

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO.114/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

KNOX MAGUGU MBAZIMA

APPELLANT

AND

TOBACCO ASSOCIATION OF ZAMBIA

RESPONDENT

Coram: Makungu, Sichinga and Ngulube, JJA
On the 26th day of August, 2020 and 4th day of November, 2020

For the Appellant: In person

For the Respondent: Mrs M. Banda Mutuna of Mweshi Banda and Associates

JUDGMENT

MAKUNGU, JA delivered the judgment of the court.

Cases referred to:

1. *Sablehand Zambia Limited v. Zambia Revenue Authority (2) (2005) ZR 109.*
2. *Sithole v. The State Lotteries Board (1975) ZR 106*
3. *Chantiers De L'Atlantique SA v. Gaztransport Technigas SAS (2011) EWHC 3383*
4. *Secretary of State for Home Department v. Raytheon Systems Limited (2014) EWHC 4327 and (2015)EWHC 311 (TCC)*
5. *Mususu Kalenga Building Ltd & Another v. Richman's Money Lenders Enterprise (1999) ZR 28*
6. *John Kunda (suing as Country Director and on behalf of the Adventist Development and Relief Agency (ADRA) v. Keren Motors (z) Limited 2008/HPC/550*

7. *Nkhata & Others v. The Attorney General* (1966) Z.R 124 (S.C)
8. *Savenda Management Limited v. Stanbic Bank Zambia – (Appeal No. 002/2015*
9. *Westacre Investment Inc v. Jugoimport-SDPR Holding Co ltd* (1999) 2 Lloyds Rep 65

Legislation referred to:

1. *The Arbitration Act, No.19 of 2000*
2. *Arbitration (Court Proceedings) Rules, SI No. 75 of 2001*

Authorities referred to:

Black's Law Dictionary, 8th ed. St. Paul, MN: Thomson/West, 2004

1.0 INTRODUCTION

This is an appeal against the Judgment of the Honourable Mr. Justice M. Chitabo dated 9th February, 2018 refusing to set aside an arbitral award. We shall refer to the appellant as the applicant and the respondent as such as these were their designations in the court below.

2.0 ARBITRAL AWARD

2.1 In the arbitral proceedings, the claimant was Tobacco Association of Zambia while the respondent was Knox Magugu Mbazima. The issue for determination before the arbitral

tribunal rendered by Sharpe – Phiri, J concerned the claim for refund of gratuity on peripheral business claim, purportedly unauthorized. The claim was for a refund of the sum of K286,305.53 arising from various payments made to or on behalf of the respondent by the claimant at the respondent's request.

2.2 Upon considering the evidence before her the arbitrator found that the applicant was not entitled to gratuity on the second contract. Therefore, he was indebted to the respondent in the sum of K218,724.59 being monies paid to him in June, 2012 in connection with 40% gratuity on peripheral income in the second contract.

2.3 The arbitrator further found that the respondent conceded that he owed the claimant the following amounts of money:

1. K62,093.15 in respect of various loans and advances made to him by the Claimant during his employment with them and for which he had signed a proposed repayment plan on the 6th December, 2012.
2. K2,810.80 in respect of unretired petty cash.
3. K2,677.16 being rentals for the Roma House.

2.4 The value of the undisputed claims is K67, 581. 11. The total award to the Claimant was therefore K286, 305. 53.

3.0 BACKGROUND

3.1 The background of the appeal before us is that the applicant now appellant applied by Originating Summons to the lower court pursuant to section 17 of the Arbitration Act No. 19 of 2000 and the Arbitration (Court proceedings) Rules SI No. 75 of 2001 to set aside the arbitral award dated 31st August, 2015 on the ground that the evidence tendered by the respondent in the arbitral proceedings was fraudulent.

3.2 The affidavit in support of the summons was sworn by the applicant who avowed that he was employed by the respondent under various contracts of employment, the latest one dated 1st July, 2012 to 30th June, 2014. Those contracts were exhibited as **'KW1 - KW3.'**

3.3 There was an arbitration clause in the contract of employment pursuant to which the dispute that arose between the parties was referred to arbitration. The final award was delivered by the arbitral tribunal on 31st August, 2015. The same was produced as exhibit **'KM3.'** The applicant deposed that the

respondent tendered fraudulent evidence of Payment Request Vouchers of 20th June, 2012 and copies of which were exhibited and produced marked '**KM4- 1** and **KM4 - 2.**' That a report of the fraudulent documents was made to the Zambia Police Service Fraud Department and a preliminary investigation indicated that the documents were seemingly fraudulent. The applicant stated that the other fraudulent evidence tendered to the arbitral tribunal was an e-mail dated 8th June, 2012 purportedly authored by him. A report of fraudulent e-mail correspondence was made to the Police Cyber Crime Department and the preliminary indication was that the document appeared fraudulent.

3.4 On 2nd November, 2015 the respondent filed an affidavit in opposition sworn by Owen Simukoko, the respondent's Finance and Administration Manager. His evidence was that during the arbitral proceedings the respondent challenged the contract marked '**KM1 - 3**' as being a forged document. The Finance and Administration Manager further deposed that the payment vouchers marked as exhibits '**KM4 - 1** and **KM4 - 2**' which were alleged to be fraudulent by the applicant were in fact authentic. During the arbitration proceedings the

applicant did not challenge the authenticity of the payment vouchers. Copies of e-mails dated 22nd January, 2015 and 27th January, 2015 were exhibited as **'052'** and **'054.'**

3.5 The deponent of the affidavit in opposition further stated that under cross- examination the applicant had confirmed that he received payment of K25, 000,000.00 and K76, 650,000.00 which were reflected in the payment vouchers he was alleging to be fraudulent. The applicant signed each of the said payment vouchers on the far right hand side. That the report made to the Zambia Police Service Fraud Department was in bad faith and there is no report from the fraud department in support of the applicant's claims.

3.6 The deponent stated further that the applicant admitted in his evidence during the arbitration proceedings that he authored the e- mail exhibited as **'KM5.'** The affidavit reads further that the deponent was advised by the respondents advocates that the arbitral award was made on findings in relation to exhibit **'KM1-KM3'** about the applicant's entitlement to gratuity on peripheral income and not the alleged fraudulent payment

vouchers and e-mail dated 8th June, 2012 and as such the arbitral award was not based on fraudulent evidence.

4.0 DECISION OF THE COURT BELOW

4.1 Upon considering the affidavits and submissions filed by both parties, the lower court found as follows:

The applicant did not demonstrate that the arbitral award was in fact based on evidence fraudulently generated by the respondent. In fact, the applicant admitted to having signed the payment vouchers in question and authoring the e-mail dated 8th June, 2012. The court stated that the applicant had not produced any evidence to show the alleged fraud apart from his word. He failed to distinctly allege and to prove fraud as guided by the Supreme Court in the cases of **Sablehand Zambia Limited v. Zambia Revenue Authority** ⁽¹⁾ and **Sithole v. The State Lotteries Board.** ⁽²⁾ The Judge opined that even if it were assumed that the said payment vouchers were fraudulent and that the e-mail dated 8th June, 2012 was fraudulently generated, the arbitral award clearly shows that the issue of connection was that the applicant made misrepresentations that led to him being paid monies on the

basis of the renewed letter of contract dated 30th June, 2012 which he was not entitled to receive. The payment was not premised on the alleged fraudulent payment vouchers. The applicant in the arbitration proceedings did not allege that the payment vouchers and the e-mail of 8th June, 2012 were fraudulent.

- 4.2 The lower court went on to rely on the case of **Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS** ⁽³⁾ wherein it was adjudged that the evidence of fraud now relied upon was not such as could have been obtained or produced at the arbitration hearing with reasonable diligence and must show that the evidence in question is so material that its production would probably have affected the result.
- 4.3 In view of the above authority, the lower court opined that the applicant had every opportunity to raise objections as to the authenticity of the payment vouchers and the e-mail dated 8th June, 2012 but decided to remain silent.
- 4.4 That the applicant's action was an attempt to appeal against the arbitral award which the court has no jurisdiction to hear. The court further found no causative link between the arbitral

award and the alleged fraudulent evidence. the reasons given for this were that it was clear from the arbitrator's analysis that the applicant's contract renewal letter was found to be fraudulent and as such all payments made pursuant to it were erroneously made.

4.5 The court found no merit in the applicant's submissions and he had failed to prove the alleged fraud to the required standard. The application was accordingly dismissed with costs.

5.0 GROUNDS OF APPEAL

5.1 The applicant advanced the following amended grounds of appeal on 26th February, 2019:

1. *The Judge in the court below erred in law and fact by relying on submissions attributed to the respondent, an entity without a legal personality, thereby committing a grave error.*
2. *The Judge in the court below erred in law and fact by relying on hearsay evidence upon which the Arbitral Award was unlawfully premised.*
3. *The Judge in the court below erred in law and fact by exhibiting inconsistencies in his interpretation of fraud.*

4. *The Judge in the court below misdirected himself by failing to place the burden of production on the respondent for the purported reason of negligence for its failure to produce the Forensic Audit Report of 30th November, 2012 conducted by Walis Chartered Accountants.*
5. *The Judge in the court below misdirected himself when he failed to delve into the inconsistencies of the submission of CW1 with regard to the inscriptions dated 20th June, 2012 and the purported payments of USD 15,000 by cheque and USD 5,000 by cheque which none showed on the summary of Gratuity payments authenticated by CW1 himself.*

6.0 APPELLANT'S ARGUMENTS

- 6.1 In the heads of argument filed on 4th December, 2019, the grounds of appeal were phrased and re-arranged as follows:
As regards the first ground, the arguments on the respondent's legal personality will not be regurgitated here as the same were advanced in a preliminary application which we determined on 30th June, 2020 against the appellant.
- 6.2 The applicant stated that he was deprived of the due procedural process after his resignation on 30th September,

2012 as he was not accorded the right to be heard. He submitted that, this was against the rules of natural justice and therefore the arbitral award should be set aside or the matter should be sent back to the Arbitrator for reconsideration. To support this, we were referred to **Article 18 of the Uncitral Model Law (the Model Law)** which states that, **“parties shall be treated with equality.”**

6.3 As regards the allegation of fraud in ground 3 and 4, the applicant submitted that there was fraudulent concealment of evidence in that the Forensic Audit Report upon which the matter was premised was not submitted in evidence. He also argued that, the instructions on the renewal letter dated 30th June, 2012 were fraudulent in that the president of the Tobacco Association of Zambia confirmed that he received the draft letter of the renewal of contract on 26th June, 2012, studied it overnight and only signed it on 27th June, 2012. Therefore, the purported payment instructions were fraudulent in that they could not have been inscribed on a letter that had not yet been written. We were referred to the case of **Secretary of State for Home Department v.**

Raytheon Systems Limited ⁽⁴⁾ where the court set aside an arbitral award on grounds of serious irregularity.

6.4 On the strength of the above case, the appellant submitted that there was serious irregularity as the lower court failed to delve into matters he had raised, effectively prejudicing his case. He therefore urged us to set aside the arbitral award on the grounds of serious irregularity, fraud and misrepresentation pursuant to section 17(2) (b)(ii) of the Arbitration Act.

6.5 In his oral submissions he reiterated what he stated in his written arguments.

7.0 RESPONDENT'S ARGUMENTS

7.1 The respondents counsel relied on the heads of argument filed on 14th June, 2019. We note that, the respondent responded to the grounds of appeal contained in memorandum of appeal filed on 26th February, 2018 instead of the amended memorandum of appeal filed on 26th February, 2019. In the amended grounds of appeal, the applicant had done away with most of the grounds they responded to. Therefore, we shall only consider the respondent's response to issues raised in the

amended grounds of appeal. The relevant portion of their response as it relates to the issue of fraud.

7.2 That, the lower court properly analyzed the allegation of fraud in the procurement of the arbitral award. Counsel argued that, instead of demonstrating the manner in which the allegation of fraud was trivialized, the applicant just argued that the non-availability of the Forensic Audit Report before court was due to negligence and should have been to the peril of the respondent.

7.3 Counsel further submitted that, the applicant did not raise any objection concerning the authenticity of the payment vouchers pursuant to which he received the sums of ZMK25,000,000 and ZMK 76,650,000 respectively.

7.4 It was further submitted that, the applicant did not report the respondent to Zambia Police Service for them to investigate whether there was fraud arising from the production of the vouchers. The respondent did not make any submissions that it failed to produce the Forensic Audit Report due to negligence. Arguments made concerning a failure to disclose information due to negligence were merely made in the context

of demonstrating to the court below that even in cases where non-disclosure exists, an innocent failure to disclose evidence does not go against public policy.

7.5 Counsel submitted further that, the Court below properly addressed its mind to the position of the law governing allegations of fraud when it relied on the cases of **Sable Hand Zambia Limited v. Zambia Revenue Authority** ⁽¹⁾ and **Sithole v. the State Lotteries Board.** ⁽²⁾

7.6 The lower court went on to consider and affirm an English authority that dealt with allegations of fraud in procuring an arbitral award, in **Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS** ⁽³⁾ when he made the finding that:

... “the applicant must show that the evidence of fraud now relied upon was not such as could have been obtained or produced at the arbitral hearing with reasonable due diligence and must show that the evidence in question is so material that its production would have affected the result. In my opinion, the applicant had every opportunity to raise

objections as to the authenticity of the payment vouchers and the email dated 8th June, 2012 but decided to remain silent.”

7.7 The affirmation of the **Chantiers de l’atlantique** came from the **International Journal of Arbitration, Mediation and Dispute Management**. Counsel submitted that the judgment in **Chantiers de l’Atlantique** demonstrates the extremely restrictive approach of English Courts in setting aside arbitral awards. Flaux J. enunciated the following four principles in relation to the Arbitration Act s.68.

“An arbitral award will only be set aside for fraud in extreme cases as s.68 is designed as a longstop only available in extreme cases.”

Fraud is dishonest, reprehensible or unconscionable conduct and it must be distinctly pleaded and proved, to a heightened burden of proof. The award itself must have been obtained by fraud. This will be where;

The party which has deliberately concealed the document has, as a consequence of that concealment

obtained an award in its favour. The party relying on s.68 (2)(g) must therefore prove a causative. This means that there has to be fraud in the arbitration.

The evidence of fraud must not be of such a kind “as could have been obtained or produced at the arbitration hearing with reasonable diligence” and the evidence must be “so material that its production (at trial) would probably have affected the result.”

7.8 Counsel went on to argue that, the applicant having limited his allegation of fraud to the vouchers and email, cannot at this late stage attempt to broaden the scope to include issues to do with the non-production of the Forensic Audit Report. In this regard, he cited the case of **Mususu Kalenga Building Limited & Another v. Richman’s Money Lenders Enterprise**, ⁽⁵⁾ where it was stated *inter alia* that; issues not raised in the Court below cannot be raised on appeal.

7.9 It was submitted further that, the applicant’s application to set aside the arbitral award was not based on the award itself but the quantum of the award. The issue concerning quantum

goes to the merits of the award contrary to the purpose and intent of section 17 of the Arbitration Act No.19 of 2000. We were referred to the case of **John Kunda (suing as Country Director and on behalf of the Adventist Development and Relief Agency (ADRA) v. Keren Motors (z) Limited** ⁽⁶⁾ where it was stated that:

“To preserve the integrity of the arbitral process, the point should be noted that setting aside proceedings do not serve as a means to achieve a review of the tribunals decision on the merits. This court’s view is fortified by the learned authors, Redfern and Hunter, law and Practice of International Commercial Arbitration, Third Edition (London, Sweet & Maxwell, 1999) where they state that:

“Arbitral rules, such as those of the UNCITRAL...provide unequivocally that an arbitration award is final and binding. These are not intended to be mere empty words. One of the advantages of arbitration is that it is meant to result in the final determination of the dispute

between the parties....By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is in principle, final and binding. It is not intended to be a proposal as to how the dispute might be resolved; nor is it intended to be the first step on a ladder of appeals through national courts.”

7.10 It was further submitted that, although the applicant has not pin pointed the exact portions of the Judgment he has taken issue with, this appeal is against findings of fact made by the Court below. It is trite law that the appellate Court is slow to reverse findings of fact and will only do so if the findings were, inter alia, perverse or have no relationship to the evidence presented to the trial Court, in accordance with the case of **Nkhata & Others v. The Attorney General.**⁽⁷⁾

7.11 In light of the foregoing, it was submitted that the Court below did not “trivialize a case of fraudulent concealment of evidence” as the applicant failed to demonstrate that the award was based on fraudulent evidence.

8.0 DECISION OF THIS COURT

8.1 We have considered the record of appeal and submissions by both the appellant and learned counsel for the respondent.

8.2 The first ground of appeal was determined by us as a preliminary issue raised by the appellant and our ruling is dated 30th June, 2020. In brief, we stated in the ruling that the appellant waived his right to raise the issue of the respondent's legal personality as he had failed to raise it during the arbitration proceedings not later than the statement of defence as provided for under Articles 4 and 16 (2) of the Model Law.

8.3 Grounds 2 – 5 can be compressed into one issue which is as follows:

a) Whether the arbitral award was tainted by fraud, serious irregularities and misrepresentation.

8.4 This issue will be considered and determined below:

The arbitration process is final and binding on the parties that have submitted themselves for arbitration. Courts do not have jurisdiction to sit as appellate courts to review and alter

arbitral awards. These principles were confirmed in the case of **Savenda Management Limited v. Stanbic Bank Zambia.** ⁽⁸⁾

8.5 The only recourse to a court that an aggrieved party has is to apply to set aside the award. This can be done under the circumstances set out in section 17 of the Arbitration Act which provides *inter alia* as follows:

“Recourse to a court against an arbitral award may be made only by application for setting aside in accordance with subsections (2) and (3)-

(2) An arbitral award may be set aside by the court only if-

(b) 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.***
- iii. The making of the award was induced or affected by fraud, corruption or misrepresentation.”***

8.6 Although not specifically stated, we note that by raising allegations of fraud concealment of evidence and misrepresentation, the applicant in this case, wishes to have the arbitral award set aside under Section 17(2)(b)(iii) of the Arbitration Act. Black's Law Dictionary 8th edition defines fraudulent concealment as:

“The affirmative suppression or hiding, with intent to deceive or defraud of a material fact or circumstance that one is legally (or sometimes morally) bound to reveal.”

8.7 Further, the case of **Sithole v. The State Lotteries Board**, ⁽²⁾ established that:

“The onus on the party alleging fraud is greater than a simple balance of probabilities.”

8.8 According to the case of **Chantiers De L'Atlantique SA v. Gaztransport Technigas SAS** ⁽³⁾ the award will not be set aside by the court if the fraud did not affect the result of the arbitration. A fraud that is without any real consequence or effect on the result of the award would not be adequate to warrant the setting aside of an arbitral award.

8.9 The applicant alleged that the court failed to pronounce itself on some serious irregularities in this case concerning the contract renewal letter. According to him, the purported payment instructions were fraudulent in that they could not have been inscribed on a letter that had not yet come into existence at the time the President of the respondent claimed to have signed it or the Accountant worked on it. In support of this, he cited the case of **Secretary of State for Home Department v. Raytheon Systems Limited**, ⁽⁴⁾ where Akenhead J, upheld a challenge to an arbitral award as there had been serious irregularity under section 68(2) (d) of the Arbitration Act. The court found that the arbitral tribunal had failed to address two key matters that were put to it; one relating to liability and the other to quantum. In terms of liability, the court found that the tribunal never got around to considering that substantially all the delay was caused by Raytheon. Had it done so, the judge considered, there was a real chance that it would have had to reconsider some of its key findings. The tribunal did not consider the extent to which costs incurred related to any default by Raytheon.

8.10 The case mentioned above can be distinguished from the one at hand, in that, the award in this case was based on the fact that the applicant received monies he was not entitled to, based on a contract renewal letter which he had authored, knowing fully well that it had not been ratified by the Council. The lower court was on firm ground by not treating the application before him as an application for review of the arbitral proceedings or award. We dismiss the appellant's allegation that the lower court relied on hearsay evidence, just like the arbitral tribunal. Therefore, the 2nd, 4th and 5th grounds of appeal have no merit.

8.11 As for the 3rd ground of appeal, the appellant has not demonstrated the alleged inconsistencies in the lower court's interpretation of fraud. This ground therefore also lacks merit.

8.12 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. The case of **Westacre Investment Inc v. Jugoimport-SDPR Holding Co Limited**, ⁽⁹⁾ elucidated that: ***“Even if a party knew of the fraud during the course of an arbitration, they are not permitted to use that evidence after the issuance of the award to challenge the award.”***

8.13 In the present case, the appellant is under the circumstances precluded from taking advantage of the absence of the Forensic Audit Report.

8.14 We hold further that the legal principles laid down in the case of **Chantiers de L'Atlantique** *supra* have not been met by the appellant herein and we therefore accept the findings by the court below at page 26 of the Judgment that:

“There is no causative link between the Arbitral Award and the alleged fraudulent evidence. This is because it is clear from the Arbitrators analysis that the Applicant's Contract Renewal

Letter was found to be fraudulent and as such all payments made pursuant to the said letter were erroneously made.”

8.15 The award was not induced or affected by fraud or serious irregularities or misrepresentation and it cannot be set aside pursuant to Section 17 (2) (b) (iii) of the Arbitration Act.

9.0 CONCLUSION

9.1 All in all, we find no merit in this appeal and it is accordingly dismissed with costs to be either agreed upon between the parties or taxed. The judgment of the lower court is upheld.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE