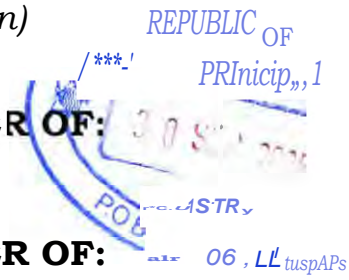
IN THE HIGH COURT FOR ZAMBIA **2023/HP/ARB/005**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



IN THE MATTER OF: ,THE ARBITRATION ACT, 2000

AND

IN THE MATTER OF: N ARBITRATION

BETWEEN:

WBHO CONSTRUCTION (ZAMBIA) LIMITED **APPLICANT**

AND

COSTAIN SIMAMBA **RESPONDENT**

BEFORE THE HONOURABLE MRS. JUSTICE M.0 KOMBE

For the Applicant: *Mr. C. K. Bwalya and Mr. Brazho - Messrs. D. H. Kemps & Co.*

For the Respondent: Mr. J. Banda and Mr. Kasewe Banda - Messrs. AMW & Co. Legal Practitioners.

RULING

Cases referred to:

1. **China Henan International Cooperation Group Company Limited v G and G Nationwide (Z) Limited (Selected Judgment No.8 of 2017).**
2. **Costain Simamba v. Amdac-Carmichael Limited and Alan Palmer(SCZ/8/93/2013).**

3. **Gerald Chilumba v. ZESCO Limited (Appeal No. 106/2014).**
4. **Collet v. Van Zyl Brothers Ltd (1966) Z.R. 65.**
5. **Access Bank (Z) Ltd. v. Group Five/Zcon Business Park Joint Ventures (SCZ 8/52/2014).**
6. **D.E. Nkuwa v. Lusaka Tyres Services Limited (1977) Z.R 43.**
7. **Martin Mesheck Simpemba Rose Domingo Kakompe v. Noone Mukanta Zambia Industrial Minerals Limited (2008/HP/268).**
8. **John Kunda (suing as Country Director of and on behalf of the Adventist Development(2008/HPC/550).**
9. **Relief Agency (ADRA) v. Keren Motors (Z) Limited (2008/HPC/ 550).**
10. **The Minister of Information and Broadcasting Services and Another v. Fanwell Chembo (On His Own Behalf and on Behalf of Other Members of the Media Institute of Southern Africa (2007) Z.R. 82.**
11. **Corkery v. Carpenter (1951) 1 KB 102.**
12. **Notham v. London Borough of Barnet (1971) 1 WLR 220.**
13. **Amuel Miyanda v. Raymond Handahu (S.C.Z. Judgment No 5 of 1994)**
14. **Attorney General & Another v. Lewanika & Others (S.C.Z. Judgment No 2 of 1994).**
15. **Hakainde Hichilema v. Attorney General (S.C.Z. Appeal No. 4 of 2019).**
16. **Paolo Marandolo and 2 Others v. Gianpietro Milanese and 4 Others (Appeal No. 130/2008).**
17. **Cash Crusaders Franchising PTY Limited v. Shakers and Movers Zambia Limited (2012) 3 Z.R. 174.**
18. **Mifra Construction v. Eldoret Municipal Council (2000) Eklr.**
19. **Groupe Antione Tabet v. Republique du Congo (Cass Civ 1 October 12, 2011).**
20. **Inforica Inc. v. CGL Information Systems and Management Consultants Inc. (2009) 254. OAC 117.**
21. **ZCCM Investment Holdings Plc v. Kansanshi Holdings Plc and Another (2019) EWHC 1285 (Comm).**
22. **K v. S (2019) EWHC 2386 (Comm).**
23. **Cinevistaas Limited v. Parsar Bharti (2009) SCC Online Del 7071.**

24. **ONGC Petro Additions v. Tecnimont S.P.A and another (2019 SCC Online Del 1908).**
25. **Asurasu Jasa Indonesia v. Dexia Bank SA (CA 127/2005).**

Legislation and other material referred to:

1. **The Arbitration Act No. 19 of 2000.**
2. **The Arbitration (Court Proceedings) Rules, 2021.**
3. **Kirby Jennifer, what is an Award Anyway; Journal of International Arbitration 31, no.4 (2014) Kluwer Law International BV, The Netherlands).**
4. **Somani, S. Procedural Orders in International Commercial Arbitration, vol. 32, 2023.**
5. **The New York Convention on the Enforcement of Foreign Arbitral Awards.**
6. **The UNCITRAL Model Law.**

1. INTRODUCTION

1.1 In an Originating Summons taken out on 29th March, 2023, the Applicant seeks this Court's Order to have the Arbitral Ruling dated 17th March, 2023, set aside on the following grounds:

a. *Pursuant to section 17(2)(a)(iv) of the Arbitration Act, 2000, the arbitral procedure was not in accordance with the agreement of the parties;*

b. *Pursuant to section 17(2)(a)(iv) of the Arbitration Act, 2000, the arbitral procedure was not in accordance with the Arbitration Act of 2000 or the law;*

c. *Pursuant to section 17(2)(b)(ii) of the Arbitration Act, 2000, the award is in conflict with public policy including the failure by the tribunal to treat the parties fairly and impartially (and amounts to a profound denial of justice against the Applicant);*

d. *Pursuant to section 17(2)(b)(iii) of the Arbitration Act, 2000, the making of the award was induced or effected by misrepresentation.*

1.2 The application is made pursuant to Section 17 of the Arbitration Act No.19 2000 and Rule 23, the Arbitration (Court Proceedings) Rules, 2001.

2. APPLICANT'S AFFIDVIT EVIDENCE

2.1 The facts leading to this application are set out in the Affidavit in support of summons deposed to by **JOHANNES CHRISTIAN BUYS,** the Director in the Applicant Company herein.

2.2 He explained that he was informed by the Applicant's advocates, D. H. Kemp & Co, that on 17th March, 2023 at 6:36 PM, the said advocates received an email and the Ruling or Interlocutory award

(the "Award") made by Mr. Elijah Chola Banda SC (the Tribunal") dated 17th March, 2023 in which the following was ordered:

N *The Respondent's application to declare the Claimants Bundle of Documents null and void and expunged from the record succeeds and is granted.*

(ii) As a consequence, the Claimant's application for extension cannot be entertained.

(iii) The arbitration will proceed on the basis of documents properly before the tribunal.

(iv) Costs shall follow the event of the substantive arbitration.

2.3 Copies of the certified Ruling dated 17th March, 2023 and the corrected version of the said ruling were exhibited in the affidavit and marked **"JCB2" and "JCB4".**

2.4 Regarding the contract that gave rise to the arbitration, the deponent explained that the Respondent and the Applicant entered into contract agreements dated 24th September, 2020 for phase 1 (the "first agreement") and 15th January, 2021 for phase 2 (the "second agreement") of certain building works.

2.5 In accordance with clause 5 of the contract agreements, the Applicant duly served on the Respondent a Notice of Arbitration dated 30th May, 2022 pursuant to Article 3 of the UNCITRAL Arbitration Rules 2013.

2.6 The Respondent duly served on the Applicant a response to the Notice of Arbitration and counterclaim dated 29th June, 2022 pursuant to Article 4 of the UNCITRAL Arbitration Rules 2013.

2.7 After a preliminary meeting held by the Tribunal regarding the claims, orders for directions No. 1 dated 22nd August, 2022 were issued by the Tribunal giving directions to the parties as to the dates by which specific milestones in the arbitral proceedings were to be achieved with liberty accorded to either party to apply. A copy of the said orders for directions No. 1 dated 22nd August, 2022 was exhibited in the affidavit and marked "**JCB9".**

2.8 Under paragraph 7 of the order for directions No. 1, the parties were to file their respective bundles of documents by 7th December, 2022.

2.9 Following another preliminary meeting of 18th January, 2023, the tribunal issued order for directions No. 3 by email dated 24th January, 2023 addressed to the parties. Copies of the email dated 24th January, 2023 and orders for directions No. 3 which varied the order for directions No. 1 were exhibited in the affidavit and marked "**JCB 10**" and "**JCB11".**

2.10 The parties were to file and exchange their bundles of documents not later than 3rd March, 2023 which was a variation of paragraph 7 of Order for direction No. 1 which required that the bundles be filed by 7 December, 2022.

2.11 On the 3rd March, 2023, the Applicant was served with the Respondent's bundle of documents.

2.12 That they were copied in an email addressed to the Tribunal by the Respondent's advocate's which stated that the Respondent's documents had been dispatched to the Tribunal on 3rd March, 2023 which was a Friday by FEDEX and attached an International Airway Bill dated 3rd March, 2023 purportedly issued by FEDEX to the Respondent's advocates.

2.13 On Monday 6th March, 2023, the Applicant's advocates wrote to the Tribunal and the Respondent's advocates enclosing the

Applicant's bundle of documents which had been separated into two volumes numbering about 805 pages, apologized for not having delivered the documents on Friday 3rd March, 2023 as directed and requested for the Tribunal's and the Respondent's advocates indulgence.

2.14 However, he was informed on 6th March, 2023 by his advocates that the indulgence sought was declined. In view of the refusal by the Respondent's advocates, it was agreed that an appropriate application would be made to the Tribunal in order to remedy the default and ensure that the Applicant's bundle of documents was duly filed before the Tribunal.

2.15 Whilst they were preparing the application pertaining to the Applicant's bundle of documents, they received an email which was addressed to the Tribunal. The same was copied to Applicant's advocates to which a letter dated 7th March, 2023 authored by the Respondent's advocates was attached, praying that the Tribunal declares the Applicant's bundle of documents null and void, expunged from the Record and that at the Tribunal proceeds to hear and determine the matter based on the documents that were properly before it.

2.20 As the complainant before the Disciplinary Committee was the Respondent and the Applicant was referred to as the accused, and in view of certain correspondence regarding that matter which had previously come to his attention, he reasonably suspected that the hearing concerned the same or similar matters as those that were pending determination by the Tribunal. Therefore, he saw it fit to retain the Applicant's advocates in that matter as well as they had been fairly acquainted with the ongoing dispute between the Applicant and the Respondent at that stage.

2.21 On 1st February, 2023 the EIZ served on them a letter dated 31st January, 2023 with certain enclosures for the hearing of the matter that was scheduled for 28th February, 2023. The allegations contained in the said complaint made to the EIZ by the Respondent against the Applicant were same as those placed in issue for determination before the Tribunal.

2.22 Consequently, the Applicant's advocates filed a Notice of Motion before the Disciplinary Committee to set aside the proceedings before it for incompetence or to stay the proceedings for abuse of process on account of the arbitral proceedings that were already on foot. This was only heard on the 25th February, 2023 and was now pending the decision of the Disciplinary Committee.

2.23 He thus explained that a substantial amount of time was spent by the Applicant's advocates in preparing the requisite documents and attending to the hearing of the matter before the Disciplinary Committee of the EIZ on behalf of the Applicant which disrupted and consumed part of the time reserved for the preparation and serving of the Applicant's bundle of documents resulting in the delay.

2.24 Therefore, failure to file and serve the Applicant's bundle of documents by the 3rd of March, 2023 on the Respondent as directed by the Tribunal was not deliberate nor did the Applicant refuse to file its bundle.

2.25 He deposed that the Tribunal declined to entertain the application made on behalf of the Applicant for extension of time on the ground that the Respondent's application to declare the claimant's bundle of documents null and void and expunged from the record succeeded and was thereby granted.

2.26 On 20th March, 2023, they made an inquiry with FEDEX Express Official based on the Airway Bill dated 3rd March, 2023 marked as exhibit "JCB15" hereto and the information obtained from FEDEX in Lusaka disclosed that the shipment containing the Respondent's bundle of documents was actually delivered at the

offices of the Tribunal on Monday, 6th March, 2023 and not 3rd March, 2023.

2.27 In this regard, the FEDEX Express office in Lusaka produced a computerized document with the parcel information establishing that the above shipment with Parcel Number 801235939194 was delivered to the office of the Tribunal in Kitwe on 6th March, 2023 and a P. Mpelo signed for the delivery at 14:15 hours. A copy of the print out obtained from the FEDEX Express Office on 20th March, 2023 was exhibited in the affidavit and marked **"JCB30".**

2.28 That the Tribunal did not inform the Applicant's Advocates that the date of actual delivery of the Respondent's Bundle of Documents to him was 6th March, 2023 at 14:45 hours. Further, that they were not aware of any order or decision by the Tribunal that permitted the Respondent to file his documents on 6th March, 2023. By virtue of paragraph 4 of order for directions No. 3 of the Tribunal, the final date fixed for filing and exchanging the parties' witness statements was 3rd March, 2023.

2.29 The deponent thus explained that the expunction of the Applicant's bundle of documents had rendered the task of preparing and serving the Applicant's witnesses statements in the arbitral proceedings impossible. And ultimately, the task of the

Applicant in prosecuting its claim against the Respondent or defending the counterclaim made against it by the Respondent had been rendered impossible.

3. RESPONDENT'S AFFIDAVIT EVIDENCE

3.1 The Respondent opposed the application and filed an affidavit in opposition into Court.

3.2 He deposed that based on the information availed to him by the Applicant, the director of the Applicant Company was Johan Buys as shown by a copy of the documentation exhibited in the affidavit and marked "CS1". That in the event that it was Johan Buys, then he was not competent to depose to that affidavit in his capacity of the Applicant Company as the said Johan Buys was not duly registered to practice engineering in Zambia.

3.3 He further explained that on the 28th day of January, 2023, the Arbitral Tribunal issued order for directions No. 3, and *inter alia,* ordered that there would be discovery by way of simultaneous exchange of the parties' respective list of documents on or before 17th day of February, 2023.

3.4 Order for directions No. 3 also mandated the parties to file and serve their respective bundles on or before 3rd March, 2023. On 17th February, 2023, the parties filed and served their respective lists of documents.

3.5 On 3rd March 2023, the Respondent filed and served its bundles of documents on the Applicant and on the Arbitral Tribunal as required. Copies of the letter of service and email to the Arbitral Tribunal were collectively exhibited in the affidavit and marked "**CS4**".

3.6 On 6th March, 2023, the Applicant without leave of the Arbitrator and without consent of the Respondent, simply proceeded to file and serve the claimant's bundle of documents out of time.

3.7 On the 7th March, 2023, the Respondent rejected the claimant's bundle filed out of time without leave and filed its application to declare null and void and expunge the claimant's bundles of documents from the record.

3.8 The Applicant on the 10th March, 2023 filed its application for an extension of time within which to file its bundle of documents even though there was pending the Respondent's application to expunge the same from the record.

3.13 On 3rd December, 2023, the Applicant and the Respondent, collected all the documents from the site that they needed for their respective bundles of documents. Thereafter, on the 28th January 2023, the Arbitrator issued order for direction No. 3 that obligated the parties to, *inter alia,* exchange their lists of documents on the 3rd March, 2023.

3.14 Regarding the complaint made to EIZ, he explained that On 13th September 2022, he issued a complaint to the EIZ against the Applicant alleging professional misconduct. In particular, the Applicant made (mis)representations to subcontractors that the reason the Applicant did not settle the sums due to the said subcontractors was because he had not settled the Applicant when in fact he had settled the Applicant in full.

3.15 On 22nd September, 2022 the EIZ responded to his letter and advised that it would investigate the same. On the 10th January, 2023 the EIZ issued a notice of hearing for 25th January, 2023 to the Applicant and Q Electrical Limited as shown the Notices of hearing collectively exhibited in the affidavit and marked **"CS13".**

3.16 At the hearing, the Applicant applied to set aside the proceedings for abuse of process essentially challenging the jurisdiction of Disciplinary Committee. On 11th May, 2023, the EIZ dismissed the

Applicant's application as shown in the ruling exhibited in the affidavit and marked **"CS14".**

3.17 In responding to the contents of paragraph 35, he explained that the same were peculiar to the Respondent's knowledge and were in any event irrelevant to this application. That the Applicant never notified the Respondent beforehand on the purported challenges it was facing nor applied for an extension of time before it was too late.

3.18 He added that the Applicant's affidavit was not backed by any evidence and the Applicant simply failed or neglected to file within time. That the application to expunge the claimant's bundle was made before the Applicant's application for an extension of time and that the said application for extension filed on the 10th March, 2023 was already out of time

3.19 The Respondent vehemently denied the contents of paragraph 40 by stating that the Arbitrator was based in Kitwe while the Applicant and the Respondent and their respective advocates were based in Lusaka. In this regard, meetings had been held online and if physical at the offices of Nchito and Nchito Advocates.

3.20 As such it was, at all material times, the practice of the parties was (and arbitration generally) to serve the Arbitrator

electronically on or before the due date and simultaneously courier hard copies of the documents for his benefit to Kitwe.

3.21 On 3rd March 2023, the Respondent physically served the Applicant with its bundles of documents and delivered to FEDEX physical copies of his bundle of documents meant for the Arbitrator. On the same day, the Respondent then informed the Applicant and the Arbitrator via email that the Applicant had been served physically with the Respondent's bundle of documents while the Arbitrator's copies of the said bundles had been delivered to FEDEX which would courier the same to the Arbitrator.

3.22 On 22nd March, 2023, the Applicant applied to expunge the Respondent's bundle of documents on grounds that the same were filed out of time. The Arbitrator then gave directions for the said application.

3.23 On 17th April, 2023, the Arbitral Tribunal issued a Ruling dismissing the Applicant's application. A copy of the Ruling was exhibited in the affidavit and marked "**CS18**".

3.24 The Respondent thus explained that the Applicant had itself to blame as it failed, refused or neglected to file its Bundles within

documents were filed by the Respondent with the Arbitral Tribunal before 6th March, 2023. The Respondent did not comply with the directions as required.

4.5 In the letter dated 6th March, 2023 an indulgence was requested from both the Arbitrator and the Respondent's advocates to accept the Applicant's bundle of documents on 6th March, 2023, which was the first working day following, Friday, 3rd March, 2023 and presented the earliest opportunity of serving the said documents on the Respondent.

4.6 When the indulgence sought was refused by the Respondent's advocates, a formal application was then made to cure, what, in the context of the arbitral proceedings was a very minor breach of the directions that had been issued with liberty to make applications.

4.7 The purported additional documents referred to in paragraph 8 (viii) of the affidavit in opposition were signed documents of the drafts that were referred to in the applicant's list of documents, and in any case, were also common to both parties.

4.8 Concerning paragraph 15 of the affidavit in opposition, he explained that the same or similar allegations that were subject of

the arbitral proceedings formed the basis of the purported complaint before the Disciplinary Committee of the EIZ.

4.9 Following the decision of the Disciplinary Committee of the EIZ of 11th May, 2023, the Applicant, which was aggrieved thereby, exercised its right of appeal to the High Court and did, on 2nd June, 2023 filed a Notice of Appeal, which appeal was pending determination under the short title WBHO CONSTRUCTION ZAMBIA LIMITED V. THE ENGINEERING INSTITUTION OF ZAMBIA, Appeal No. 2023/HP/A025.

4.10 The proceedings before the Disciplinary Committee had been stayed pending determination of the above appeal by operation of law.

4.11 He also deposed that paragraph 20 of the affidavit in opposition was not true as he had not misled the Court. It further did not contain a complete and accurate representation of the facts because the correct practice was that whenever the parties served any documents electronically, actual copies of those documents were transmitted to the electronic mail address of the recipient and nothing less than that sufficed.

4.12 When the hard copies of these documents were subsequently delivered physically, the recipient would have already been served

with the full complement or image electronically. The Respondent's bundle of documents were not transmitted electronically on 3rd March, 2023 and the FEDEX office was not agreed by the parties, or appointed by the Arbitral Tribunal and therefore, delivery of the Respondent's bundle of documents to FEDEX was not and did not constitute filing of the Respondent's bundle of document. In fact, the Arbitral Tribunal had at no time stated that delivery to the mentioned courier company was filing of any document before him.

4.13 In further response to paragraph 20 of the affidavit in opposition, it was stated that after it was discovered from FEDEX on 20th March, 2023 that the Respondent's bundle of documents were filed with the Arbitral Tribunal on 6th March, 2023 and not 3rd March, 2023, as earlier misrepresented, the Applicant, by letter dated 22nd March, 2023 addressed to the Arbitral Tribunal and copied to the Respondent's advocates, objected to the Respondent's bundle of documents and applied to have the said bundles and struck out and removed from the arbitral proceedings on the grounds that the said Respondent's bundle of documents were filed on Monday, 6th March, 2023 without the consent of the

in conflict with public policy and, that the making of the award was induced or effected by misrepresentation.

5.3 As a starting point, the Applicant sought recourse to the definition of award in section 2 of the Arbitration Act No. 19 of 2000 (hereafter referred to as the "Arbitration Act"). According to the Applicant, the definition of award includes any decision of the tribunal, be it on the substance of the dispute, interim, interlocutory, or partial award or indeed on any procedural or a substantive issue. In support of this submission, the Applicant cited the Supreme Court case of **China Henan International Cooperation Group Company Limited v. G. &. G. Nationwide Zambia Limited** [1] in which the Court stated that section 17 of the Arbitration Act No.19 of 2000 does not distinguish between a final and interim or interlocutory award.

5.4 While accepting the Model Law on International Commercial Arbitration, which is the First Schedule to the Arbitration Act, it was the Applicant's submission that the same should be interpreted or applied subject to the provisions of the Arbitration Act. Thus, the procedure under section 17 was applicable regardless of the provisions of the First Schedule.

5.5 The first two grounds alleging that the arbitral proceedings were not conducted in accordance with the parties' agreement and the Arbitration Act, were argued together. Making reference to the Order for Directions No. 1, the Applicant submitted that the Tribunal, in agreement with the parties, gave directions for specific milestones and crucially, that the parties were at liberty to apply. Further that, the parties agreed to apply the UNCITRAL Arbitration Rules, 2013, which gave the Arbitrator the discretion to extend time, in its Article 17(2).

5.6 In line with Order for Directions No. 1 and Rule 17(2) of the UNCITRAL Arbitration Rules, it was submitted that the Tribunal was not barred from entertaining the Applicant's application for extension of time. That the filing of the Applicant's bundle of documents without leave was a curable defect and the law as it stood, allowed for curative steps to be taken. The Supreme Court decision of **Costain Simamba v. Amdac-Carmichael Limited and Alan Palmer** [2], was called in aid. In that case, the Court held that a defaulting party was still at liberty to cure the defect of not having filed the Notice of Appeal together with the Memorandum of Appeal.

5.7 To amplify the assertion that that the arbitral procedure was not in accordance with the parties' agreement nor the Arbitration Act, it was submitted that the Arbitrator wrongly applied the concept of *amiable compositeur.* Firstly, the rules applied in respect of substantive as opposed to procedural matters. Secondly, for the Arbitrator to have ruled that the parties did not authorize the extension of time was contradictory to the parties' agreement. The Court was invited to see exhibit "**JCB2",** being a copy of the Arbitral Ruling.

5.8 Regarding the allegation that the interlocutory award was in conflict with public policy, Article 18 of the Model Law and Regulation 5(1)(d) of the Arbitration (Code of Conduct and Standards) Regulations, 2007, both of which provide for equal treatment of parties and opportunity to be heard, were referred to. In reliance to the aforementioned provisions, the Applicant submitted that the parties could not be said to have been treated the same as the Applicant was not given an opportunity to fully present its case. That exhibits "**JCB14", "JCB 15**" and "**JCB30",** showed that the Respondent only filed his Bundles of Documents on 6th March, 2023 in breach of Order for Directions No. 3, and

yet only the Bundles of Documents for the Applicant were expunged.

5.9 As regards the allegation that the making of the award was induced by misrepresentation, it was submitted that the Respondent misrepresented facts when he stated that the Bundles of Documents were filed on 3rd March, 2023 when in fact they were filed on 6th March, 2023, being the date when the documents reached the office of Tribunal.

5.10 The Applicant concluded by submitting that the award should be set aside based on the submissions in the paragraphs above.

6.SUBMISSIONS BY THE RESPONDENT

6.1 Learned counsel for the Respondent, Mr. J. Banda and Mr. K. Banda also relied on the affidavit in opposition filed on 23rd May, 2023 and the list of authorities and skeleton arguments filed on the same date. The same were augmented with verbal submissions.

6.2 As a prelude to his skeleton arguments, Mr. Banda submitted on the Arbitral Tribunal's jurisdiction in the conduct of the arbitral proceedings. It was submitted that a procedural order should be

distinguished from an interim award. As authority for this proposition, the 2012 UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, `*travaux preparatoires* on Article 31', was relied on, where at page 127, it states as follows:

> **"The term "award" is not defined in the Model Law. Canadian courts have held that the term connotes the decision of an arbitral tribunal that "disposes of part or all of the disputes between the parties". An arbitrator's decision concerning the admissibility of evidence and an order for security for costs were held to be procedural rulings and not awards."**

6.3 Also called in aid for a distinction between a procedural order and an interim award was Roy Goode on Commercial Law, third edition, where at page 1189 - 1191 he wrote as follows:

> **"It is necessary to distinguish procedural orders from interim awards. The latter disposes of a part of the issues referred for arbitration and are, in substance, final as to those issues. Procedural orders are concerned with the conduct of the arbitration, not with the substantive rights of the parties. Subject to any agreement between the parties, the arbitrator has wide power to make orders for the conduct of the arbitration,**

including orders for delivery of pleadings and particulars, disclosure of documents, exchange of experts' reports, security for costs, and the like ... The court also has limited powers of control prior to the award. ... it has no general supervisory jurisdiction, so that, short of an application to remove the arbitrator or revoke his authority, the conduct of the arbitration cannot in general be challenged until after the issue of the award."

6.4 On the basis of the authorities cited above, the Respondent submitted that the Applicant had proceeded on a wrong presupposition, and therefore, this Court could not consider an application to set aside an interlocutory award that was never issued. By way of emphasis, the Respondent submitted that what was determined by the Arbitral Tribunal were procedural orders, including that of the 17th of March 2023, arising from procedural issues. That the conduct of the arbitration could not in general be challenged until the issuance of an award.

6.5 Notwithstanding the submission on the Arbitral Tribunal's jurisdiction, the Respondent submitted to the grounds for setting aside the award as outlined by the Applicant.

6.6 Regarding the Applicant's assertion that the arbitration proceedings were not in accordance with the agreement of the

parties and the Arbitration Act, it was the Respondent's contention that the Applicant had not shown which part of the Arbitration Act or agreement of the parties was breached by the Arbitrator. That the Applicant had merely argued that the Arbitrator had discretion to allow extension of time and further that, the Arbitrator had misapplied the concept of *amiable compositeur.*

6.7 It was the Respondent's submission that the parties agreed from the outset that the arbitral proceedings would be governed by the UNCITRAL Rules of 2013 and the Arbitration Act. In submitting on the default of a party, Article 30 rule 3 of the UNCITRAL Arbitration Rules which makes provision for the arbitral tribunal to proceed to make an award on the evidence before it where, a party failed to produce documents within the established period of time without sufficient cause for such failure was referred to.

6.8 To amplify on this, the Respondent also referred to the Handbook on UNCITRAL Arbitration: Commentary, Precedents and Materials (2nd Edition) Sweet 86 Maxwell, where at page 490, paragraph 30-39, the authors alluded to default of a party in presenting its case.

6.9 By way of augmentation, the Respondent cited authorities from foreign jurisdiction where default of a party was considered. These

are, In Re Corporacion Transacinal de Inversiones, S.A, de C.V et al STET International, S.P.A et al [1999] CanLii 14819 (On SC); Geotech Lizenz AG v. Evergreen Systems 697 F. Suppe.1248 (1988); Parsons & Whittemore Overseas Co. v. Society Generale de L'Industrie du papier (RAKTA) - 508 F.2d 969 ("d Cir. 1974). I hasten here to state that copies of these were not availed to the Court.

6.10 In addition to the above, it was the Respondent's submission that the law in Zambia was settled to the effect that an extension of time was not a matter of right but rather sufficient reason had to be given for the court to exercise its discretion. In that regard, it was submitted that the reasons advanced by the Applicant for its failure to file documents within the prescribed period were found not to be compelling by the Arbitrator.

6.11 As such, the Arbitrator could not be faulted in so finding as an application for extension of time was not a matter of right but rather that of discretion exercised judiciously.

6.12 In support of this proposition, the following cases were cited: **Gerald Chilumba v. ZESCO Limited** [3]; **Collet v. Van Zyl Brothers Ltd** [4]; **Access Bank (Z) Ltd. v. Group Five/Zcon**

Business Park Joint Ventures (5); and **D.E. Nkuwa v. Lusaka Tyres Services Limited** (6).

6.13 Regarding the allegation that the award was against public policy, it was submitted that the Applicant's argument in this regard was frivolous and vexatious as it had not demonstrated how the award was against public policy and only referred to the provisions from the Arbitrator's Code of Conduct. The case of **Martin Mesheck Simpemba Rose Domingo Kakompe v. Noone Mukanta Zambia Industrial Minerals Limited** (7) in which public policy as a ground for setting aside an arbitral award, was considered was cited. In that case, the Court observed that the Arbitration Act and the Model Law do not define public policy and that the defence of public policy should only be invoked where the award was shocking to the conscience, injurious to the public good and violated the forum's most basic notion of morality or justice.

6.14 On the basis of the cited authority, it was argued that the Applicant had not shown how the award was shocking to the conscience, injurious to the public good and wholly offensive to an ordinary member of society, or violated the forum's most basic notion of morality or justice.

6.15 That the Applicant could not argue that the ruling was in conflict with public policy merely because it was dissatisfied with that. As such, this allegation was bound to fail.

6.16 On the allegation that the award was induced by misrepresentation, it was submitted that there was evidence that the Respondent had complied with Order for Directions no. 3 whereas the Applicant failed to comply with the same. That the Applicant had failed to show that the award was obtained by fraudulent means, corruption or misrepresentation as held in the case of John **Kunda (suing as Country Director of and on behalf of the Adventist Development** [8] and **Relief Agency (ADRA) v. Keren Motors (Z) Limited** [9].

6.17 The Respondent concluded by submitting that he had demonstrated that the application to set aside the ruling was incompetent, frivolous and vexatious and should be dismissed with costs.

7.0 APPLICANT'S SUBMISSIONS IN REPLY

7.1 The Applicant filed skeleton arguments in reply in which counsel submitted that the Respondent's argument that there was no interlocutory award to be set aside, was misplaced and wrong.

That the definition of award in section 2 of the Arbitration Act settled any question(s) as to the character of the decision of the 17th March, 2023. Further that, it was plain to see the restriction intended by Parliament under section 2(1) of the Arbitration Act.

7.2 Referencing Craies on Statute Law, Fifth Edition at page 197 where the author stated that, "where the word defined is declared to 'mean' so and so, the definition was explanatory and prima facie "restrictive" and where the word defined was declared to 'include' so and so, the definition was extensive. It was submitted that since section 2(1) of the Arbitration Act declared the meaning of an award to "mean", then it was restrictive and it was not open to the courts to add or subtract from it.

7.3 The Applicant further submitted that the Respondent's submission in this regard, went against the construction of statutes. That there was sufficient jurisprudence in our jurisdiction and the law was settled that the court's power to depart from the plain and ordinary meaning of the words used was restrictive. Reliance was placed on the case of **The Minister of Information and Broadcasting Services and Another v. Fanwell Chembo (On His Own Behalf and on Behalf of Other Members of the Media Institute of Southern Africa** [10] in which the Supreme Court stated that it was

not the duty of the courts to edit or paragraph the laws passed by Parliament but rather, to interpret the laws as found in statute.

7.4 In rebutting the Respondent's reliance on the UNCITRAL Arbitration Rules for the definition of an award, the Applicant submitted that the same did not help the Respondent's case as the UNCITRAL Rules were subject to the Arbitration Act in accordance with section 8 of the Act. The Applicant reiterated that the Arbitration Act was instructive as to what amounted to an award and that the Arbitral Tribunal even acknowledged at page R14, paragraph 7 of Exhibit "JCB6" by referring to the directions as award. The Applicant dispelled the Respondent's assertion that granting the application would set a bad precedent as every procedural order would be challenged, arguing that the fear of dangerous precedent could not be used to take away the right of the Applicant.

7.5 On the Respondent's submission that the Applicant had not demonstrated which part of the Arbitration Act or parties' agreement had been breached, it was contended that the Applicant had already filed an application for extension of which was not granted by the Tribunal on the basis that the documents had already been expunged.

7.6 That the refusal by the Tribunal to hear and determine the application was contrary to the parties' agreement, the Arbitration Act and the UNCITRAL Rules. As the hearing had not yet commenced, no prejudice whatsoever, would have been occasioned on the Respondent, so argued the Applicant.

7.7 In relation to the concept of *amiable compositeur* and the allegation that the award was induced by misrepresentation, the arguments were a repeat of Applicant's skeleton arguments in support of the application. I will thus, not repeat the same.

7.8 The Applicant concluded with a prayer that the application be granted and that costs be to the Applicant.

8.0 **CONSIDERATION AND DECISION OF THE COURT**

8.1 By this application, I have been called upon to determine whether the Applicant is entitled to an Order to set aside the Ruling of the Arbitrator dated 17th March, 2023.

8.2 The application is anchored on **section 17 of the Arbitration Act, Act No.19 of 2000 and Rule 23 of the Arbitration (Court Proceedings) Rules, 2001,**

8.3 Section 17 of the Arbitration Act provides for setting aside of an award and spells out the grounds on which an arbitral award may be set aside as follows:

> "**(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

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

8.4 It is clear upon a fair reading of the above provision that the Court may set aside an arbitral award under section 17(2) (b) of the Arbitration Act where the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Zambia or the award is in conflict with public policy; or on the ground that the making of the award was induced or effected by fraud, corruption or misrepresentation.

8.5 Rule 23 of the Arbitration (Court Proceedings) Rules, 2001 provides for the application for setting aside an arbitral award.

8.6 Learned counsel for the parties argued quite passionately in support of their client's case as I have highlighted above. This Court has been enlightened and counsel is commended for being resourceful.

8.7 However, as a starting point, it is important that there is clarity whether or not the Ruling of the Arbitrator dated 17th March, 2023 is amenable to be set aside by this Court in view of the position taken by the Respondent that the Ruling is not an Award which can be set aside under the provisions of section 17 of the Arbitration Act. In short, it is important that the legal status of the said ruling is ascertained because this has significant consequences on the parties to the arbitration.

8.8 Despite the importance of the question, there is no internationally accepted definition of the term award as it has not been defined in the leading instruments such as the New York Convention on the Enforcement of Foreign Arbitral Awards or the UNCITRAL Model Law.

8.9 Most national laws have also left the concept undefined. That notwithstanding, the Zambian Arbitration Act in section 2 defines an award as:

> **"award" means the decision of an arbitral tribunal on the substance of a dispute and includes any interim, interlocutory or partial award and on any procedural or substantive issue."**

8.10 What is clear from the above definition is that an award refers to a decision of the arbitral tribunal on the substance of the dispute. This does not only include a final award rendered at the conclusion of the arbitral proceedings but also includes an interim, interlocutory or partial award.

8.11 Therefore, in relation to section 17 of the Arbitration Act, the Supreme Court in the case of ***China Henan International Cooperation Group Company Limited v. G and G Nationwide (Z) Limited*** referred to by the Applicant stated as follows:

"We have taken this view notwithstanding that section 17 of the Act does not make a distinction between a final award and interim or interlocutory award because there is a specific recourse provided against a decision on jurisdiction handed down as a preliminary question."

8.12 The critical question to be analyzed however is whether the definition of an award under section 2 also covers the decision that was rendered by the Arbitrator in this case wherein he expunged the Applicant's bundle of documents on the ground that there was non-compliance with the Orders for Directions.

8.13 Mr. Banda counsel for the Respondent, argued that an interim award disposes of part of the issues referred for arbitration and is in substance final as to those issues. He added that when dealing with the substantive dispute, there may be several issues that may arise which may either be procedural or substantive. If a decision is made, that decision on a procedural or substantive issue will be an award as long as it relates to the substance of the dispute.

8.14 Counsel therefore contends that the decision herein was not an award but a procedural order as it did not relate to the substance of the dispute.

8.15 In making reference to a procedural order, it is the Respondent's contention that procedural orders are concerned with the conduct of the arbitration. That it follows therefore that a procedural order and an interim award under UNCITRAL are two distinct legal concepts which serve different purposes and have different consequences.

8.16 The author of Procedural Orders in International Commercial Arbitration, also distinguishes a procedural order from an award in the following terms:

> "**Procedural orders and directions help to move the arbitration forward by addressing issues such as the exchange of written evidence, the production of documents, and the hearing arrangements. They do not have the status of awards, and they may be challenged after the final award is made. Formally, they have no bearing on the resolution of the parties' dispute but are only used to determine the procedure of the arbitration process."** **(Underlining mine for emphasis).**

8.17 Given the foregoing definition what is evident is that a procedural order is an order issued to help move the arbitration forward and

8.21 The objective or purposive approach on the other hand ascertains the intention of the lawgiver and gives such meaning to words of enactment that is best suited to the intention so discovered.

8.22 In **Corkery v. Carpenter** ([11]), the Lordships posited that unlike the literal interpretation which only looks at the literal meaning of the words, the mischief rule focuses on the gap or the mischief that the statute was intended to cover. Lord Denning also adjudged in the case of **Notham v. London Borough of Barnet** aal, that the "purposive approach is one that will promote the general legislative purpose underlying the provisions."

8.23 The learned author N.S Bindra's of Interpretation of Statutes, 9th Edition, posited as follows:

> **"The most fair and rational method for interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are either the words, the context, the subject matter, the effects and the consequences, or the spirit and reason of the law. But the whole of what is enacted by necessary implication can hardly be determined without keeping in mind the purpose or object of the statute. A bare mechanical interpretation of the words and application of legislative intent devoid**

of concept or purpose will reduce most of the remedial and beneficent legislation to futility."

8.24 What I discern from the above excerpt as far as construction of statutes is concerned is that the most rational method of interpreting statute is by exploring the intention of the legislature through the most natural and probable signs which are either the words, the context, the subject matter, the effects and the consequences, or the spirit and reason of the law. This is done by keeping in mind the purpose and object of the statute.

8.25 In this regard, a bare mechanical interpretation of the words and application of legislative intent devoid of concept or purpose will reduce most of the remedial and beneficent legislation to futility.

8.26 Words to much the same effect were used by the Supreme Court in the case of **Amuel Miyanda v. Raymond Handahu** [13] wherein it was stated that:

"We have reminded ourselves that the object of interpretation is the ascertainment of the intention expressed. As Basu's commentary on the constitution of India puts it in the 5th edition, vol. 1, at p. 34: -

"The fundamental rule of interpretation of all enactment to which all other rules are subordinate is that they should be construed according to the intent of the Parliament which passed the law."
It is not what the legislature meant to say or what their supposed intentions were with which the court would be concerned; the court's duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers, and the like."

8.27 Furthermore, in the case of **Attorney General & Another v. Lewanika & Others** (14) the Supreme Court stated that:

"In considering the law relating to this appeal we have referred to the learned author of Maxwell on interpretation and Statutes who, at p. 43, had this to say on the Golden rule: -
"The so called 'Golden rule' is really a modification of the literal rule. It is stated in this way by Parke B:

"It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language used may be varied or modified, so as to avoid such inconvenience but no further."

And Craies on Statute Law at p. 64 has this to say:

"The Cardinal rule for the construction of Acts of parliament is that they should be construed according to the intention expressed in the acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expand those words in their ordinary and natural sense. The words themselves alone also in such case best declare the intention of the Law giver. "The tribunal that has to construe an act of legislature or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view".

Against these authorities is that referred to by Mr. Kinariwala namely *Nothman v Barnett Council* (6) affirmed by the House of Lords in 1979 1 All E.R

142. Lord Denning's words are most appropriate in this case namely:

"Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it - by reading words in if necessary - so as to do what parliament would have done had they had the situation in mind."

8.28 Given the foregoing, it is clear that the Supreme Court whilst quoting from the legal authors considered the Golden rule of interpretation when it stated that the rule was actually a modification of the literal rule. However, what was stressed was that in the construction of a statute, it was useful to adhere to the ordinary meaning of the words and to the grammatical construction unless that was at variance with the intention of the legislature to be collected from the statute itself, or led to any manifest absurdity or repugnance, in which case the language used may be varied or modified, so as to avoid such inconvenience.

8.29 In 2019, the Supreme Court again, in its decision in **Hakainde Hichilema v. Attorney General** (15) deliberated on the rules of

interpretation and re-echoed its earlier decisions when it stated as follows:

> **"The primary rule of interpretation focuses on the plain and unambiguous language of an enactment. This rule, which is sometimes referred to as the literal rule, has, over the years been modified. In the case of Anderson Kamuela Mazoka and Others v. Levy Patrick Mwanawasa and Others, we did refer to the words of Lord Denning in the case of Northman v. Barnet Council (1978)1 ALL ER 12431 in which he stated: "In all cases now in the interpretation of Statutes we adopt such a construction as will provide the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of the statute give rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it by reading words in if necessary, so as to do what Parliament would have done, had they had the situation in mind.**

8.30 On the basis of the above exposition on the rules of interpretation, it is very clear to me that the reason why the Applicant contends that the ruling rendered herein is an award is because of the use

of the words a 'and on a procedural issue'. Taken literally and in isolation from the other words in the definition it would seem as though the definition is extensive so as to include procedural orders given at the preliminary stage aimed at moving the arbitration forward.

8.31 However, the view I hold is that if it is construed literally and not in context it would lead to an absurdity especially if the general legislative purpose underlying the provision is considered. Therefore, in my view, a proper interpretation would require a broader understanding of the principles of arbitration vis-à-vis the lingering powers of the Courts to intervene in arbitral proceedings. In addition, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.

8.32 And what is the legislative purpose underlying the provision?

8.33 What is abundantly clear is that the rationale for enacting this piece of legislation was to promote the speedy disposal of commercial disputes by the use of alternative dispute resolution mechanisms such as arbitration.

8.34 This rationale was highlighted by the Supreme Court in the case of **Paolo Marandolo and 2 Others v. Gianpietro Milanese and**

4 Others [16] where it was stated regarding the purpose of arbitration that:

> **"We note that the issue that brought about arbitration in the case before us is a commercial issue. We believe that Arbitration is used in commercial matters to resolve matters speedily. The parties in this case agreed to proceed through arbitration so that the matter can be disposed of quickly. The application to set aside the arbitral award was made two years and five months after the additional award. We believe that allowing the application would seriously defeat the whole intention of parliament in coming up with the Arbitration Act... The appellants sat on their rights for over 2 years. Allowing the application would defeat the aims and aspirations of the law relating to the quick disposal of commercial matters through arbitration. This would not be in the interest of justice which this Court is called upon to uphold."**

8.35 In this regard, the Supreme Court declined an application to extend the time frame of three (3) months' time within which to make an application to set aside the arbitral award as that would

have defeated the intention of parliament to resolve commercial disputes speedily.

8.36 In addition to the foregoing, it is abundantly clear that the Arbitration Act was also for ululated in line with internationally accepted principles and specifically the Model Law. The Supreme Court in the case of ***China Henan International*** outlined the relationship between the Arbitration Act and the Model Law which is the first schedule of the Arbitration Act when it stated that:

> **"The Model Law was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in June 1985 and was introduced onto the international plane for purposes of harmonizing arbitration laws and thus providing a laws consistent with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention.) The need for harmonizing international arbitration laws stems from the fact that on the international plane, arbitration is the preferred choice of dispute resolution in international trade and other relationships resulting in a need to have a uniform set of rules relating to international arbitration to avoid the uncertainty and inconsistency that arises from**

8.39 What is the significance of the foregoing? It is clear that by virtue of Article 5 of the Model Law, it advocates for limiting and clearly defining Court involvement as it provides that:

> **"In matters governed by this Law, no court shall intervene except where so provided by law."**

8.40 The main purpose of the above provision is to ensure predictability and certainty of the arbitral process. This was also highlighted by Mutuna J, in the case of **Cash Crusaders Franchising PTY Limited v. Shakers and Movers (Zambia Limited)** [17] wherein he stated that:

> **"The starting point is to recognize that once parties have decided to have their dispute adjudicated upon by way of arbitration, they are in fact saying that they do not wish to avail themselves of the Courts save in the limited circumstances provided by the law."**

8.41 In view of the above, it can be stated that recourse to the Courts should be in very limited circumstances. This is in tandem with what the learned author Roy Goode stated in his text Commercial Law referred to by counsel for the Respondent that the court has limited powers of control prior to the award...it has no general

supervisory jurisdiction, so that, short of an application to remove the arbitrator or revoke his authority, the conduct of the arbitration cannot in general be challenged until after the issue of the award.

8.42 In view of the foregoing, if parties to the arbitration proceedings were allowed to have recourse to the Court pursuant to section 17 to challenge procedural orders given during the preliminary stage of the proceedings, it would in effect defeat the general legislative purpose underlying the enactment of the Arbitration Act which is aimed at resolving commercial disputes expeditiously and efficiently.

8.43 Given what I have highlighted above, I have had regard to the context, the subject matter, the effects and the consequences, or the spirit and reason of the law, keeping in mind the purpose and object of the statute which is to expeditiously handle commercial disputes.

8.44 I have also considered the fact that if procedural orders are challenged in the court of law before the issuance of the award, it means that the court would have general supervisory jurisdiction over the arbitral process even at the preliminary stage given the

fact that arbitrators have the powers to issue procedural orders for the conduct of arbitration.

8.45 I should also mention that the Applicant urged me to be persuaded by the decision reached in the Kenyan case of **Mifra Construction v. Eldoret Municipal Council** [18]. This is on the ground that the definition of arbitral award under section 3 of the Kenyan Arbitration Act is the same as the definition in section 2 of our Arbitration Act.

8.46 For the sake of clarity, the Kenyan Arbitration Act provides that arbitral award means:

> "**Any award of an arbitral tribunal and includes an interim arbitral award.**"

8.47 There is no doubt that the above definition is similar to the definition of award under section 2 of the Arbitration Act only to the extent that award includes an interim arbitral award. However, I wish to add that in the above Kenyan case, the order sought was to set aside an interim arbitral award. The question whether the same was amenable to be set aside was also raised and the judge in deciding the matter concluded that it could be set aside on the ground that the agreement for arbitration was illegal among other grounds.

8.48 From my understanding, the challenge was brought about because of an allegation that the contract sought to be enforced under the arbitration proceedings was illegal. In the view that I hold, the judge proceeded with the application because the issue related to the substance of the dispute affecting the rights of the parties and not on a procedural issue.

8.49 I therefore find that the ***Mifra*** case can be distinguished with the present case which seeks to set aside a decision on a procedural issue.

8.50 It is for these reasons that I agree with counsel for the Respondent and state that while the meaning of award as defined in section 2 of the Arbitration Act includes an interim or partial award, I find that an award relates to a decision of an arbitral tribunal on the substance of the dispute which decision may be on a procedural or substantive issue. The decision on the procedural orders which was made in this case expunging the Applicant's bundle of documents does not relate to the substance of the dispute.

8.51 I am fortified in my finding based on the research I have conducted on this subject. While there is no internationally accepted definition of the term award, one widely agreed upon

point is that the term is reserved for decisions that finally resolve a substantive issue rather than decisions made in relation to procedural issues outlining the procedure and conduct of the arbitration.

8.52 To this end, one learned author in an article entitled: What Is an Award, Anyway' stated regarding an award that:

> **"To be an award, a decision has to be rendered by an arbitral tribunal. It must also finally settle all or part of the parties' dispute. It can do this by finally resolving jurisdiction, or some aspect of the merits of the dispute or a procedural issue that terminates the arbitration." (Underlining mine for emphasis only).**

8.53 The same author further stated at page 477 that:

> **"Whether we consider a decision an award or not has real, practical consequences. Most obviously, if a decision is an award, it can usually be subject to an action for set aside at the place of arbitration or be recognized and enforced around the world under the New York Convention."**

8.54 In relation to case law which I cite merely for their persuasive value in the context of international arbitration, the French

Supreme Court weighed in in defining the concept of arbitral award in the case of **Groupe Antione Tabet v. Republique du Congo** [19]. In rejecting to set aside a procedural order made by the arbitral tribunal it stated that only proper arbitral awards may be challenged through an action to set aside. It went on and defined awards as:

> **"Decisions made by the arbitrators which resolve in a definitive manner all or part of the dispute that is submitted to them on the merits, jurisdiction or procedural matter which leads them to put an end to the proceedings."**

8.55 What can be gleaned from the foregoing is that a decision of the tribunal will be considered an award if it finally settles all or part of the parties' dispute by finally resolving jurisdiction, or some aspect of the merits of the dispute or a procedural issue that tel the arbitration. The underlined portion in my view is in line with the argument advanced by counsel for the Respondent which I agree with that there may be procedural issues which relate to the substance of the dispute and which may terminate the arbitration. The decision with respect to that procedural issue may be termed an award.

8.59 The above elucidation in my view is similar to the definition provided under section 2 of the Arbitration Act and also my finding that an award on a procedural issue should relate to the substance of the dispute.

8.60 To buttress the point further, I am persuaded by what was stated by the Ontario Court of Appeal in its decision in the case of **Inforica Inc. v. CGL Information Systems and Management Consultants Inc.** ([20]). I find it imperative to set out the facts of the case as the Court was faced with a similar situation in determining whether or not the decision of the arbitral tribunal was an award or a procedural order.

8.61 CGI and Inforica entered into a service agreement which provided that any disputes should be resolved by arbitration under the Ontario Arbitration Act of 1991. Inforica commenced arbitral proceedings against CGI claiming among other damages an amount of $14.4 million.

8.62 Before the hearing of the arbitration, CGI brought a motion for security for costs. The arbitrator granted CGI's motion ruling that Inforica was required to post $750,000 in security for costs failing which CGI could move to have the arbitration dismissed. The

arbitrator found that he had jurisdiction to make an order for costs pursuant to the Arbitration Act and the ADR Chambers Rules.

8.63 Inforica brought an application before the Court to set aside the arbitrator's order arguing that the arbitrator did not have jurisdiction to order security for costs. CGI opposed the application on the basis that the Judge did not have jurisdiction to hear the application because the order appealed from was a procedural order rather than a final award and the Arbitration Act of 1991 did not permit an appeal from a procedural order.

8.64 The Judge allowed Inforica's application and set aside the arbitrator's order. However, the Judge did not make a pronouncement on the issue of jurisdiction. The Court of Appeal set aside the Judge's decision and upheld the order of the arbitrator on the ground that the Judge did not have jurisdiction to hear Inforica's application in the first place because the Arbitration Act of 1991 only permitted appeals from a final award which disposes of the merits of arbitration and not an arbitrator's procedural order. The Court of Appeal therefore emphasized that arbitral awards deal with substantive rights whereas procedural

decisions serve to ensure that the parties would be governed by the rules of the game.

8.65 In reaching its conclusion, the Court of Appeal reaffirmed the primacy of arbitration and the importance of judicial restraint. Thus it stated that:

> **"It is clear from the structure of the purpose of the Act in general and from the working of s.6 in particular that judicial intervention in the arbitral process is to be strictly limited to those situations contemplated by the Act. This is in keeping with modern approach that sees arbitration as an autonomous self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator not by courts. The Act encourages parties to resort to arbitration requires them to hold to that course once they have agreed to do so and entrenches the primacy of arbitration proceedings...directing the court generally not to intervene." (Underlining mine for emphasis only).**

8.66 The approach taken by the Ontario Court of Appeal is the approach that I have taken in interpreting section 2 of the Arbitration Act as it is clear that the primacy of arbitration and the importance of judicial restraint is fundamental.

8.67 A similar approach was taken by the English Court in the case of **ZCCM Investment Holdings Plc. v. Kansanshi Holdings Plc. and Another** [21], in which the Applicant challenged a tribunal's decision under section 68 of the English Arbitration Act, 1996, which provides that a party may apply to the Court to challenge an award in the proceedings on the grounds of serious irregularity affecting the tribunal, the proceedings or the award.

8.68 It is important to note that what gave rise to the decision in the above case was the terminology used when the arbitral tribunal described the decision as Ruling on Claimants' Application.

8.69 The Court clarified its approach to determine whether a decision by an arbitral tribunal was an award or a procedural order. It identified a list of principles to be followed as follows:

> "**a) The Court will certainly give real weight to the question of substance and not merely to form;**
>
> **b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio,* either entirely or in relation to that issue or claim:**

c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award.

d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status.

e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it:

f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning.

g) While the authorities do not expressly say so I also form the view that:

i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

ii. The focus must be on a reasonable recipient with all the information that would have been

available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award."

8.70 Furthermore, in **K v. S** [22] the Court, applying the principles in ***ZCCM Investment Holdings*** case held that the tribunal's decision to disallow the expert's report was a procedural order and not an award and, as such, could not be challenged under section 68 of the Arbitration Act. Cooke J, thus stated that:

"Of the factors listed there, in my judgment, the factor to be accorded the most weight in accordance with earlier authority, is whether or not there was a final determination on the merits of a substantive point in the arbitration. Here, there was no finding on the recoverability of the "moral damages" at all. Those were capable of being pursued on the existing factual evidence to the extent that it referred to them at all, which it does not appear to have done, or indeed I suppose at a further stage in the arbitration if an adjournment had been sought in respect of that part of the case.

There was no final determination of that element nor were the arbitrators functus in respect of it."

8.71 It is apparent from the foregoing that the factor to be accorded the most weight in considering whether a decision is an award or merely a procedural order is whether or not there was a final determination on the merits of a substantive point in the arbitration and not the form.

8.72 This approach is seen again in the Indian case of **Cinevistaas Limited v. Parsar Bharti** [23] where the Delhi High Court held that under section 2 (1) (c) of the Act, an award includes an interim award and whether an impugned order constitutes an interim award or not is to be decided by seeing the nature of the order and not the title of the application.

8.73 Similarly, in another Indian case of **ONGC Petro Additions v. Tecnimont S.P.A and another** [24] the Court held that:

"The arbitral tribunal while passing any procedural order may determine certain valuable right of the parties. However, it does not necessarily mean that such determination renders an order to be an award within the meaning of section 2(1) (c) of the Act. Whereas such determination of a valuable right in any legal proceedings would not necessarily result

8.76 I say this because it is well-defined based on the elucidation made by the legal scholars as well as the foreign authorities that I have scrutinized that although most national laws do not define the term award, as I have already mentioned, one widely agreed upon point is that the term is reserved for decisions that finally or partially resolve a substantive issue so as to render the arbitral tribunal *functus officio* regarding that issue or claim. The element of finality is significant as it affords the beneficiary the utmost protection of their right. This is different from a procedural order aimed at outlining the procedure and conduct of the arbitration.

8.77 It is therefore clear that it is the content of a decision not its nomenclature that determines finality. In the case of **Asurasu Jasa Indonesia v. Dexia Bank** [25] Chan Sek Keong CJ stated that:

> **"The mere titling of a document as an award does not make it one and that it is the substance and not the form that determines the true nature of the ruling."**

8.78 It is clear that these cases I have referred to have been decided against the backdrop that arbitration is an alternative dispute

award. If this was the case, it would clearly defeat the importance of resolving disputes efficiently and with certainty.

8.82 For these reasons, I reiterate and I find that the decision rendered by the Arbitrator on 17th March, 2023, was merely a procedural order and not an interlocutory or interim award that is liable to be set aside.

8.83 Having said that, I find that it is otiose to make a determination whether or not the decision of the arbitrator is liable to be set aside on the grounds relied on by the Applicant as I do not have the jurisdiction to hear and determine the application before me.

8.84 I have already stated that the jurisdiction of the court in arbitration is limited save in circumstances provided for by law. This Court cannot act as an appellate court to alter, review or set aside a decision that is merely a procedural and directive as to the conduct of the proceedings of the arbitration. This is because the decision has no bearing on the merits or substance of the dispute between the parties and cannot, therefore, be set aside on grounds spelt out under section 17 of the Arbitration Act.

8.85 In light of the foregoing, I find that the decision of 17th March, 2023, falls short of a decision of an Arbitrator that is liable to be set aside on the grounds prescribed by law.

8.86 I therefore decline to grant the order sought and accordingly dismiss the application with costs to the Respondent.

8.87 Leave to appeal is granted.

DELIVERED AT LUSAKA THIS 30TH DAY OF SEPTEMBER, 2024

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA

Q 5FP 2024

M.C. KOMBE
JUDGE