IN THE SUPREME COURT OF ZAMBIA **SCZ/08/14/2021**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

KNOX MAGUGU MBAZIMA **APPLICANT**

AND

TOBACCO ASSOCIATION OF ZAMBIA **RESPONDENT**

Coram: **Malila CJ, Wood and Kabuka, JJS**
on 10th May, 2022 and 9th November, 2022

For the Applicant: In Person

For the Respondent: Ms. M. L. Nkhonde of Messrs Mweshi Banda and Associates

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R U L I N G

Malila, CJ delivered the ruling of the Court.

Cases referred to:

1. *Bellamano v. Ligure Lombarda Limited (1) (1976) Z.R. 267 (S.C.)*
2. *Kansanshi Mine Plc v. Joseph Maini Mudumina & Others (Appeal No. 149/2010)*
3. *Zambia Telecommunications Company Limited v. Muyawa Liyuwa SCZ No. 16 of 2002*
4. *Rosemary Nyangu v. Pamodzi PLC SCZ/8/08/2021*
5. *Clever Mpoha and Savenda Management Services v. ETS Rwasa Salvator SCZ/8/25/2021*
6. *ZCCM Investment Holdings PLC v. Muyangwa Mufalali & 141 Others (Selected Judgments No. 14 of 2017)*
7. *National Milling Company Limited v Vashee (2000) Z.R. 98*

8. *Westacre Investments Limited v. Jugo Import – SDPR Holding Company Limited [1999] 3 ALL ER 864*
9. *Takhar v. Gracefield Developments Limited [2019] EWCA Civ. 13*
10. *Natasha Nawa v. The People (SCZ/9/2/2019)*
11. *Bidvest Food Zambia Limited & Others v. CAA Import and Export Limited (SCZ Appeal No. 57 of 2017)*
12. *Standard Chartered Bank Zambia PLC v. Wisdom Chanda & Christopher Chanda (SCZ Judgment No. 18 of 2014)*
13. *ZCCM Investments Holding PLC v. Vedanta Resources Holding Limited and Konkola Copper Mines PLC (SCZ Appeal No. 14 of 2021)*
14. *Savenda Management Services v. Stanbic Bank Zambia Limited Selected Judgment No. 10 of 2018*

Legislation and other works referred to:

1. *Arbitration Act No. 19 of 2000*
2. *Court of Appeal Act No. 7 of 2016*
3. *Rules of the Supreme Court of England (White Book) 1999 Edition*
4. *Rule 48 (4) of the Supreme Court Rules*
5. *Practice Direction No. 1 of 2002*

1.0. INTRODUCTION AND BACKGROUND FACTS

1.1. We regret the delay in delivering this ruling. It was occasioned by circumstances beyond our control.

1.2. The present application was filed pursuant to Rule 48 (4) of the Supreme Court Rules. It is a renewed application coming to us following a refusal by a single judge to grant leave to appeal against a judgment of the Court of Appeal given on 4th November, 2020.

1.3. The background to the application is that the parties enjoyed an employer-employee relationship. During the course of this relationship, they executed various contracts of employment. In the contract subject of these proceedings, the parties had agreed that any dispute between them arising out of their relationship would be settled through arbitration.

1.4. As fate would have it, a dispute ensued between the parties. The matter was referred to arbitration and an award was subsequently given. The applicant was incensed by the award rendered. This prompted him to move the High Court in an attempt to have the arbitral award set aside.

1.5. The sole ground forming the bedrock of his discontentment with the award was his conviction that part of the evidence adduced by the respondent during the arbitral proceedings was tainted with fraud.

1.6. After hearing the parties, the High Court noted that the applicant had failed to challenge the alleged fraudulent evidence at arbitration. Regarding the matter before it, the High Court found that the applicant had failed to demonstrate that the arbitral award was founded on fraudulent evidence. It thus held that the applicant had failed to distinctly allege and prove fraud to warrant setting aside the award.

1.7. Consequently, the court found no merit in the application to set aside the arbitral award and dismissed it.

1.8. Determined to have the arbitral award set aside, the applicant escalated the matter to the Court of Appeal. There he raised issue, unsuccessfully, with the respondent's *locus standi* as a party to the proceedings. In the appeal, the applicant again challenged the evidence that was admitted and relied upon by the arbitral tribunal. The appeal hinged on the argument that the arbitral award was tainted by fraud, serious irregularities and misrepresentation.

1.9. The Court of Appeal, in a nutshell, was of the view that the award was not induced or affected by fraud or serious irregularities, neither was it blemished with misrepresentation. The court, as did the High Court, refused to set aside the award, citing the failure to meet the requirements under section 17(2)(b)(iii) of the Arbitration Act as the reason. The appeal was thus dismissed in its entirety.

1.10. The applicant's attempt to obtain leave to appeal to this Court from the Court of Appeal was unsuccessful. The court's basis for the refusal was that the applicant did not satisfy the threshold for the grant of leave as set out in section 13 of the Court of Appeal Act. Section 13 (3) of the Court of Appeal Act stipulates that:

> **13.(3) The Court may grant leave to appeal where it considers that—**
>
> **(a) the appeal raises a point of law of public importance;**
>
> **(b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
>
> **(c) the appeal would have a reasonable prospect of success; or**

(d) there is some other compelling reason for the appeal to be heard.

1.11. Troubled by the court's refusal to grant leave, the applicant moved a single judge of this court by way of renewal of the application for leave to appeal. The single judge condensed the issues raised in the proposed appeal into a solitary question. In his view, the question was simply whether or not the award should be set aside and whether this falls within the intendment of section 13 (3) of the Court of Appeal Act. He noted that the applicant, through his intended appeal, seeks to raise procedural issues that arose at arbitration as opposed to highlighting the basis upon which the award must be set aside in keeping with the provisions of section 17 of the Arbitration Act.

1.12. The single judge concluded that the intended appeal does not reveal any prospects of success, nor does it raise any point of law of public importance to justify the grant of leave to appeal. The renewed application for leave to appeal thus fell on stony ground.

1.13. Riled by the decision of the single judge, the applicant has now decided to take his chance with the full Court, still eager to obtain leave to appeal, and hence the current motion.

2.0. APPLICATION TO AMEND MOTION

2.1. When the motion came up for hearing, the applicant made an application to amend his motion. We refused the application and heard the motion in the manner and form it was initially filed. We had indicated then that we would give our reasons for our refusal later. We now do so.

2.2. For the sake of brevity, we shall not belabor or rehash all the issues that the applicant raised in his application to amend the motion. Suffice it to say that the applicant's application was made pursuant to Order 20 of the Rules of the Supreme Court of England (White Book) 1999 Edition. To assist him move the court, the applicant also relied on Order 18 of the High Court Rules. In his oral submissions at the hearing, he made his intention to amend the motion clear.

2.3. Ms. Nkhonde, Counsel for the respondent, informed us that she did not file any response to the application in question but opted to oppose the application *viva voce,* on points of law. She quickly pointed out that the Rules of the High Court relied upon by the applicant are not applicable in our court.

2.4. She was, however, of the view that even if we allowed the proposed amendment, the same would not assist the applicant's case. In any event, counsel argued, the respondent's affidavit in opposition to the motion would still adequately address the issues the proposed amendment sought to raise.

2.5. We perused the applicant's application and noted, as did the respondent, that the applicant relied on wrong law in moving the court. In providing the legal basis for applications made in the Supreme Court, High Court rules are obviously alien to this court. We must hasten to state that it is always necessary for parties to not only cite the law that they seek to rely upon when moving the court but

to also, most importantly, cite the correct law. In the case of **Bellamano v. Ligure Lombarda Limited** [1] we guided that when moving a court:

> **It is always necessary ... for the summons or notice of application to contain a reference to the order and rule number or other authority under which relief is sought.**

Our decision in **Kansanshi Mine Plc v. Joseph Maini Mudumina & Others** [2] is to the same effect.

2.6. Practice Direction No. 1 of 2002 requires all applications brought to court to indicate the Act and Section or Order and Rule under which applications are made. This position applies now as it did then.

2.7. Besides the attempt to move the court under wrong rules, a perusal of the proposed amendments, revealed that the amendments would not materially alter the applicant's motion in its initial form.

2.8. It was for the foregoing reason that we refused to allow the proposed amendment and instead heard the applicant's motion in the form and manner in which it was filed.

Inevitably, this meant that we invoked our inherent discretion and ignored some of the irregularities manifest in the manner in which the motion was presented.

2.9. One irregularity we noted is by no means insignificant. The applicant presented the motion to us as an appeal against the decision of the single judge as opposed to it being presented as a renewed application. This is apparent from paragraph 5 of the applicant's affidavit in support of the motion where he states that:

> **I have indicated my grounds of appeal against the ruling of the single judge of the Supreme Court...**

The applicant, in fact, sets out six grounds of appeal against the decision of the single judge at page 207 of the record of motion.

2.10. We have stated on numerous occasions that an application or motion properly comes from a single judge to the full Court by way of renewal and must be presented as such. It is not an appeal necessitating new grounds premised on the decision of the single judge. In **Zambia**

Telecommunications Company Limited v. Muyawa Liyuwa[3] we stated as follows:

> **...we want to state here for the benefit of litigants and advocates who appear before judges of this court at chambers, that when aggrieved, or dissatisfied by any decision of a single judge of this court, they come to a full court by way of renewal of the application or motion and not by way of appeal. This is so because in terms of section 4 of the Supreme Court Act, Cap. 25 of the Laws of Zambia a single judge of the court may exercise any powers of the court not involving the decision of an appeal or a final decision in the exercise of his original jurisdiction...the renewed application is not an appeal.**

2.11. We must again warn all litigants that come before us that presenting a motion before the full Court that emanates from a decision of a single judge in the form of an appeal is fatal. In **Rosemary Nyangu v. Pamodzi PLC**[4] and more recently in **Clever Mpoha and Savenda Management Services v. ETS Rwasa Salvator**[5] we dismissed the motions on account that they were erroneously presented to us as appeals from decisions of a single judge as opposed to renewed applications.

2.12. We shall revert to this important issue later in this ruling. For now, we shall turn to consider the applicant's motion.

3.0. NOTICE OF MOTION FOR LEAVE TO APPEAL TO THIS COURT: THE APPLICANT'S CASE

3.1. As we indicated earlier in this ruling, the applicant was aggrieved by the decision of a single judge of this court. He has now moved the full court seeking leave to appeal.

3.2. The applicant swore the affidavit in support of the motion. In his words, the *"grounds of appeal against the ruling of the single judge of the Supreme Court [appear] on page 207"*.

3.3. The 'grounds' of appeal, as the applicant puts it, are reproduced, below:

a) **The single Judge erred and severely prejudiced the Applicant by failing to pronounce himself on Ground one as shown [on] page 132 of the Applicant's Supplementary to the *Ex-parte* motion for leave of Court to appeal to the Supreme Court.**

b) **The single judge did not address and pronounce himself [on] ground two on page 132 regarding the *locus standi* of one Owen Simukoko (Late).**

c) **The single Judge erred in fact by not pronouncing himself on the Applicant's challenge to the Court of Appeal Judgment of 4th November, 2022 reported on page 133 of a misrepresent[ed] case law Westacre Investment Limited v. Jugo Import – SDPR Holding Company Limited.**

d) **In his ruling of 9th March, 2021, the single judge misdirected himself by concluding that the Applicant had limited his appeal to applying of grounds of an award premised on fraud, corruption and misrepresentation as stated in Section 17 of the Arbitration Act (2) and (3) when in fact on his page 137 last paragraph and 138 first paragraph he actually indicated that the applicant had challenged the locus standi of Mr. Owen Simukoko (Late) and that of the jurisdiction of the Respondent suing in its name when it was a voluntary unincorporated association which was not a legal entity effectively denying the Court jurisdiction which was a challenge to the Arbitral award under Section 17 subsection 2 (b)(iii) of the Arbitration Act in regard to an award that was against public policy.**

e) **The Single Judge erred in law and fact when he ruled that court[s] are not concerned with matters of procedure in civil matters when in fact there exists civil procedure rules that courts use in English Courts whose laws are the basis of our own laws.**

f) **The learned judge, by holding an award in which key evidence being the Forensic Audit was relied upon but not produced failed to pronounce himself on the matter**

of fraudulent concealment of evidence to adduce an award.

3.4. It is on the basis of the above 'grounds' that the applicant entreats us to reverse the ruling of the single judge. We are alive to the fact that before the Court of Appeal, the applicant formulated proposed grounds of appeal which were different from those presented before the single judge. We have had sight of both of them and note that their substance is essentially the same.

3.5. In his affidavit, the applicant avers that he has exhibited a forensic audit report authored by a firm called Walis Management Accountants dated 30th November, 2012. He revealed that a copy of this report was sent to him on 22nd May, 2019. On the strength of this report, which apparently speaks to the allegations of fraud at arbitration, the applicant urged us to reverse the decision of the single judge and grant him leave to appeal to this court.

3.6. In his skeleton arguments, the applicant recounted, in sequence, the facts that culminated into the case before the arbitral tribunal up until the decision of the tribunal. More relevantly, he argued that the decision of the arbitral tribunal did not take into account the contents of the forensic audit report.

3.7. The applicant maintained that he challenged the award on the basis that the respondent, being an association, has no legal capacity to be party to these proceedings. This argument, according to the applicant, also extends to the respondent's witness, at the arbitral tribunal and in the High Court, a Mr. Simukoko. The applicant claimed that Mr. Simukoko had no capacity to give evidence for and on behalf of the respondent.

3.8. The applicant went on to argue that the question of *locus standi*, at least in relation to the respondent, goes to jurisdiction. More forcefully, he argued that the question of jurisdiction can be raised at any stage of the proceedings. To buttress this point, he referred us to our decision in

ZCCM Investment Holdings PLC v. Muyangwa Mufalali & 141 Others [6].

3.9. The applicant invited us to consider the legal capacity of the respondent as a party to these proceedings against the guidance we gave in **National Milling Company Limited v. Vashee**[7] that an unincorporated association is not a legal person and, therefore, cannot sue or be sued.

3.10. It was the applicant's contention that the question of legal capacity of the respondent was raised at arbitration but was never addressed by the tribunal. However, he was unable to point to a portion in the record of motion showing that the issue was indeed raised at arbitration.

3.11. The applicant questioned why the forensic audit report was never considered by the arbitral tribunal when, in his estimation, the report showed the extent of the fraudulent evidence that was accepted and relied upon by the tribunal.

3.12. Aside the procedural issues that the applicant raised he argued that it was wrong for the Court of Appeal to rely on a non-existent passage purportedly extracted from the case of **Westacre Investments Limited v. Jugo Import – SDPR Holding Company Limited**[8]. He submitted that the Court of Appeal judgment must be set aside on this basis alone. This, according to Mr. Mbazima, is in keeping with the views of the Supreme Court of England and Wales in **Takhar v. Gracefield Developments Limited**[9]. In this case the Supreme Court of England intimated that a judgment obtained by fraud ought to be set aside.

3.13. In closing, the applicant invoked the spirit of justice, referring us to Article 118(2)(e) of the Constitution which directs that justice should be administered without undue regard to procedural technicalities.

3.14. We were urged to grant the applicant leave to appeal to this court as, in his view, the issues he has raised in the intended appeal are of public importance.

4.0. THE RESPONDENT'S CASE

4.1. The respondent opposed the application and filed an affidavit in opposition deposed to by Counsel for the Respondent, Mrs. Mweshi Banda-Mutuna. She informed us, through that affidavit, that the High Court dismissed the applicant's matter on account of his failure to prove the allegations of fraud to the satisfaction of the court.

4.2. She averred that, on appeal, the lower court equally dismissed the applicant's case with costs and subsequently refused to grant him leave to appeal. She went on to state that the applicant's attempt, before the Court of Appeal, to have its decision varied on account that it incorrectly applied the case of **Westacre Investments Limited v. Jugo Import – SDPR Holding Company Limited**[8] failed.

4.3. According to the deponent, the applicant also unsuccessfully sought leave to appeal to this court before a single judge of this court.

4.4. In addition to relying on the affidavit in opposition, Ms. Nkhonde, counsel for the respondent, in her skeleton arguments, gave a brief background of the matter and raised objections regarding the form of the motion.

4.5. At the hearing, we ruled that we would hear, and did in fact hear, the motion in its original form for the reasons we have given at paragraphs 2.7 and 2.8 of this ruling. Therefore, we shall not reproduce the arguments raised regarding the imperfections in form, of the motion.

4.6. With regard to the substance of the motion, counsel argued that the application does not meet the threshold set out in section 13 of the Court of Appeal Act 7 of 2016. According to her, the applicant has not given any reason why leave should be granted.

4.7. Ms. Nkhonde stressed the fact that the Applicant discusses, in his motion, issues irrelevant to his application for leave. She went on to submit that in line with section 13(3) of the Court of Appeal Act, an appeal will only be allowed if it raises a point of law of public

importance or has prospects of success or there is some other compelling reason for the appeal to be heard by this court.

4.8. According to Counsel, this motion is bound to fail if the guidance we gave in **Natasha Nawa v. The People**[10] and **Bidvest Food Zambia Limited and Others v. CAA Import and Export Limited**[11] is anything to go by. The gist of our sentiments in these cases, particularly in the **Bidvest**[11] Case, is that appeals to this court are restricted to only those raising weighty issues deserving our determination and pronouncement. We emphasized that the purpose of section 13 of the Court of Appeal Act is to filter out those cases that do not warrant our attention.

4.9. Ms. Nkhonde maintained that the intended appeal is devoid of points of law of public importance. Counsel pushed the argument further and submitted that the issue of *locus standi* is not the basis for setting aside an arbitral award. To contextualise this point, Ms. Nkhonde referred us to the provisions of section 17 of the Arbitration Act

which sets out the grounds upon which an award may be set aside.

4.10. Counsel submitted that the issue of *locus standi* has been sufficiently litigated in the past and numerous decisions have been made by this court in that regard. In her view, the law on that issue is settled.

4.11. With regard to the question of the forensic audit report, Counsel contended that the applicant ought to have produced the report during the arbitration proceedings.

4.12. On the issue relating to the Court of Appeal not taking into account the applicant's submissions, it was contended by Counsel that the applicant had an option to make the relevant application to have any accidental slips corrected by the Court of Appeal as provided for under Order 13 rule 8 of the Court of Appeal Rules. To support this line of argument we were referred to the case of **Standard Chartered Bank Zambia PLC v. Wisdom Chanda & Christopher Chanda**[12] where we stated that a defect in a decision of the

court can be considered if a party makes an application to have it corrected.

4.13. Ms. Nkhonde entreated the court to dismiss the applicant's application for leave to appeal because, in her view, it lacked merit.

5.0. DECISION OF THE COURT

5.1. We have painstakingly considered the motion before us, the arguments of both parties and their oral submissions. Our view is that it is beyond doubt that what is at the core of the matter is whether this is a proper case for us to set aside the single judge's decision in which he refused to grant the applicant leave to appeal, and whether there is a point of law of public importance likely to arise in the appeal.

5.2. The single judge refused to grant the applicant leave to appeal because, in his view, there was no point of law of public importance that required our intervention. In brief, the single judge found that the applicant failed to justify his request for the grant of leave to appeal as

contemplated under section 13(3) of the Court of Appeal Act.

5.3. A perusal of the applicant's application immediately reveals that he raises two broad issues which, in his view, would warrant the grant of leave to appeal to this court.

5.4. The two questions, as we see them are: first, whether the arbitral tribunal took into account the forensic audit report; and second, whether the respondent has the requisite legal capacity to play any part in these proceedings.

5.5. On the other hand, the thrust of the respondent's opposition is that the issues the applicant raises have nothing to do with the issues he ought to be presenting to show that the award must be set aside and leave to appeal must be granted. The respondent has particularly pointed out that the question of *locus standi* is not a basis for setting aside an award.

5.6. In determining whether leave to appeal to this court should be granted, we shall address the two broad questions that emanate from the applicant's motion.

5.7. Before we do, it is imperative for us to note that we have stated on numerous occasions that with regard to setting aside arbitral awards, the hands of the court are tied in a strait jacket. The courts have very little wriggle room, if at all, with respect to the circumstances under which they are allowed to set aside an award. The number of cases in which we have echoed this position are legion.

5.8. Fairly recently, in **ZCCM Investments Holding PLC v. Vedanta Resources Holding Limited and Konkola Copper Mines PLC**[13] we stated as follows:

> **It is obvious that it should not be the remit of this court to attempt to make a determination on issues that were already a subject of determination by the arbitral tribunal.**

5.9. We went on to state that:

> **In keeping with the spirit of Article 5 of the Model Law, our courts are enjoined to embrace the principle of limited court intervention in arbitration...obviously, a principal rationale for the non-interventionist stance is respect for party choice and autonomy.**

5.10. Therefore, it is clear that the approach we took in the **ZCCM**[13] case, above, and many others is founded on the appreciation that an arbitral award is an award emanating from the tribunal chosen by the parties themselves.

5.11. The provisions of section 17 of the Arbitration Act clearly illustrate the fact that the courts may only set aside awards in very limited circumstances. For the sake of clarity, we shall produce the provisions of section 17 below:

> **17.(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).**
>
> **(2) An arbitral award may be set aside by the court only if-**
>
> **(a) the party making the application furnishes proof that-**
>
> **(i) a party to the arbitration agreement was under some incapacity; or the said**

agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;

(ii) the party making the application was not given proper notice of the appointment of an arbitral or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside;

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that -

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia; or

(ii) the award is in conflict with public policy; or

(v) the making of the award was induced or effected by fraud, corruption or misrepresentation.

(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 articles 33 of the First Schedule, from the date on which that request had been disposed of by the arbitral tribunal.

5.12. Having carefully perused the record of motion, we note that the applicant initially approached the High Court to have the arbitral award set aside on account that the

award was tainted with fraud. He essentially invoked the provision of section 17(2)(b)(iii) of the Arbitration Act.

5.13. From our scrutiny of the record, we note that the applicant's case has steadily morphed as it has made its way through the court hierarchy on appeal. Along the way, the applicant has raised various peripheral issues that have tended, in our view, to obfuscate the real reason he moved the courts.

5.14. We do not intend to lose track of the fact that the applicant initially moved the court to have the arbitral award set aside on account that it was tainted with fraud. He has vehemently argued, at every level, that he has issue with the tribunal's failure to take into account the forensic audit report which, in his view, clearly highlights the fraud that he has so forcefully referred to.

5.15. At the hearing, we asked the applicant whether or not the report was produced at arbitration. He initially agreed that it was but when we quizzed him further, he reneged on his

statement and indicated that he did not produce the report during the arbitral proceedings.

5.16. The view we take is that the applicant's failure to produce the report is a procedural issue which, by his own admission, is attributable to him. This cannot be the basis for setting aside an award let alone the basis for granting leave to appeal to this court. In fact, the report was available at the time the arbitral proceedings were on going but the applicant failed to produce it. We note that the Court of Appeal adequately dealt with the issue of the report when, at page J23, it noted that:

> **We now turn to deal with the issue of the Forensic Audit Report. During the arbitration proceedings, parties are expected to raise concerns about documents which they feel should be brought before the arbitrator at the earliest opportunity, failing which they waive their rights to raise objections relating to those documents (see Article 4 of the Model Law). The Forensic Audit Report was in existence at the time of the applicant's resignation and hearing of the matter by the arbitral tribunal. However, the applicant did not request for a subpoena to be issued for its production.**

5.17. Therefore, although the report was available during the arbitration proceedings, the applicant failed to produce it. More importantly, the failure to take into account evidence, in this case the report, does not constitute a ground for setting aside the arbitral award.

5.18. The question of *locus standi* or capacity of the Respondent was also raised by the applicant. This too is a procedural issue and should have been raised before the arbitral tribunal. Above all, the issue of capacity of a party cannot be the basis for setting aside an arbitral award as envisaged under section 17 of the Arbitration Act which we reproduced earlier in this ruling.

5.19. As rightly noted by the single judge, the applicant has failed to meet the threshold for the grant of leave to appeal as outlined in section 13(3) of the Court of Appeal Act. In **Savenda Management Services v. Stanbic Bank Zambia Limited** [14] we stated that:

> **...this Court should only be open to a litigant who has moved the Court of Appeal and met the threshold set out in section 13 (3) of the Court of Appeal Act.**

5.20. In the **Bidvest**[11] case, we stated that the reason for restricting the grant of leave to appeal to the limited circumstances set out in section 13 (3) of the Court of Appeal Act is that the Supreme Court must necessarily concentrate its attention on a relatively small number of cases recognized as raising questions of general importance. This is not one such case.

5.21. We agree with the single judge that the applicant, in his proposed appeal, seeks to raise procedural issues that do not fall within the scope of section 17 (2)(b)(iii) of the Arbitration Act to warrant setting aside the award. The intended appeal raises no point of law of public importance nor does it have any prospects of success.

5.22. Apart from the fatal irregularity we referred to earlier in our ruling, at paragraph 2.9, which is in itself sufficient to warrant dismissal we have illustrated that the application was still bound to fail on the merits for all the reasons we have adumbrated above. We accordingly dismiss it.

5.23. Costs shall follow the event to be taxed if not agreed.

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Mumba Malila
CHIEF JUSTICE

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A. M. Wood
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE