & KPMG Peat Marwick v Sunvest Ltd & Another (1997) S.J. 10 (S.C.)**
2. **BP Zambia Plc v Interland Motors Ltd (2001) SCZ No. 5 of 2001**
3. **Cash Crusaders Franchising Pty Limited v. Shakers and Movers Zambia Limited (2006) Z.R. 174**

4. **Paola Marandola & 2 Others v. Gianpietro Milanese and 4 Others SCZ Judgment No. 6 of 2014**
5. **Roan Antelope Mining Corporation of Zambia PLC (In Receivership v. Transityre BV Michelin Export Facilities: Appeal No. 173/2003**

Legislation referred to:

1. **Arbitration Act No. 19 of 2000**
2. **Order 33, Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia**
3. **Order 14A of the White Book**
4. ***Section 17 of the Arbitration Act No. 19 of 2010.***

1.0 Introduction

1.1 This is an appeal against a Ruling of the court below which purportedly dismissed the appellant's application to set aside an arbitral award which had earlier been rendered against the appellant in accordance with the provisions contained in the Arbitration Act No. 19 of 2000.

1.2 We hasten to confirm that we have deliberately used the word 'purportedly' in 1.1 above for reasons which will become clear later in this judgment.

2.0 History and Background Facts

2.1 The background to this appeal could not have been any simpler.

2.2 On 27th September and 10th October, 2011, the appellant executed two construction contracts with the respondent for the purpose of securing the construction, by the latter, of hard standing slabs at Kabompo and Ikelenge in North-Western Province of Zambia. The total aggregate sum for the two contracts was K1,621,268.00.

2.3 The contracts in question contained an arbitration clause which obliged the parties to the same to refer any disputes which were to arise between them to arbitration.

2.4 On 19th October, 2011, a total aggregate sum of K704,898.00 (less the appellant's 5% retention) was paid to the respondent by the appellant by way of an advance payment in accordance with the terms of the contracts.

2.5 A dispute subsequently arose as between the parties which became the subject of a reference to arbitration by a single arbitrator.

2.6 Following the arbitral hearing, an award was rendered by the single arbitrator on 18th July, 2014.

2.7 In terms of that arbitral award, the appellant was ordered to pay a total sum of K964,070.43 to the respondent.

2.8 The arbitral award in question was not, however, served upon the appellant until the 13th of October, 2014.

2.9 On 17th October, 2014, the respondent successfully secured the registration of the arbitral award in question before the Deputy Registrar for the purpose of its recognition and enforcement via ordinary judicial process. The relevant court process was prosecuted under Cause 2014/ARB/20.

2.10 On 22nd October, 2014, the appellant applied to the High Court of Zambia to have the registration of the arbitral award as confirmed in 2.9 above set aside.

2.11 By a ruling of the Deputy Registrar dated 19th January, 2015, the order of registration of the arbitral award in question was set aside. In the same ruling, the Deputy Registrar directed the appellant to take steps, that is, within 60 days from the date of the ruling, for the purpose of securing the determination, before a High

Court judge, of the question whether or not, in terms of Section 17 of the Arbitration Act, the award in question was legal.

2.12 On 19th March, 2015, the appellant took out an originating summons for the purpose of securing the setting aside of the arbitral award in question.

2.13 The basis for seeking to have the arbitral award set aside was set out in the affidavit which the appellant filed in support of the originating summons alluded to in 2.12 in the following terms:

2.13.1 That the respondent had allegedly concealed the fact that while the arbitral award was dated 18th July, 2014 it was only served on 13th October, 2014;

2.13.2 That the affidavit which had been filed in support of the application to register the arbitral award did not exhibit the original or authenticated copies of the arbitration award and the arbitration agreement as required under the law;

2.13.3 That the Order and Notice of registration of the

arbitration award did not comply with the requirements of the law, namely, to state a period, within 90 days from the date of receipt of the award by the appellant, within which an application to set aside the registration of the award could be made; and

2.13.4 That the Order and Notice of registration of the arbitral award had not complied with the requirement under the law *vis-à-vis* the need for the same to contain a notice to the effect that execution of the award could not issue until after the expiration of the period of 90 days from the date of receipt of the award by the appellant.

2.14 On 15th April, 2015, the respondent filed a Notice of intention to raise a preliminary issue pursuant to Order 33, Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 14A of the *White Book* which was expressed in the following terms:

> "***TAKE NOTICE*** *that on the scheduled date of hearing of this matter 28th April 2015 at 9 hours in the forenoon before* ***Honourable Judge G. C.***

Chawatama, *Counsel for the Defendant herein shall raise the following preliminary issues on a point of law and seek their determination in limine videlicet:-*

1. *Whether Plaintiff's Application to Set Aside the Arbitration Award of Bwalya Lumbwe dated 18th July 2014 received by the Plaintiff on 13th October 2014 can be entertained by the Court in view of the provisions of Section 17 (2) and (3) of the Arbitration Act No. 19 of 2000 which stipulate that an application for setting aside may not be made after Three months have elapsed from the date on which the party making that application had received the award;*

2. *Whether the Court can hear and determine the proceedings herein when there are proceedings pending under Cause Number 2014/HP/ARB/20 between the same parties relating to the same issues, which amounts to multiplicity of actions between the same parties on the same subject matter and is therefore an abuse of Court Process.*

AND TAKE NOTICE *that the Defendant shall move that the Application to Set Aside the Arbitration Award dated 18th July, 2014 be dismissed forthwith with Costs to the Defendant.*

AND TAKE FURTHER NOTICE *that the Defendant shall rely on the following authorities:*

1. *Section 17(3) of the Arbitration Act No. 19 of 2000*
2. *Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia*
3. ***Development Bank of Zambia & KPMG Peat Marwick v Sunvest Ltd & Another (1997) S.J. 10 (S.C.)[1]***
4. ***BP Zambia Plc v Interland Motors Ltd (2001) SCZ No. 5 of 2001[2].”***

2.15 The Notice of intention to raise a preliminary issue was supported by an affidavit the core depositions of which were that:

2.15.1 The appellant's application to set aside the arbitral award could not be entertained by the court below as it had been made well after the maximum prescribed period of three months from the date of receipt of the award;

2.15.2 That it was mandatory for any application to set aside an arbitral award to be made within a period of three months;

2.15.3 That as a period in excess of 5 months had elapsed from the date, namely, 13th October, 2014, when the appellant received the arbitral award and the date when the application to set aside was filed in court on 19th March, 2015, the application was irregular and not properly before the court; and

2.15.4 That the award revealed matters which were beyond the scope of the parties' submission to arbitration.

2.16 In its affidavit opposing the preliminary issue, the appellant essentially adopted the depositions which were made on its behalf in the affidavit in support of its originating summons as adverted to under 2.13 above.

3.0 Hearing of Preliminary Issue

3.1 The respondent's preliminary issue was heard by the court below on 28th April, 2015 when the dealing judge reserved its ruling.

4.0 Ruling of the Court

4.1 In opening its ruling, the court below observed that *"[the appellant], Food Reserved Agency, seeks an Order to set aside an arbitration award..."* (emphasis ours).

4.2 The court below then went on to review the affidavit evidence which had been placed before it on behalf of the two protagonists in this matter before coming to the conclusion that:

> *"...the application to set aside the arbitral award is irregular and improperly before me because it was made [after a period in excess of 5 months and, therefore] outside the stipulated time frame..."*

4.3 The lower court accordingly concluded its ruling by observing that the appellant had failed to demonstrate that it would be appropriate for the court to set aside the arbitral award and accordingly dismissed the appellant's application with costs.

5.0 The Appeal and Grounds therefor

5.1 The appellant was not satisfied with the ruling of the court below and has come to this court of last resort on

the basis of two grounds which have been expressed in the memorandum of appeal in the following terms:

1. **The Court below erred in law and in fact in holding that the Appellant filed the application to set aside the arbitration award out of time despite the order of the Deputy Registrar dated 19th January, 2015 having enlarged the limitation period for filing the application to set aside the arbitration award.**

2. **The Court below misdirected itself in making pronouncements on the substantive application before it and dismissing the action in the absence of full evidence from the parties on record.**

6.0 Hearing of the Appeal and Arguments Canvassed

6.1 At the hearing of the appeal, counsel for the two contestants confirmed having filed their respective Heads of Argument upon which they relied.

6.1.1 Learned counsel for the appellant's argument around the first ground of appeal was founded upon the following observations which were contained in the Ruling of the Deputy Registrar upon the appellant's application to set aside the order of registration of the arbitral award:

6.1.3 According to the appellant's counsel, the directive by the Deputy Registrar had never been challenged and remained in force.

6.1.4 Counsel for the appellant accordingly concluded his arguments around the first ground of appeal by submitting that the lower court fell in error when it dismissed the appellant's application to set aside the arbitral award.

6.1.5 With regard to the second ground of appeal, the short and simple argument which counsel canvassed on behalf of the appellant was that the lower court erred when it proceeded to pronounce itself on the merits of the substantive application which the parties had not addressed the court upon.

6.2.1 For her part, counsel for the respondent opened her substantive arguments in response in respect of the first ground of appeal by quoting Section 17(3) of the Arbitration Act No. 19 of 2000 which enacts thus:

> *"I also direct that the claimant (i.e. the appellant) to, within the next 60 days, cause to be taken. Steps to have the matter heard before a (High Court) judge with regard to matters raised touching the legality of the award in terms of Section 17 of the Arbitration Act No. 19 of 2000. Failure to take such steps will entail the respondent being at liberty to register the award provided there is compliance with the necessary statutory provisions."*

6.1.2 In the view which learned counsel for the appellant took, the Deputy Registrar, in the portion of his ruling cited above, extended the time within which the appellant was to file the application to set aside the arbitral award by 60 days with effect from 19th January, 2015. Counsel contended that, as the application to set aside the award was filed on 19th March, 2015, this date represented the very last day on which the appellant was entitled to file the application in question (i.e. from 19th January, 2015).

> *"3 An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or, if a request has been made under Article 33 of the First Schedule, from that date on which that request has been disposed of by an arbitral tribunal" (emphasis by counsel).*

6.2.2 Learned counsel then went on to say that, in relation to the matter at hand, the appellant received the arbitral award on 13th October, 2014 but only launched its application to set aside the award on 19th March, 2015. Counsel further argued that the relevant intervening period was well beyond the three months which the law prescribes.

6.2.3 With respect to the appellant's counsel's contention that the Deputy Registrar had enlarged or extended the time within which the application to set aside the arbitral award was to be made, counsel for the respondent argued, on the authority of **Cash Crusaders Franchising Pty Limited v. Shakers and Movers Zambia Limited**[3] that only a judge before whom an application to set aside the award can be made would

have jurisdiction to extend the time. Counsel accordingly submitted that the learned Deputy Registrar had no jurisdiction to extend the time within which the application to set aside the arbitral award could be made.

6.2.4 Counsel for the respondent went on to cite our decision in **Paola Marandola & 2 Others v. Gianpietro Milanese and 4 Others**[4] in which we said, at page J11, that:

> *"We are of the view that the purpose of putting a time frame of 3 months was to ensure that matters which are commenced through arbitration are speedily disposed of. In our view, if Parliament intended to grant the court power to extend the period of 3 months, the section could have expressly provided for such an extension. We do not see that intention from this section. Further, it is a well-known fact that parties opt for arbitration and not litigation so that they can get their matters disposed of speedily. Therefore, we do not think that with this in mind Parliament would decide to allow an extension beyond 3 months within which to make the application. Therefore, our conclusion is that the application to set aside the award should be made*

within 3 months of the award. The period cannot be extended" (emphasis by Counsel).

6.2.5 With regard to the second ground of appeal, counsel for the respondent supported the lower court's conclusion that the appellant had failed to demonstrate that the application to set aside the arbitral award in question had been properly made.

6.2.6 Counsel then went on to canvass a few other arguments which we have deemed unnecessary to highlight in this judgment as they are clearly superfluous to the real issue upon which this appeal must turn, suffice it to say that we were urged to dismiss the appellant's appeal with costs.

7.0 Consideration of Matter and Decision

7.1 We have considered the affidavit evidence as well as the arguments which counsel for the two sides laid before us in relation to the ruling under attack and express our gratitude to counsel involved for their invaluable perspectives.

7.2 As we begin our reflections around the issues which were at play in this appeal, we wish to make some preliminary observations with regard to the nature of the application which was before the court below and the Ruling which the court handed down.

7.3 In opening her Ruling, the learned judge said:

> *"The plaintiff [now appellant], Food Reserve Agency, seeks an order to set aside an arbitration award..."*

7.4 In concluding her Ruling the judge below said:

> *"The plaintiff has not demonstrated that this is an application in which the court can set aside the arbitral award. The application, therefore, fails and I dismiss it with costs to the defendant..."*

7.5 It is evident from what we have unravelled in 7.3 and 7.4 above that the court below was labouring under the clear misapprehension that it was dealing with the plaintiff's application to set aside the arbitral award.

7.6 In point of fact, and, contrary to the lower court's misapprehension, the application to which the court

ought to have directed its Ruling was the defendant (now respondent)'s preliminary application (or, more appropriately, objection) which was filed on 15th April, 2015.

7.7 Indeed, even the relevant court proceedings of 24th April, 2015 related to the respondent's preliminary application in respect of which the lower court reserved its ruling. For the removal of any doubt, there is nothing in the record relating to this appeal which suggests that the appellant's application to set aside the arbitral award in question was ever heard.

7.8 Accordingly, the lower court clearly fell in error when it purported to pronounce itself upon an application which it neither heard nor was the same specifically argued by the parties.

7.9 Needless to say, the purpose which the respondent (defendant below) sought to achieve by launching the preliminary application (or objection) was to stop the lower court from proceeding to determine the appellant (plaintiff)'s application to set aside the arbitral award on

the ground that the same had been irregularly and improperly filed.

7.10 In point of fact, the lower court acknowledged the irregularity adverted to in the preceding paragraph when it said, at page R6 of the Ruling now under attack:

> *"I agree with counsel for the defendant that the application to set aside the arbitral award is irregular and improperly before me because it was made outside the stipulated time-frame."*

7.11 Contrary to the court's conclusion as highlighted in 7.4 above, it was the success of the Respondent's pre-emptive preliminary application which had the effect of disentitling the lower court from proceeding to hear the appellant's application to set aside the arbitral award.

7.12 Although, contrary to the guidance which we offered in **Roan Antelope Mining Corporation of Zambia PLC (In Receivership v. Transityre BV Michelin Export Facilities**[5], the lower court erroneously proceeded to pronounce itself on the primary or substantive application when it ought to have confined itself to the

preliminary issue, we are satisfied that the judge below properly acknowledged and accepted that she could not hear nor determine the appellant's application to set aside the arbitral award on the ground that the same had been irregularly and improperly launched.

7.13 For the avoidance of doubt, we dismiss the appellant's contention that the Deputy Registrar's Ruling of 19th January, 2015 had the effect of enlarging or extending the statutory period of three months within which the appellant ought to have launched its application to set aside the arbitral award in question. Quite aside from the issue of the time bar which we resolved in **Paola Marandola**[4], the Deputy Registrar simply did not possess the requisite jurisdiction to enlarge the time.

7.14 Although the second ground could have succeeded if a little more had been done in the way of improving its crafting and presentation, such success would have counted for nothing more than hollow victory in the light of the failure of the first and determinative ground.

7.15 In sum, this appeal fails. The respondent will have its costs, and these should be taxed if not agreed.

.....

A. M. WOOD
SUPREME COURT JUDGE

.....

R. M. C. KAOMA
SUPREME COURT JUDGE

.....

M. MUSONDA, SC
SUPREME COURT JUDGE