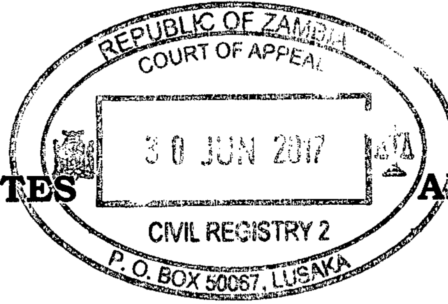
IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 22/2016
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:



NDILILA ASSOCIATES **APPELLANT**

AND

SUPPLY CONNECTIONS LIMITED **RESPONDENT**

Coram: Makungu, Chashi and Kondolo, SC J.J.A
On the 9th day of March, 2017 and 30th day of June, 2017

For the Appellants: Mr. O. Sitimela of Messrs Fraizer & Associates
For the Respondent: Mrs. O. Chirwa of Messrs Ranchold Chungu Associates

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JUDGMENT

C.K. MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Winnie Zaloumis (suing in her capacity as the Acting National Secretary for Movement for Multiparty Democracy) v. Felix Mutati and 3 others SCZ Judgment No. 28 of 2016*
2. *Collet v. Von Zyl Bros Limited (1966) ZR 65*
3. *Rodwell K. Musamba v. M.M. Simpemba (T/A Electrical and Building Contractors) (1978) ZR 175.*
4. *Mwape v. Chikwanda 2011/HP/1938*
5. *Booker Bus Service Company Limited v. Stanbic Bank Zambia Limited SCZ/8/226/2014*
6. *Emmanuel Mutale v. Zambia Consolidated Copper Mines Limited (1994) SCJ 67*
7. *Shamwana v. Mwanawasa (1993 - 1994) ZR 149*
8. *Zambia Seed Company v. Dawson Lupunga (1994) HR 1990 (unreported)*

Other authorities referred to:

1. *Arbitration Act No. 19 of 2000 – Section 12*
2. *Rules of the Supreme Court, 1999 Edition (White book) - 32/5/2, order 62/3/3*

This is an appeal against the ruling of the High Court Judge delivered on 17th August, 2016. The brief back ground is that on 18th February, 2016 the appellant filed an ex-parte application under the Arbitration Act No. 19 of 2000 for the appointment of a Mr. Dixon Bwalya of Messrs Lisulo Bwalya Associates as a single arbitrator in a dispute that had arisen between the parties, which was covered by an arbitration clause. On 10th February, 2016 the respondent's advocates filed in a Notice of Appointment of Advocates.

On 18thFebruary, 2016 the learned Deputy Registrar signed a formal Ex-parte Order appointing Dixon Bwalya as an Arbitrator. Being dissatisfied with the decision of the learned Deputy Registrar, the respondent appealed to a single Judge who on 17th August, 2016 set aside the said Ex-parte Order.

The learned Judge found that the learned Deputy Registrar erred when he proceeded to appoint an arbitrator ex-parte.Further that the Deputy Registrar had an option to make the application interlocutory or interparte becausethesubstance of the application was an arbitration dispute requiring the parties to agree on an Arbitrator. In arriving at this finding, he made reference to the case of ***Winnie Zaloumis (Suing in her capacity as the Acting National Secretary for Movement for Multiparty Democracy)***

and Felix Mutati and 3 others[1]which talks about the steps to be taken by a puisne Judge faced with an exparte application. The learned High Court Judge said in his ruling that he could not fathom why a party who was not given an opportunity to be heard in an arbitral application for a crucial appointment of an independent arbitrator could be condemned to costs.

The grounds of appeal filed herein are as follows:

1. The learned Judge in the court below erred in both law and fact when he found that the appeal was not frivolous considering that the appellant before him had voluntarily consented to and submitted to another independent arbitral tribunal which had since commenced the arbitral process.He should have found in the circumstances that the appeal had been overtaken by events.
2. The learned Judge in the court below erred in both law and fact in condemning the appellant to costs as there was no reasonable basis for doing so going by the conduct of the appellant prior to and during the litigation below.

At the hearing of the appeal, the appellants advocate relied entirely on his heads of argument filed herein on 22nd December, 2016. The respondent's advocates also relied merely on the heads of argument filed herein on 3rd March, 2017.

In relation to ground 1, learned counsel for the appellant drew our attention to the following portions of the record of appeal:

i. Page 45 which is a Notice of Appeal.
ii. Pages 66 and 67 -Exhibits to the affidavit in support of the application for the appointment of an arbitrator i.e. 'FN1' a copy of a letter dated 8th December, 2015from the Chartered Institute of Arbitrators in accordance with the Arbitration Act appointing Professor Mundia Muya as an arbitrator and 'FN2' a copy of a Consent Order for directions from Professor Mundia Muya dated 22nd March, 2016.

He argued that since the Notice of Appeal was filed by the respondent on 1st April, 2016 after the said Order for directions was issued by the new arbitrator; there was no need for the respondent to lodge an appeal against the Ex -parte Order of appointment of a single arbitrator made by the Deputy Registrar as the matter had already been dealt with by the Chartered Institute of Arbitrators. He therefore argued that the said appeal was frivolous and as such the learned Judge in the court below ought to have dismissed it with costs.

As regards ground 2, the gist of the appellant's argument is that the court below erred in condemning the appellant to costs because the proceedings in the court below were necessitated by the respondent's lack of co-operation in the appointment of an arbitrator as provided for in the joint venture agreement between the parties herein. He referred us to page 34 of the record of appeal which is a Notice to Concur in the Appointment of the said Dixon Bwalya as an Arbitrator, which he said the respondent refused or

neglected to sign. It was counsel's argument that the respondent willingly withheld its consent from 15/08/2014 to sometime in February, 2016, when proceedings were commenced in the High Court by the appellant.

It was contended further that the learned High Court Judge did not consider the fact that the subject matter, involved payments arising out of a joint venture agreement and that it was necessary for the learned Deputy Registrar to proceed to appoint an arbitrator ex-parte as well as condemn the respondent to costs for withholding the consent and unnecessarily denying the appellant the fruits of its labour. The appellant's advocate further submitted that this court is entitled to review the exercise of the lower court's discretion on costs according to the principle laid down in the case of ***Collet v. Von Zyl Bros Limited*** (2) where it was held that:

> ***"A trial Judge, in exercise of his discretion, should as a matter of principle, view the litigation as a whole and see what the substantial result was. Where he does not do so, the Court of Appeal is entitled to review the exercise of this discretion."***

He went on to argue that in the court below, there was no substantial recovery of any kind to warrant the grant of costs in favour of the respondent. He relied on the caseof ***Rodwell K. Musamba v. M.M. Simpemba (T/A) Electrical and Building Contractors)*** (3) where it was held that:

"A Plaintiff who recovers nominal damages is not necessarily successful."

He finally prayed that the appeal be allowed with costs.

In brief the respondent's written arguments are as follows:-
Page 26 of the Record of Appeal discloses that on 8th December, 2014 the appellant filed out of the principal registry Originating Summons for an Order of Appointment of an Arbitrator and an Affidavit in Support. On the 10th of February, 2015 the respondent's advocates filed a Notice of Appointment of Advocates. The record further shows on page 40 that on the same date, both the appellant's advocate and the respondents advocate appeared before the Honourable Mr. Justice M. Chitabo in Chambers. Thereafter the appellant proceeded to amend the originating process and to file an Ex-parte Originating Summons on the 18th February, 2015 and the Deputy Registrar heard the matter ex-parte. In support of this, she referred to Order 32/6/2 of the White Book[1] which elucidates that the court has the power to direct that, an application made ex-parte be made inter-parte in order to give the other side an opportunity to be heard. She argued that the said Order clearly states what applications can be made ex-parte such as applications for injunctions, appointment of a receiver, other than a receiver by way of equitable execution, leave for judicial review etc. An appointment of an arbitrator is not on the list.

In the same written arguments, Mrs. Chirwa argued further that the learned Judge was on firm ground when he found that arbitration is a party driven process and that the respondent had

an equal role to play in the process. She stated that the Judge also rightly found that it was wrong for the Deputy Registrar to condemn the appellant (Ndilila Associates) costs for legal proceedings it did not take part in. That the learned Judge's determination that the appeal in the court below was not frivolous was also made on firm grounds.

She further submitted that, the parties conduct to appoint another arbitrator rather than the one appointed ex-parte was illustrative of the fact that the learned Deputy Registrar erred. That there was no evidence on record to show that the respondent had frustrated the arbitral process. Therefore the appeal must fail for lack of merit.

As regards ground 2, Mrs. Chirwa referred us to the case of ***Booker Bus Services Company Limited v. Stanbic Bank Zambia Limited*** [5] where the Hon. Mr. Justice Malila SC stated as follows:

> ***"It is settled law that costs are awarded at the discretion of the court. This position was well articulated in the case of Collet v. Von Zyl Brothers Limited and was restated in Musamba v. Simpemba and in General Nursing Council of Zambia v. Mbangweta. I am not unmindful that in awarding costs, the court ought to exercise that discretion judicially. I am alive to the fact that there are certain canons to which the Judge, considering the question of costs must conform in exercising discretion. Among the key considerations that ought to be had in mind by a Judge in awarding costs, is***

the one soclearly stated in YB and F Transport v. Supersonic Motors Limited .... that the general rule is that costs follow the event, in other words, the successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or conduct of it."

She went on to submit that the same principle was explained in ***Emmanuel Mutale v. Zambia Consolidated Copper Mines Limited***[6] by GardenerJ.S as follows:

"With regard to the argument as to costs, the general rule is that a successful party should not be deprived of costs unless his conduct in the course of proceedings merits the court's displeasure or unless his success is more apparent than real, for instance where only nominal damages are awarded."

Counsel also referred to Order 62 of the Whitebook[1]outlining the principles of a party's entitlement to costs. She further submitted that the respondent in this case succeeded on all the four grounds of appeal in the court below. The court below had taken into account that an arbitrator was appointed and had taken jurisdiction of the arbitration proceedings between parties.

She went on to analyze the procedural history,and the conduct of the appellant in these proceedings to fortify her submission that there was no wrongful conduct on the part of the respondent during

the proceedings in the court below and that the respondent has always been willing to participate in the proceedings.

She further stated that the acts of the parties prior to the institution of these proceedings had no bearing on the Judge's discretion to grant costs. Reliance was placed on the case of ***Booker Bus Service Company limited v. Stanbic Bank.***[5]She added that the appellant herein was guilty of wrongful conduct in the court below because its advocates amended the application ex-parte with full knowledge that the respondent was represented and his advocates appeared at all the hearings conducted in the court below together with the appellant's advocates. No inter- parte hearing date was endorsed on the ex-parte summons and Order.

Mrs. Chirwa further submitted that page 2 of the Supplementary Record of Appeal filed herein on 6th March, 2017 indicates that from the onset of the dispute, the respondent had informed the appellant of its choice of an Arbitrator. Exhibit SKR3 was the correspondence where the appellant herein was informed that since the Arbitration Clause or Arbitration agreement was silent on the number of Arbitrators, the default provision would apply and each party would therefore appoint one Arbitrator, and the two Arbitrators would thereafter appoint a third Arbitrator. The Respondent's advocates thereafter informed the appellant's advocates that since they had proposed in writing that a single Arbitrator adjudicates over the dispute, their proposal was that a Mr. Patrick Kapengele be appointed as such. She said that evidence was not contested in the court below. Therefore the respondent acted justly and was entitled

to costs of the appeal. She finally urged us to dismiss the appeal with costs.

We have considered the judgment appealed against, the rest of the record of appeal and the oral and written submissions made by both parties.

As regards the first ground of appeal, our views are as follows:
The learned trial judge was on firm ground when he found on page R5 that *"It is trite that since arbitration is a party driven process.....the respondent had an equal role in participating as to who was to take charge of the Arbitral proceedings and render a final Arbitral Award."*

"The appellant has complained that it has been condemned to pay costs in a legal contest in which it did not participate and they would like a determination on that point too."

The Judge was also right to reject the suggestion that the appeal was frivolous. He was on point when he held that "*....the fact that a different arbitrator has been appointed and agreed upon by the parties is demonstrative of the fact that the learned Deputy Registrar erred when he proceeded to appoint an Arbitrator ex-parte, without giving an opportunity to the respondent to be heard."*

The two issues which the learned trial Judge pointed out were not frivolous (trivial) but serious as they were to do with the right manner in which an arbitrator can be appointed and whether or not the costs order made by the Deputy Registrar was justified. It was

therefore expedient and in the interest of justice for him to hear and determine the appeal on its own merits instead of dismissing it forthrightly. It was important under the circumstances for the Judge to set aside the Deputy Registrars ex-parte order as he did because that order was improper. Furthermore there was no need to have two orders of appointment of arbitrators, one by the court and the other by the Chartered Institute of Arbitrators. The first ground of appeal therefore fails.

Coming to the second ground of appeal, we do not accept the appellants submission that the court below failed to view the litigation as a whole and that if he had done so he would have found that the respondent was reluctant to sign the Notice of Appointment of Dixon Bwalya as an arbitrator which notice was sent to them earlier by the appellant. The respondent'sfailure to sign the notice necessitated the proceedings in the court below. It was further submitted that the court would have also realized that there was no substantial recovery of any kind to warrant an award of costs in favour of the appellant who is now the respondent.

We are satisfied that the court below had considered the proceedings from inception up to the appeal before it, before it decided to award costs to the appellant who is now the respondent.In finding that there was everything wrong with the procedure adopted by the appellant in filing an ex-parte application, the court had examined the ex-parte Originating Summons and rightly found that it did not cite the particular section under the Arbitration Act No. 19 of 2000 nor under the Arbitration Rules of

2001 pursuant to which the ex-parte Originating Summons was made. Therefore the court was not satisfied that the Deputy Registrar was justified in appointing an arbitrator ex-parte.

The lower court had also applied case law to the facts of the matter before him. The cases he relied on were the ***Winnie Zaloumis case,*** [1] ***Shamwana v. Mwanawasa***[7] and ***Zambia Seed Company Limited v. Dawson Lupungu***[8] therefore the Judge had properly directed himself when he decided that the Deputy Registrar should have made the ex-parte application inter-parte especially that the respondent's advocates were on record.

Although the lower court did not look at the Arbitration Act No. 19 of 2000[1] to examine and interprete the provisions on appointment of an arbitrator, we shall refer to section 12 of that Act which gives guidelines in this respect.Section 12(2) provides that "***the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of subsection (5).***"

Subsection (3) provides "***failing such agreement –***

(b) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitration, the arbitrator shall be appointed, upon request of a party, by an arbitral institution.

(4) Where under an appointment procedure agreed upon by the parties –

(a) Aparty fails to act as required under such procedure; or

(b) The parties or two arbitrators, are unable to reach an agreement expected of them under such procedure or

(c) A third party, including an arbitral institution, fails to perform any functions entrusted to it under such procedure, any party may request the court to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on another arbitrator entrusted by subsection (3) or 4 to the court or to an arbitral institution shall not be subject to appeal."

In the present case, it is clear from the record that the arbitration clause was contained in paragraph 5 of the Agreement of Association exhibited as SKR 1 to an Affidavit in Opposition filed by the respondent (Ndilila Associates) in the court below and appearing on page 6 of the supplementary Record of Appeal filed herein on 6th March, 2017 and it reads:

> ***"5. This Agreement shall be governed by the Laws of Zambia. All disputes arising from this Agreement shall be finally settled by arbitration, governed by the Laws of Zambia."***

It is clear that the said Agreement did not provide for the procedure for appointing an arbitrator or arbitrators. The parties were therefore at liberty to agree on a procedure of appointing an arbitrator as they did but subject to the provisions of subsection 5 of Section 12 of the Arbitration Act. [1]

It is clear that whereas the appellant wanted Mr. Dixon Bwalya to be appointed, the other party wanted Mr. Patrick Kapengele to be appointed as such. In short, they had agreed to appoint a sole arbitrator but they were unable to agree on which one of the two.

Therefore section 12 (3) (b) of the Act [1] should have been invoked by the appellant who wanted to expedite the process. Instead of going to court when the respondent failed to sign the Notice to Concur in appointment of a single Arbitrator, the appellant should have straight away,requested the Zambia Institute of Arbitrators to appoint an arbitrator.

It is clear from subsection 4 of section 12 of the Arbitration Act[1] that any party may request the court to take the necessary measures only if a third party, including an arbitral institution, fails to perform any functions entrusted to it under such procedure and unless the agreement on the appointment procedure provides other means for securing the appointment. We therefore hold that the appellant breached section 12 (3) (b) and went to court prematurely. The respondent did not at all misconduct itself before and after the court case was instituted by the appellant.

The lower court's award of costs was supported by the cases of ***Booker Bus Service Company Limited v. Stanbic Zambia Limited, Emmanuel Mutale v. Zambia Consolidated Copper Mines Ltd and Order 62/3/3 of the White Book.***[2]

We therefore hold that indeed the Judge exercised his discretion in this regard judiciously. There was no need for him to consider whether the appellant had recovered nominal damages because it was not a case for damages.

It suffices in a case such as this, to just consider whether the successful party has done something wrong or brought about the litigation before reaching a decision on the issue of costs.

The second ground of appeal therefore also fails and we dismiss the appeal with costs.

Dated this ..30th.. day of ...June,... 2017

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J. CHASHI
COURT OF APPEAL JUDGE

....
M.M. KONDOLO, SC
COURT OF APPEAL JUDGE