IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 44 OF 2017**
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

BETWEEN:

NHA-MKP ESTATE DEVELOPMENT LIMITED **APPELLANT**

AND

WORKERS COMPENSATION FUND CONTROL BOARD **RESPONDENT**

Coram: ***Makungu, Mulongoti, Sichinga J.J.A***
On 1st August, 2017 and 2nd May, 2018

For the Appellant: Messrs M.R.N. Legal Practitioners
For the Respondent: Messrs Imasiku & Company

JUDGMENT

MAKUNGU, JA delivered the Judgment of the court.

Cases referred to:

1. *Bellamano v. Ligure Lombard Limited (1976) ZR 267*
2. *Konkola Copper Mines v. Copperfields (2010) ZR Vol. 3 156*
3. *Simbamayo Estates Limited v. Seyani Brothers Company Limited Misc Application No. 555 of 2002 of the Republic of Uganda*
4. *Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited (1915) AC 79*
5. *Watts, Watts and Company v. Mitsui (1917) AC 227*
6. *Scandinavian Trading v. Flota Equatoriana (1983) 2 AC 694,702*
7. *Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172*
8. *Zimbabwe Electricity Supply Authority v. Maposa (1992) 2 ZLR 452*

9. *Zambia Revenue Authority v. Tiger Limited and Zambia Development Agency - Selected Judgment No. 11 of 2006*

Legislation referred to:

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

Other authorities referred to:

1. *Law Relating to Arbitration and Conciliation PC Markanda, Narresh Markanda and Rafesh Markanda (2001) 4th edition Page 435 Wadhwa, 2001.*
2. *Mustill and Boyd: Commercial Arbitration 2nd Edition at page 641 (1989) – class.c. standard work.*
3. *Chitty on Contracts Volume 1 General Principles, (1994) 27th edition, Sweet and Maxwell.*

This is an appeal against the High Court Judgment delivered on 27th December, 2016 refusing to partially set aside an arbitral award given by the arbitrator, Dr. Sylvester Mashamba on 19th December, 2015. The appellant had, in the court below, filed an Originating Summons on 11th February, 2016 setting out the following claims:

1. *The provision for liquidated and ascertained damages pursuant to the terms of the Construction and Sale Agreement signed by the parties on 18th May, 2011 be set aside.*
2. *The finding by the arbitrator that the said agreement included a contractual obligation on the applicant to construct roads and connect water and electricity installations to the*

four housing units, is mistaken, perverse and ultra vires the powers of the arbitrator and therefore should be set aside.

3. *That the costs of these proceedings and the arbitration proceedings be borne by the respondent.*

In this Judgment, we shall refer to the appellant as the applicant and the respondent as such as they were in the Court below. The applicant commenced an arbitration for recovery of K2,363, 178.31 from the respondent which amount was subject of an interim progress claim issued pursuant to clause 11 of the said agreement. Upon receipt of the interim progress claim, the respondent withheld the payment on the ground that the applicant had not delivered the forty housing units complete with bulk services in time. The bulk services referred to were water sewerage, electricity and roads. The respondent counter claimed, among other things, damages for breach of contract, payment of lost rental income, interest thereon and costs of the arbitration.

The arbitrator awarded the applicant K2,363,178.31 with simple interest from the date the payment was due until full settlement. The respondent was also awarded damages for loss of business resulting from the fact that the respondent was unable to take vacant possession of the said forty housing units with bulk services. The award went on to state that the rentals were to be calculated as stipulated in the Appendix of the Articles of Agreement and varied and taxed by the arbitrator, after submission of the detailed claim by the respondent. It was further ordered by the arbitrator that each party should bear its

own legal bills, including costs incidental to the arbitration tribunal.

In her judgment, the learned trial judge first and foremost noted that in the Motion the applicant did not refer to any section of the Arbitration Act [1] upon which the application was based. She proceeded to refer to the case of ***Bellamano v. Ligure Lombard Limited*** [1] to support her finding that the Motion was defective and that it is an irregularity that the courts frown upon.

The learned Judge went on to state that since the applicant had not produced the "Submission Agreement" she was unable to determine whether or not the arbitrator had exceeded the scope of his mandate to justify a portion of his award being set aside. The court was also of the view that since the applicant had made submissions on the merits of the award, it was in essence requesting for a review of the award. She found that untenable on the authority of ***Konkola Copper Mines v. Copperfields.*** [2] In conclusion, she decided that the applicant had not met the requirements for setting aside the award pursuant to Section 17 of the Arbitration Act. [1] She therefore dismissed the application for lack of merit and ordered that costs should follow the event.

We note that in the Memorandum of Appeal there are four grounds couched as follows:

1. *The learned judge misdirected herself when she adjudged that there were no facts on record to enable her ascertain*

whether the arbitrator had exceeded the scope of his authority.

2. *The learned Judge abdicated her responsibility as a Judge when she declined to adjudicate on the consequences of the arbitrator's award of damages to the respondent which was based on rights and obligations not provided for in the Construction and Sale Agreement dated 18th May, 2011 between the appellant and the respondent.*
3. *The learned Judge misdirected herself when she adjudged that the appellant was seeking to re-open the case and review the arbitrator's decision.*
4. *The learned Judge misdirected herself when she adjudged that the appellant's application to partially set aside the arbitral award is an appeal against the award.*

However, in the Heads of Argument the appellant has only argued the first and second ground. We have therefore, taken it that grounds 3 and 4 have been abandoned and we have accordingly not considered them. The appellant paraphrased the second ground to read as follows:

> *"The learned Judge abdicated her responsibility when she declined or did not adjudicate on the consequences of the Arbitrator's award of damages for non-completion."*

According to the appellant's written Heads of Argument filed herein on 5th May, 2017, on the first ground, it was submitted that in order to determine what the arbitrator's mandate was, it was open to the trial judge to peruse the "Award" which defines

the dispute and jurisdiction of the arbitrator and to look at the pleadings and all attendant documents which were filed in support of the application to set aside the arbitral award. The appellant relied on the Ugandan case of ***Simbamayo Estates Limited v. Seyani Brothers Company Limited*** [3] where Judge M.S. Arach – Amoko in determining the scope of the Arbitrator's authority referred to the text book ***"Law Relating to Arbitration and Conciliation"***[1] at page 435 where the authors state that:

> ***"In order to ascertain what the jurisdiction of the arbitrator is, it is open to the court to see what dispute was submitted to him. If that is not clear from the award, it is open to the court to have recourse to outside sources. The court can look at the affidavits and pleadings of the parties; the court can look at the agreement itself."***

In light of the foregoing, counsel stated that in *casu;* the issues determined by the arbitrator were, firstly, whether the respondent was justified in withholding a progress claim for K2, 368,178.31 issued pursuant to the provisions of the Construction and Sale Agreement, which appears on pages 62 to 111 of the record of appeal, on the ground that the appellant had allegedly failed to deliver the forty housing units it was contracted to build. Secondly, whether the agreement entitles the respondent to liquidated and ascertained damages for the appellant's alleged failure to construct roads, connect water and sewerage facilities (bulk services) to the forty housing units.

It was submitted further that the arbitrator erred by not restricting himself to the specific terms of the agreement regarding the obligations of the appellant. That there was already a value of K20,000,000.00 on the contractual works which the architect for the project testified did not include bulk services. Counsel for the appellant pointed out that, on page 48 of the record lines 20 to 26 the architect testified that the contract between the parties did not contain a bill of quantities and when submitting progress claims for payment, the appellant was using a schedule of materials. That the usual practice in construction contracts is to issue a bill of quantities. The schedule of materials on pages 97 – 111 of the record of appeal does not contain materials for provision of water, electricity and road construction to the forty housing units. It was further deposed in paragraph 11 of the affidavit in lines number 3 to 10 that out of the K20,000,000.00 contract sum, the appellant has by way of submission of progress claims based on work done, received a total of K15,915,107.66 leaving a balance of K4,084,892.34 (page 26 of the record).

In developing his arguments, it was submitted that the question that begs the determination of this court is whether it was competent for the arbitrator to firstly order that the agreement between the parties included bulk services and secondly whether by implication, the appellant should provide the said bulk services from the original contract sum of K20,000,000.00 which was almost depleted. He pointed out that on page 310 lines 22 to 27 of the record which is page 13 of the award, the arbitrator made the following findings:

"....it is my finding and decision that the parties had agreed to have bulk services on site as part of their original signed contracts i.e. costs included in the original construction sum. However, when the service providers failed to do so for various unknown reasons, and the project delivery date could not seemingly be met, the claimant tried to vary the contract to provide for the respondent to take responsibility of financing for bulk services, a variation order proposal that was rejected."

It was argued that this finding was perverse as it is not in accordance with the provisions of the signed agreement. It was further submitted that the arbitral tribunal was only mandated to decide rights and obligations which are provided for in the contract and any decision to the contrary was *ultra vires*. He further submitted that as regards the duty of an arbitral tribunal, the authors of ***"Law Relating to Arbitration and Conciliation"*** [(1)] *cite* ***Mustill and Boyd's Commercial Arbitration 2nd Edition at page 641*** [(2)] where it is stated that:

"An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Act which embodies the principles derived from a specialised branch of law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from the contract amounts to not only a manifest

disregard of his authority or misconduct on his part but it may be tantamount to a mala fide action."

In light of the foregoing, he submitted that the decision of the arbitrator should have been limited to whether or not the contract as drafted, did in fact provide for construction of roads, provision of water and electricity. Further that, it is important to appreciate that any additional works over and above what was already provided for in the agreement would come at an additional cost and is a matter for agreement between the parties on how to proceed with the project.

In addition, counsel stated that it was not the arbitrator's duty to vary the terms of the Construction and Sale Agreement by imposing obligations on one party which were not originally provided for. The said terms implied by the Arbitrator, in fact created obligations on the appellant which are normally provided by third parties and attract their own charges. Therefore, the arbitrator was in violation of ***Section 17(2) (a) (iii) of the Arbitration Act*** [1] and on this basis the Arbitral award ought to be set aside.

As regards the second ground, learned counsel for the appellant submitted that the argument in the court below and before this court is that clause 22 of the Construction and Sale Agreement on page 203 of the record, read with the appendix to the agreement shown on page 217 is penal in nature. That Charles

Victor Holland on behalf of the appellant deposed under paragraph 16 on page 28 of the record that the said provisions for liquidated and ascertained damages do not represent a legitimate pre-estimate of any loss likely to be suffered by the respondent for breach of the agreement. That clause 22 should be considered as at the time the contract was drafted and signed rather than from the time of the alleged breach as found by the arbitrator.

It was also argued that on the basis of the contract and without delving into the merits of the case before the arbitrator, the contractual provision which provides for damages in the event of "non-completion" would entitle the respondent to an award of rentals in perpetuity (as awarded by the arbitrator) as the contract does not provide for constructing houses which are ready for habitation. Reliance was placed on the arguments filed in the court below in support of the application to set aside the award of damages on pages 353 to 358 of the record of appeal and ***Chitty on Contracts Volume 1 General Principles*** [3] and the case of ***Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited.*** [4]

The appellant's counsel also reiterated his submissions before the arbitrator on penal contractual provisions which are on pages 286 to 288 of the record of appeal. The gist thereof being that the English cases of ***Watts, Watts and Company v. Mitsui*** [5] and ***Scandinavian Trading v. Flota Equatoriana*** [6] are instructive on the consideration of whether a contractual provision clothed as damages is a penalty clause or indeed genuine damages.

He also referred to the case of ***Wilson Masauso Zulu v. Avondale Housing Project Limited*** [7] where the Supreme Court held that:

> ***"The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality."***

It was further submitted that the aspect of whether the damages awarded by the arbitrator were indeed damages or penalties ought to have been adjudicated upon by the Judge. That the enforcement of penal provisions is contrary to public policy and therefore in violation of ***Section 17 (2) (b) (ii) of the Arbitration Act.*** [1] In this regard, it was stated that the award of damages pursuant to clause 22 of the Construction and Sale Agreement which obliges the appellant to pay rentals for houses which are not capable of being rented out when complete as per contractual specifications must certainly be contrary to public policy. These damages as awarded continue to accrue until the appellant performs the obligations imposed on them. As to what constitutes public policy, he referred us to the Zimbabwean case of ***Zimbabwe Electricity Authority v. Genius Joel Maposa*** [8] where the Supreme Court said as follows:

> ***"Where an award is based on so fundamental an error as in this case that it constitutes a palpable inequity that was so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that***

the conception of justice in Zimbabwe would intolerably be hurt by the award then it should be contrary to public policy to uphold it."

In that case, the Zimbabwean Supreme Court held that the award was contrary to public policy under the Model Law Article 34(2)(b)(ii) which is couched in exactly the same words as Section 17(2)(b)(ii) of the Zambian Arbitration Act. (1)

He stated in addition, that while the appellant as a contractor is expected to use its own money, as opposed to getting funding from the respondent which is its employer, for construction of bulk services, it is expected to pay damages for non-completion until the said bulk services are provided. He prayed that the whole judgment of the High Court be overturned with costs and the portion of the arbitral award relating to an award of damages to the respondent be set aside.

In response to the appellant's submissions on both grounds of appeal, the learned respondent's counsel in his written Heads of Argument filed herein on 27th July, 2017 stated that the circumstances under which an aggrieved party can apply to set aside an arbitral award are stated in ***Section 17 of the Arbitration Act*** *(1)* which provides as follows:

"17(1) Recourse to a court against an arbitral award may be made only by application for setting aside in accordance with subsections (2) and (3) -

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

(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 arbitrator 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 decisions 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.

(iii) The making of the award was induced or affected by fraud, corruption or misrepresentation."

Counsel referred to the case of ***Zambia Revenue Authority v. Tiger Limited and Zambia Development Agency*** [9] wherein the Supreme Court interpreted the said Section as follows:

> ***"What can be discerned from the foregoing Section is that there are two sets of grounds upon which an award may be set aside. These are the ones under Section 17(2) (a) from (i) to (v) and those under Section 17 (2) (b) from (i) to (iii). The threshold that a party must attain in those under Section 17(2) (a) in order for a court to set aside an award is that he has to furnish proof that the circumstances contained in the grounds exist. This can be discerned from the wording of Section 17 (2) (a) which states as follows:***

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

(a) the party making the application furnishes proof that ....”

On the other hand, the threshold for those grounds under Section 17(2) (b) is a finding by the court that the award is caught up in one of those three grounds under (i) to (iii) of the subsection. This can be discerned from the portion of the subsection which states as follows:

“An Arbitral award may be set aside by the court only if-

(b)...the court finds that...”

It was argued further that this appeal is wrongly before court as the law proscribes appeals disguised as applications to set aside arbitral awards. He stated that this case does not fall under Section 17 of the Arbitration Act No. 19 of 2000. [1] He therefore prayed that it be dismissed with costs.

We have carefully considered the record of appeal, and written submissions made by both advocates. The two grounds of appeal are interrelated therefore, we shall deal with them concurrently.

In the court below, the appellant did not specify the Section of the Arbitration Act [1] relied upon. However, it can be discerned from the affidavits filed in the court below and the arguments

made before us that the appellant is relying on Section 17 (2) (a) (iii) and (b) (ii) of the Act.

Section 17 (2)(a)(iii) talks about the award dealing with a dispute not contemplated by, or not falling within ***the terms of the submission to arbitration*** or containing decisions on matters beyond the scope of the ***submission to arbitration***. (Underlining is ours for emphasis only). The trial judge held on page 11 of her judgment in paragraph 4 that:

> ***"The applicant did not produce the submission agreement, an omission that deprives the court of an opportunity to ascertain the terms of the party's agreement and of the Arbitrator's mandate. This court is therefore unable to come to a determination as to whether or not the arbitrator exceeded the scope of his mandate to justify a portion of his award being set aside."***

Section 23 (1) (2) *and* ***(3) of the Arbitration (Court Proceedings) Rules, 2001*** [2] on setting aside an award provides as follows:

"23. (1) An application, under section seventeen of the Act, to set aside an award shall be made by originating summons to a Judge of the High Court.

(2) The application referred to in sub-rule (1) shall be supported by an affidavit -

(a) exhibiting the original award or a certified copy thereof;

(b) exhibiting the original arbitration agreement or duly certified copy thereof;

(c) stating to the best of the knowledge and belief of the deponent, the facts relied upon in support of the application; and

(d) stating the date of receipt of the award by the party applying to set aside the award.

(3) The affidavit shall be accompanied by such other evidence with respect to the matters referred to in subsection (2) of section seventeen of the Act, as may be necessary to support the application."

It is therefore imperative that an applicant relying on any part of Section 17 of the Arbitration Act exhibits the submission to arbitration in accordance with the said Section 23 (1) (b) of the Arbitration (Court Proceedings) Rules, 2001.

However, the appellant's counsel is correct to assert that in order to ascertain the jurisdiction of an arbitrator, it is open to the court to look at the award itself and the affidavits and pleadings of the parties if the submission to arbitration is not available as stated in the book entitled '***Law Relating to Arbitration and Conciliation.***' [1] We are of the view that the case of ***Simbamayo Estates Limited v. Seyani Brothers Limited*** [3] is not binding upon us and we shall not apply it to this case because it is a judgment made by the **High Court** of Uganda, notwithstanding that Uganda and Zambia have similar arbitration laws based on

the United Nations Commission on International Trade Law (UNICITRAL) Model Law.

In light of the foregoing, the trial Judge should have considered the Award, the affidavits and pleadings before her in order to ascertain the arbitrator's mandate.

We are of the considered view that the arbitral tribunal's mandate was clearly stipulated in the pleadings and the Award. We note that in paragraph 4.0 of the Award on page 9 i.e. page 306 of the record of appeal, the arbitrator set out the issues in contention between the parties as follows:

a. ***Whether the signed Construction and Sale Agreement included or were meant to include bulk services on site i.e. water, sewerage, electricity and roads and who was meant to finance these services?***
b. ***Whether the refusal by the Respondent to honour the duly signed Progressive (Interim) Certificate by the architect constituted a serious breach of the contract to warrant damages as sought by the parties otherwise provided for in the contract or not.***
c. ***Whether the parties are entitled to the claims and reliefs which they have claimed and counter claimed.***

The appellant's advocate in his heads of argument has confirmed that these were the issues between the parties in the arbitration proceedings. A perusal of the statement of claim and defence which were before the arbitrator and which were exhibited in the affidavit in support of the Originating Summons appearing on pages 23 to 38 of the record of appeal indicates that the arbitrator had confined his decision to the pleadings before him.

In the heads of argument, the appellant raised the question whether the arbitrator exceeded his authority when interpreting the Construction and Sale Agreement appearing on pages 203 – 217 of the record of appeal. We have observed that in construing the Construction and Sale Agreement, on the second page of the Award at paragraph 5, the arbitrator stated that:

"unfortunately, it is not very clear from the signed Construction and Sale Agreement whether the provision of bulk services is part and parcel of the said Agreement. The ambiguity above, is not helped by the fact that although the signed contract through the Articles of Agreement under the Standard Form of Building Contract (private edition with quantities) 1970 edition revised in 1972 issued by the Zambia Institute of Architects states that this form of contract should be accompanied by a Bill of Quantities (BOQ), however there were no BOQ used in this contract but instead a schedule of materials was used."

"In the absence of a period BOQ, (clearly itemizing each and every item in the construction contract) the question to be answered in this arbitral tribunal is whether the provision of bulk services to the said forty (40) houses were meant or implied to be part and parcel of the signed contract."

We note that in his summary of findings on page 316 of the Record of Appeal which is page 19 of the Award, the arbitrator stated *inter alia* that:

"7.1 *It is my FINDING and DECISION that the parties had agreed to have bulk services on site financed from the original K20, 000, 000.00 contract sum as part of their original signed contract."*

"7.4 Following from 7.1 above, it is my DETERMINATION that the respondent is entitled to damages, for loss of business/profit, resulting from his not taking vacant possession of the said forty (40) houses with bulk services. The rentals will be calculated as stipulated in the Appendix of the Articles of Agreement ...."

A reading of paragraph 6.2.6 of the Award on page 308 of the record shows that the arbitrator implied the term that bulk services were to be provided by the contractor from the original contract price. The said paragraph reads:

"If indeed the inclusion and costings of bulk services on site to be borne by the respondent were only subsequently presented to the respondent as a variation order, it would

support the argument by the respondent that bulk services were initially meant to be part and parcel of the original signed contract, otherwise why vary the original contract? The above argument is further supported by the claimant's own witness (CW1 Mr. Holland) who in a letter dated 4th April, 2012, wrote to the respondent's Chief Executive Officer (page 61 of the claimant's bundle):

As we advised in our letter to you dated 28th February, 2012, it is not abnormal or indeed strange within the industry to REVISIT contract conditions where the parties find that there are certain circumstances that may impede delivery of the project in accordance with the signed contract."

It is therefore clear that according to the arbitral tribunal, the contract sum includes the costs of bulk services. We reject the appellant's submission that the schedule of materials on pages 97-111 of the record of appeal does not contain materials for provision of water and electricity because a reading of the list of materials shows "Plumbing" and "Electrical" as items 7 and 11 respectively.

Having scrutinized the Construction and Sale Agreement, we are of the view that in its findings, the arbitral tribunal did not depart from it or alter the terms and conditions thereof as alleged by the appellant. It was within the arbitrator's jurisdiction to determine the matter in the manner that he did.

It is clear from the judgment of the lower court that the court did not adjudicate on the issue of the arbitral award of damages for non-completion, because the law proscribes reviewing arbitral awards. The court relied on the case of ***Konkola Copper Mines v. Copper Fields*** [2] where it was held *inter alia* that:

> ***"An application to set aside an award is not intended for the court to review the award of the tribunal or indeed conduct a hearing akin to an appeal."***

The court was therefore on firm ground.

In this appeal, the appellant's arguments against the Award of damages are based on the merits of the case that was before the arbitral tribunal. We must point out that the damages awarded to the respondent were based on Clause 22 of the Articles of Agreement between the parties at page 203 of the record of appeal which provides:

> ***"If the Contractor fails to complete the Works by the Date for Completion stated in the appendix to these Conditions or within any extended time fixed under clause 23 or clause 33 (1) (c) of these Conditions and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the said appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct***

such sum from any monies due or to become due to the Contractor under this Contract."

We therefore are of the like mind as the lower court not to review the Award or take this as an appeal against the Award.

Considering the case of ***Zambia Revenue Authority v. Tiger Limited*** [9] with regard to the definition of public policy, we are of the view that an arbitral award or part thereof can only be set aside on the ground that it is in conflict with public policy if it is apparent that the award would result in gross injustice. In *casu*, the Award is not in conflict with public policy as defined.

For the foregoing reasons, the entire appeal lacks merit and is accordingly dismissed. Each party shall bear its own costs.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE