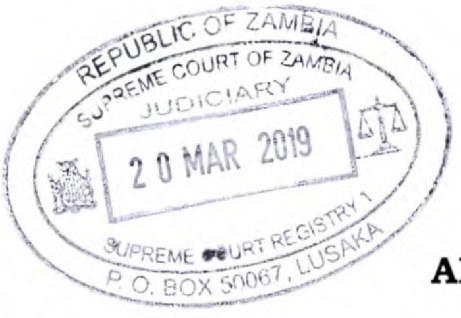
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 63/2013**
HOLDEN AT NDOLA
(CIVIL JURISDICTION)



BETWEEN:

TIGER LIMITED **APPELLANT**

AND

ENGEN PETROLEUM (Z) LIMITED **RESPONDENT**

Coram: Chibomba, Hamaundu and Kaoma, JJS.

On 4th June, 2014 and on 20th March, 2019

For the appellant : Mr J. Kabuka, Messrs Kabuka & Co.
For the respondent : Mr N. Nchito, Messrs Nchito & Nchito.

JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Pegasus Energy (Z) Ltd v Yougo Ltd, 2006/HP/Arb/005**
2. **Zimbabwe Electricity Supply Authority v Genius Joel Maposa [1999] 2 ZLR 452**
3. **Techpro Zambia Ltd v NFC Africa Mining Plc, 2004/HN/Arb.1**
4. **Attorney General v Panchal Construction Limited, 2006/HPC/0061**
5. **Locabail (UK) Limited v Bayfield Properties Limited (2000) 1 All E.R 65**
6. **Dimes v Proprietors of Grand Junction Canal (1852) 3 HL Cas 759.**

7. Metropolitain Co. (FGC) Ltd v Lannon & Others [1968] 3 All E. R. 304
8. Zambia Telecommunication Company Limited v Celtel Zambia Limited (2008) 2 ZR 44

Legislation referred to:

1. **The Arbitration Act, No. 19 of 2000**
2. **Arbitration (Code of Conduct and Standards) Regulations, 2007, Statutory Instrument No.12 of 2007**

Works referred to:

1. **MC Gregor On Damages, 17th Edition, Sweet & Maxwell**
2. **Chitty On Contracts, 31st edition, Sweet & Maxwell, 2012**

This appeal is against the dismissal by the High Court of the appellant's application to set aside an arbitral award that was given in this matter. The facts giving rise to this appeal are straight forward.

The parties entered into two contracts, namely; (i) a Bulk Consumer Agreement dated 16th February, 2006, and (ii) a Transport Services Agreement dated 5th January, 2007. A dispute having arisen in the performance of the two contracts, the parties referred it to arbitration. An arbitrator was duly appointed. He proceeded to arbitrate the dispute and gave a final award in favour of the respondent.

The record shows that upon being appointed, the only declaration that the arbitrator made to the parties was contained in

a letter that he wrote to them on 12th July, 2011. In that letter, he declared that he was not aware of any circumstances that might affect his independence and impartiality in the conduct of the arbitration; and that he also had not had any formal dealings with the parties as a legal practitioner.

On 3rd August, 2012 the appellant brought this action to set aside the award on the ground that it is in conflict with public policy. In its affidavit in support of the motion, the appellant accused the arbitrator of bias in his evaluation of the parties' respective cases; the bias was said to have tilted in favour of the respondent. The appellant attributed the alleged bias to the arbitrator's personal relationship with Mr. Guy Phiri and his family. Mr. Phiri was the managing director of the respondent. The appellant accused the arbitrator of having hidden this fact. The appellant claimed that the source of its knowledge of that fact was Mr. Phiri himself, who is said to have bragged that he had even hosted, at his home, a celebratory party for the arbitrator when the latter was appointed High Court Judge. According to the appellant, Mr. Phiri continued to brag that because of that relationship, the appellant's claim against the respondent had been doomed to fail, right from the beginning.

The respondent, through its managing director, Mr. Phiri, denied the allegations made by the appellant and contended that the award was made purely on the merits of the case. Mr. Phiri denied any personal knowledge of the arbitrator, but stated that he knew the arbitrator through his (Mr. Phiri's) wife who worked together with the arbitrator in the Judiciary and the arbitration association. He went on to state that at the commencement of the arbitration proceedings, he had informed the appellant's managing director that the arbitrator knew his wife and that she had hosted a small function at home on behalf of the Zambia Association of Arbitrators to congratulate the arbitrator on his appointment to the bench. According to Mr. Phiri, no objection to the arbitrator's appointment was raised by the appellant when the proceedings commenced; and that this was so even after the arbitrator, in his opening remarks, unequivocally declared his working relationship with both Mr. Phiri's wife and the wife of counsel representing the appellant, as judges.

In its affidavit in reply, the appellant denied the appellant's averment that at the opening of the proceedings, the arbitrator declared his working relationship with Mr. Phiri's wife and the wife of counsel for the appellant.

In the court below, the appellant set out four points on which it argued its case.

These are:

(i) *Arbitrator's failure to disclose personal/family relationship with a party (defendant's Managing Director), contrary to the purport of Article 12 of Model law on the requirements of impartiality and independence.*

Under this point, the appellant's grievance was with the arbitrator's non-disclosure of the fact that he had a family relationship with the respondent's managing director.

(ii) *Matters giving rise to justifiable doubts about Arbitrator's impartiality and independence.*

Under this point, the appellant contended that the refusal by the arbitrator to make a financial award to the appellant, even after finding that the respondent was in breach of the two agreements, gave rise to justifiable doubts about his impartiality and independence.

(iii) *Arbitrator applying wrong principles of awarding interest at bank lending rate by backdating the accrual date to 19th September, 2011.*

Under this point, the appellant contended that interest on a judgment starts to run from the date of judgment. According to the appellant, the fact that the arbitrator backdated interest on the award was another indication of his bias towards the respondent.

(iv) Consideration of Public Policy under Section 17 of the Act and article 34 of the Model Law.

Under this point, the appellant set out some instances where awards had been set aside on the ground of public policy. A number of cases were cited which contained such examples. In one case, **Pegasus Energy (Z) Ltd v Yougo Ltd**[1], the High Court, citing with approval the Zimbabwean case of **Zimbabwe Electricity Supply Authority v Genius Joel Maposa**[2], held that an award that constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible or fair-minded person would consider that the conception of justice in Zambia would be intolerably hurt by the award was contrary to public policy. In another case, **Techpro Zambia Ltd v NFC Africa Mining Plc**[3], the High Court set aside an award which was considered to be perverse. In yet another case, **Attorney General v Panchal Construction Limited**[4], the High Court set aside an award

which was rendered in unprocedural proceedings for being contrary to public policy.

The court resolved the allegation of impartiality and the issue of public policy together.

The court held that **section17** of the **Arbitration Act, No. 19 of 2000** as read with **Article 34** of the **Model Law** was the only provision under which an arbitral award could be set aside, upon proof of any of the facts listed therein.

In apparent reference to the appellant's first point concerning the alleged failure by the arbitrator to disclose his personal/family relationship with the respondent's managing director, the court pointed out that under **Article 12** of the **Model Law**, a party was empowered to challenge the appointment of an arbitrator, but that the challenge was only with regard to the suitability of the arbitrator and did not lead to the setting aside of an award.

The court looked at the case of **Locabail (UK) Limited v Bayfield Limited**[5], the Zimbabwean case which has already been referred to and a Canadian case, and held that, according to the decision in the **Locabail** case, the discovery of circumstances that gave rise to doubts of impartiality and independence after the award had been rendered could found a ground for setting aside the

award. On the question regarding public policy, the court said that it was clear from the three authorities that in considering whether to set aside an award on grounds of public policy, it was the award itself and the reason for arriving at it that was interrogated. The court cited the following passage from the Zimbabwean case:

> **"Where however the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequality that is so far-reaching and outrageous in its defiance of logic or accepted moral standards that a sensible or fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt, then it would be contrary to public policy"**

The court then noted that the award in our case, if enforced, would not hurt intolerably the concept of justice in Zambia and that the court had not seen any evidence of intolerable ignorance or corruption on the part of the arbitrator.

Coming back to the arbitrator's alleged failure to disclose his relationship, the court found that the appellant became aware of the relationship before the conclusion of the arbitral proceedings, and therefore, that the decision in the **Locabail** case could not be applied. For the same reason, the court held that the appellant had lost the right to challenge the appointment of the arbitrator under **Article 12**

of the **Model Law**; which, in any event, could not lead to the setting aside of an award.

In conclusion, the court noted that the three foreign decisions that it had considered were made by appellate courts which by virtue of their appellate powers could have taken the liberty to delve into the merits of cases before them from lower courts. The court then said that, in its case, it had refrained from behaving as though it was sitting in appeal.

On those grounds, the court dismissed the application.

The appellant appealed on four grounds. These are that:

1. **The court below misdirected itself when it held that an arbitrator's failure to disclose a personal/family relationship with one of the parties, even when such non-disclosure manifests in the arbitrator's lack of independence and impartiality, is not a ground for setting aside the arbitral award.**
2. **The court below misdirected itself when it declined to set aside an arbitral award that disregarded the basic tenets of the law and arbitral rules applicable in resolving commercial disputes between the parties on the premise that doing so would amount to entertaining an appeal.**
3. **The court below applied wrong principles or extraneous considerations in determining whether the arbitral award in issue was in conflict with public policy**
4. **The court below fell into error when it held that the High Court in Zambia, unlike courts in other jurisdictions (whose judicial authorities the appellant had cited) does not have power to**

interrogate the reasoning of the challenged arbitral award under the provisions of Section 17 of the Arbitration Act, No.19 of 2000; and in total disregard of earlier judicial decisions on the issues which were brought to the attention of the court.

In the first ground of appeal, the appellant disagreed with the view by the court below that the existence of circumstances that give rise to justifiable doubts of impartiality and independence of an arbitrator only entitles a party to challenge the appointment of the arbitrator; and cannot suffice as a basis upon which an application to set aside the award should be founded. The appellant was particularly aggrieved by the fact that, while, in its view, it had provided particulars which not only tended to show that the arbitrator had abrogated his duty of impartiality and independence but also demonstrated the arbitrator's bias in the award complained of through particular number (ii), the court below refused to consider them, saying that they merely constituted what the appellant perceived to be incidents of partiality and lack of independence on the part of the final arbitral award and that the particulars were, in any event, outside the scope of **Article 12** of the **Model Law**. Mr. Kabuka, learned counsel for the appellant, argued that it is a cherished fundamental principle of law that justice must not only be done but must be seen to be done; so that, when there is a perceived

bias on the part of the decision-maker, the decision is liable to be set aside. For that principle, we were referred to the case of **Dimes v Proprietors of Grand Junction Canal** [6]. Counsel also referred us to the case of **Metropolitain Co. (FGC) Ltd v Lannon & Others**[7] in which the rule was re-stated. Finally, counsel referred us to the case of **Locabail**[5] in which, according to learned counsel, the principle was discussed more comprehensively.

On the principle stated in the above cases, learned counsel submitted that the arbitrator's failure to disclose his personal relationship with the respondent compromised his duty of impartiality and independence, both at common law and under **Article 12** of the **Model Law**; and that the arbitrator's conduct was contrary to public policy within the contemplation of **Article 34** of the **Model Law**.

In the second ground of appeal, the appellant's grievance was with the refusal by the court below to interrogate the reasoning of the award on the ground that the court below was not sitting as a court of appeal to review the award on that footing. Learned counsel argued that, by its refusal to interrogate the award, the court below failed to consider the effect of the arbitrator's disregard of **Article 28** of the **Model Law** which states that an arbitral tribunal shall decide in

accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. As an example of the arbitrator's disregard of **Article 28** of the **Model Law**, counsel pointed out that while the arbitrator had found the respondent to have breached two of the contracts, he nevertheless refused to award any monetary damages simply because the rates on which the appellant was relying were not specifically contained in the respective contracts; in the process, counsel argued, the arbitrator disregarded any reference to the applicable trade usage, stating that doing so would amount to introducing inadmissible extrinsic evidence. We were referred to the works **Chitty On Contracts**, and **M^{c} Gregor On Damages;** in both authorities, the appellant quoted passages dealing with the purpose of awards of damages. We do not think that these authorities are relevant to this appeal, given the restricted scope in which the court can set aside an arbitral award.

In the third ground of appeal, the appellant was aggrieved by part of the holding by the court below in which it said that in deciding the application on the ground of public policy, it held the view that the award itself, if enforced as it was, would not hurt intolerably the concept of justice in Zambia. Learned counsel argued that the issue before the court below was the failure by the arbitrator to disclose a

personal relationship with a party to the arbitration. Counsel argued that the court below digressed from that issue and went on to consider other provisions, instead of **Section 17** of the **Arbitration Act**, as read with **Article 34** of the **Model Law**.

The appellant's grievance in the fourth ground was again with regard to the refusal by the court below to challenge the reasoning of the award. But this time it was against the court's holding that the High Court in Zambia, unlike courts in other jurisdictions, does not have power under **Section 17** of the Arbitration Act to interrogate the award. It was argued that our **Arbitration Act** adopted the **Model Law** which seeks to harmonize the practice of arbitral process in member States. Counsel for the appellant pointed out that **Section 17** of the **Arbitration Act** is derived from **Article 34** of the **Model Law** and that all Model Law compliant States have incorporated that Article. Counsel argued that Zambian courts cannot refuse to adopt principles enunciated in judicial decisions of other Model Law jurisdictions. Among the decisions cited was the decision in the Zimbabwean case of **Zimbabwe Electricity Supply Authority v Genius Joel Maposa**[(2)]. Counsel then argued that it was a misdirection on the part of the court below to disregard the principle enunciated in those foreign decisions that non-compliance by an

arbitrator with fundamental tenets and principles of justice is contrary to public policy.

In response to the appellant's argument in the first ground, the respondent submitted that the appellant was aware of the relationship between the respondent and the arbitrator before the arbitral proceedings commenced, but chose not to object to the appointment. Counsel cited **Articles 12** and **13** of the **Model Law**, which provide steps for challenging the appointment, and argued that the appellant had waived its right to mount the challenge.

It was the respondent's argument also that in any event, the non-disclosure of personal/family relationships is not one of the grounds provided by **Section 17** for setting aside an award. Counsel distinguished the two English cases cited by the appellant, particularly, the *Locabail* case, from the current case in that the *Locabail* case holds that circumstances which give rise to a justifiable doubt as to the impartiality or independence of an arbitrator may only be used where they become known after an award is made.

In the second ground, the respondent echoed the lower court's holding that it could not delve into the merits of the award as that would be tantamount to granting itself appellate powers, which it did not have. The appellant argued that **Article 12** does not confer

powers on the court to set aside an award, while **Section 17** of the **Arbitration Act** prescribes the circumstances when an award may be set aside.

In the third ground, the respondent distinguished the case of **Zambia Telecommunication Company Limited v Celtel Zambia Limited**[8], in which we held that the non-disclosure by an arbitrator of his interest could easily be perceived as being contrary to public policy, from the facts in this case and submitted that in the current case, the appellant was aware of the relationship and should have objected under **Article 12** of the **Model Law**.

In the fourth ground, the respondent argued that the principle that courts in Zambia follow still applies, namely, that foreign decisions are persuasive, but not binding on courts in Zambia. Counsel for the respondent then went on to argue that even assuming that foreign decisions under the Model Law were binding on our courts, the appellant did not prove its case to the standards set out in the decisions that it relied on, such as the standard in the Zimbabwe case.

Those were the submissions that the parties made before us.

The appellant's presentation of the application made it difficult to understand what it was really about. As a consequence, even the

appellant's arguments were difficult to comprehend. For example, firstly, we fail to see the difference between the first point which alleges failure by the arbitrator to disclose a relationship and the second point which is on matters giving rise to justifiable doubts about the arbitrator's impartiality and independence. Secondly, the appellant in one breath argues that the application was entirely about the non-disclosure of the relationship which offended public policy and yet the appellant goes on to attack the court below for refusing to interrogate the award. Thirdly, if, as the appellant argues, the application was about setting aside the award on the ground of non-disclosure of a relationship as set out in the first point, what then was the purpose of the fourth point which states *"(iv) consideration of public policy under Section 17 of the Act and Article 34 of the Model Law"*.

Looking at the claims in the summons as framed, our view is that the appellant's application was simply for an order setting aside the award on the ground that there was non-disclosure by the arbitrator of his relationship with the respondent; and that the reference to the award was simply there to show that there was real bias and not just a perception.

The relationship between the arbitrator and the respondent was established by both parties through their respective managing directors, who swore affidavits to the application. The relationship established was that the arbitrator and the wife of the respondent's managing director worked closely with each other as members of the Association of Arbitrators; and that when the arbitrator was appointed as High Court judge, the wife of the respondent's managing director hosted the arbitrator at a function held at the managing director's home to congratulate the arbitrator. There was an averment by the respondent's managing director in his affidavit stating that the arbitrator had told the parties at the commencement of the hearing that he knew the respondent's managing director's wife as a fellow High Court judge, in the same way that he knew the wife of counsel for the appellant as a fellow High Court judge. This was disputed by the appellant's managing director in his affidavit in reply. The court below did not resolve this issue; opting, instead, to proceed on the fact that from the appellant's managing director's averments in his affidavit, the appellant became aware of the relationship at the beginning of the arbitral proceedings; or at least in the course thereof. This in effect was a finding by the court below that there was indeed non-disclosure by the arbitrator.

The respondent's position, as was the position taken by the court below, is that the appellant having become aware of the relationship, at least before the conclusion of the arbitral proceedings, should have challenged the appointment under **Article 12** of the **Model Law**; and that having failed to do so, the appellant had sat on its right and cannot now use the relationship to challenge the award.

The **Arbitration (Code of Conduct and Standards) Regulation, 2007, Statutory Instrument No.12** of **2007** provides in **Regulation 2** as follows:

> **"2 (1) An arbitrator shall disclose at the earliest opportunity any prior interest or relationship that may affect impartiality and or independence or which might reasonably raise doubts as to the arbitrator's impartiality and or independence in the conduct of the arbitral proceedings.**
>
> **(2) If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of an appointment or at the commencement of the arbitral proceedings, disclosure shall be made when such circumstances become known to the arbitrator.**
>
> **(3) The burden of disclosure rests on the arbitrator and the duty to disclose is a continuing duty which does not cease until the arbitration has been concluded.**
>
> **(4) After appropriate disclosure, the arbitrator may serve**

> **if both parties so desire, provided that if the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desires of the parties"**

As the above provisions stipulate, the burden or duty of disclosure rests on the arbitrator. That duty is not discharged by the fact that a party becomes aware of the circumstances requiring disclosure through some other sources. In **Zambia Telecommunications Company Limited v Celtel Zambia Limited**[8], we laid emphasis on the fact that it is the non-disclosure by the arbitrator which creates a perception of possible, or likelihood of bias; and that that is what makes the non-disclosure of circumstances requiring disclosure to be contrary to public policy.

In this case, the fact that there was non-disclosure of the arbitrator's relationship was found by the court below. Although the appellant may have lost its right to challenge the appointment under **Article 12** of the **Model Law**, this did not extinguish the perception of possible, or likelihood of bias which was created by the non-disclosure. That perception persisted even after the award. Therefore, it was that non-disclosure which made the award liable to be set aside on the ground that it was against public policy. So, contrary to the holding by the court below that the relationship of the arbitrator

under **Article 12** of the **Model Law**, this did not extinguish the perception of possible, or likelihood of bias which was created by the non-disclosure. That perception persisted even after the award. Therefore, it was that non-disclosure which made the award liable to be set aside on the ground that it was against public policy. So, contrary to the holding by the court below that the relationship of the arbitrator and the respondent was only to be dealt with under **Article 12** of the **Model Law**, the non-disclosure of that relationship by the arbitrator brought it squarely into the ambit of circumstances upon which an arbitral award may be set aside under **Section 17** of the **Arbitration Act**. There is, therefore, merit in the appeal.

This appeal is allowed. The award rendered by the arbitrator is hereby set aside. The appellant will have costs, both here and in the court below.

H. Chibomba
SUPREME COURT JUDGE

E. M. Hamaundu
SUPREME COURT JUDGE

R. M. C. Kaoma
SUPREME COURT JUDGE