IN THE HIGH COURT FOR ZAMBIA **2018/HKC/0007**

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(Commercial Jurisdiction)

IN THE MATTER OF:	**SECTION 17(2) OF THE ARBITRATION ACT NO. 19 OF 2000**
AND	
IN THE MATTER OF:	**THE ARBITRATION (COURT PROCEEDINS) RULES STATUTORY INSTRUMENT NO. 75 OF 2001**

BETWEEN:

NATIONAL PENSION SCHEME AUTHORITY **APPLICANT**

AND

SHERWOOD GREENE LIMITED **RESPONDENT**

Before Lady Justice B G Shonga this 2nd day of August, 2018

For the Applicant, Mr. E.C Banda (SC), Ms. G. Kumwenda, Mr. T Chibeleka, Messrs. ECB Legal Practitioners

For the Respondent, Mr. W. Banda, Messrs. Wilson & Cornhill

JUDGMENT

CASES REFERRED TO:

1. ***Zambia Telecommunications Co. Limited vs. Celtel (Z) Ltd SCZ Judgment No. 96 of 2006;***

2. ***Mpulungu Harbour Management Ltd. Vs. Attorney General & Mpulungu Harbour Corporation Ltd 2010/HPC/ARB/0589;***
3. ***Metropolitan Properties Co. (F.G.C) Limited v Lannon 1969 1 Q.B 577;***
4. ***Konkola Copper Mines Plc vs. Copperfields Mining Services Limited (2010) ZR Vol. 3, 156;***
5. ***Porter and Another vs. Magill (2002) ALLER 465;***
6. ***R vs. Gough (1993) 2 ALL ER 724;***
7. ***China Henan International Corporation Group Company Limited vs. G & G. Nationwide (Z) Limited, Appeal No.99/2016/SCZ/8/242/2016;***
8. ***Zimbabwe Electricity Supply Authority vs. Maposa, (1992) 2ZLR 452;***
9. ***Fratelli Locci SRI Estrazion Minerarie vs. Road Development Agency, 2016/HC/ARB/0493;***
10. ***Light Weight Body Armour Vs. Sri Lanka Army, (2007) Sri LR, 412***

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. ***section 17, Arbitration Act No. 19 of 2001;***
2. ***Redfern & Hunter on International Arbitration, 5th edition, 2009;***
3. ***Rule 2 (1) of the Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007;***
4. ***Articles 12 and 13, UNCITRAL Model Law, First Schedule, Arbitration Act, No. 19 of 2001;***
5. ***section 2(3), Arbitration Act No. 19 of 2001;***
6. ***Articles 33 of the First Schedule, UNCITRAL Model Law, First Schedule, Arbitration Act, No. 19 of 2001;***

7. Rules 23 and 24, Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007

This is an application by the Applicant seeking an Order setting aside a Final Arbitration Award dated 30th December 2017, postulating that the award conflicts with public policy.

The application is made by dint of an Originating Summons, filed together with an Affidavit in Support on 31st January 2018. The legal arguments in support are presented in the Applicant's Skeleton Arguments and List of Authorities filed on 14th March 2018.

The Respondent stands in opposition, presented through an Affidavit in Opposition filed on 12th February 2018 and Skeleton Arguments filed on 22nd February 2018.

The legal arguments before Court are made on the backdrop of the following agreed facts, which I have gleaned from the Affidavit evidence on record. That is, that the Applicant and Respondent enjoyed a contractual relationship evolving from a Sales Agency Agreement dated 24th February 2014.

Under the Sales Agreement, the Applicant appointed the Respondent as it Sales Agent for a term of thirty-six (36) calendar months in respect of the sale of the Applicant's Kalulushi Housing Units.

Germane to these proceedings are clauses 3.1 and 6.5 of the Sales Agreement. Clause 3.1 reads as follows:

> *"The Owner hereby appoints the Sales Agent, which hereby accepts the appointment, to professionally, effectively, and efficiently sell the housing units as set out in this Agreement at the agreement price of Two Percent (2%) of the gross sale price of each housing unit."*

Clause 6.5.1.1 reads:

> *"As remuneration for its services, the Agent will be paid ... 2% of sale price on all property sold."*

Clause 20 of the Arbitration Agreement contained an arbitration clause that directed the submission of a dispute arising in relation to, *inter alia*, the interpretation of the Agreement to arbitration.

By the expiry of the term, the Respondent had invoiced a 2% commission on the gross sale value of all the units, whether sold, in progress or unsold, together with other expenses incurred. The Applicant rejected the claim on the basis that in terms of clause

6.5.1.1 of the Agreement, the Respondent was entitled to a commission on units whose sale had been concluded.

A dispute ensued relating to the interpretation of the Agreement respecting the Respondent's remuneration and reimbursement of expenses. The dispute was referred to arbitration.

The arbitral proceedings were conducted by a sole arbitrator, Mrs. Abha Patel (SC), who was appointed by the Court, on the recommendation of the Respondent, in proceedings instituted by the Respondent. The Affidavit evidence reveals that the Applicant did not oppose the application for the appointment of Mrs Patel.

The arbitral proceedings yielded an Award dated 30th December 2017, the subject of these proceedings.

The facts in contention, which inspire this application, sprout from the deposition by the affiant of the Affidavit in Support that the Arbitrator, before accepting the appointment as Arbitrator, omitted to disclose that her firm represented the Applicant in this matter, in a matter that was before the High Court in Ndola. The Respondent

on the other hand contends that disclosure was made, albeit at the instance of the Applicant.

Paragraph 8 (a) of the Final Award reveals that at the Preliminary Meeting, Counsel for the Applicant espied that the Firm of Abha Patel & Associates was representing the Applicant in the High Court at Ndola and that the Arbitral Tribunal was invited to address the issue.

Paragraph 8 (b) of the Award, as read with Heading 3.00 in the Order for Directions No. 1 of the Arbitral Proceedings, discloses that the Arbitral Tribunal, in heeding the invitation to comment, confirmed the existence of a relationship but took the view that there were no issues of conflict which would sway or otherwise detract from her impartiality because the High Court matter was being handled by an Associate of the Firm and the matter had no nexus or relationship with the dispute.

Paragraph 8 (b) of the Final Award also shows that the Arbitral Tribunal progressed to conduct the arbitral proceedings on the basis that there were no issues of conflict nor any challenge raised by the Applicant.

Turning back to the application, the Applicant anchored it on ***section 17 of the Arbitration Act No. 19 of 2001*** (the "Act") which lays down the grounds on which an award passed by the arbitral tribunal can be set aside. My attention was drawn to section 17 (2) (b)(ii) which states that an arbitral award may be set aside by the court if the court finds that the award conflicts with public policy.

Aside its reference to section 17, the Applicant's Skeleton Arguments prologue by highlighting the erudition of the learned authors of ***Redfern & Hunter on International Arbitration, 5th edition, 2009,*** that particularly for states that have adopted the UNCITRAL Model Law, an arbitral award may be set aside if a national court of the place of arbitration finds that the award conflicts with the public policy of its own country.

In terms of sagacity on whether the conduct of an Arbitrator could validate the setting aside of an award as being offensive to public policy, reliance was placed on the case of ***Zambia Telecommunications Co. Limited vs. Celtel (Z) Ltd SCZ Judgment No. 96 of 2006[1],*** which was

an appeal against a High Court decision setting aside an arbitral award made by an Arbitral Tribunal.

In that case, the Supreme Court had occasion to consider whether the failure by the Chairman of the Arbitral Tribunal to disclose his interest in another matter rendered the Arbitral Award issued by the Arbitral Tribunal in conflict with public policy. The interest that was not disclosed prior to awarding the Award was that the Chairman had accepted an appointment to serve as a member of another tribunal at the request of the advocate of one of the parties to the arbitral proceedings before the Arbitral Tribunal.

In upholding the decision of the High Court, the Supreme Court found it to be public policy that a person ought to be tried by an impartial tribunal. Attendant to that, the Supreme Court posited as follows:

> *"In this case the learned Chairman's involvement in this case without disclosing his interest in the other arbitral proceedings could easily be perceived as being contrary to public policy because the perceptions from the objective test, would have been that a likelihood of bias or possible conflict of interest could not be ruled out."*

The Applicant also drew the Courts attention to the case of ***Mpulungu Harbour Management Ltd. Vs. Attorney General & Mpulungu Harbour Corporation Ltd***[2] which made a nexus between the existence of a conflict of interest and an award being inconsistent with public policy. In that matter, Dr. P Matibini, the Speaker of the National Assembly, accepted an appointment as Presiding Arbitrator in an arbitration where the Government was a party. The Court took the position that notwithstanding the public notoriety that Dr Matibini was Speaker of the National Assembly, the issue was non-disclosure in respect of the potential conflict of interest that Dr Matibini was exposed to in view of his position as Speaker, the head of a wing of Government. Consequently, the Court held as follows:

> *"The failure on the part of Dr. Matibini obviously leads to the perception rightly or wrongly that the Award was biased. The Speaker of the National Assembly sitting as Presiding Arbitrator in a compensation claim in which Government is a Respondent and interested in the outcome would not only raise one but both eyebrows"*

The Court also addressed its mind to a contention that the failure by a party to raise a timely objection in accordance with Article 12 (2) and Article 13 of the First Schedule to the Act yielded a waiver of any irregularity. The Court stated that:

"... the duty to disclose was not a mere regulation but a mandatory statutory requirement. Therefore, the Applicant could only be said to have waived its rights if there had been appropriate disclosure on the part of Dr. Matibini as was required of him under The Arbitration (Code of Conduct and Standards) Regulations and the Applicant then had raised no objection and had desired that the Tribunal proceedings continues, then the Applicant can be said to have waived its right and cannot subsequently be heard to complain that the matter disclosed gives rise to a real danger of bias. The issue of waiver cannot arise here, in the absence of disclosure by the Arbitrator as required of him by law."

The Court was also invited to consider ***Rule 2 (1) of the Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007*** (the "Regulations"). Rule 2 (1) places a continuing obligation on an Arbitrator to disclose, at the earliest opportunity any prior interest or relationship that may affect impartiality and or independence or which might reasonably raise doubts as to the arbitral proceedings.

The submission was reinforced by reference to the case of ***Metropolitan Properties Co. (F.G.C) Limited v Lannon 1969 1 Q.B 577***[3] where Lord Denning, in considering whether there was a likelihood of bias, explicated that the Court looked at the impression which would be given to other people even if the person sitting in the judicial capacity was as impartial as could be. Lord Denning pronounced as follows:

> *"No man can be an Advocate for or against a party in one proceeding and at the same time sit as a Judge of that party in another proceeding"*

Having set the legal milieu upon which it relies, the Applicant submitted that the existence of a prior relationship between the Arbitrator's Firm and a party to the arbitral proceedings, albeit in other proceedings, creates an inescapable impression of bias or conflict of interest in the minds of an ordinary person. Consequently, the Applicant contends that the Arbitrator ought not to have served as Arbitrator.

In summation, the Applicant urges the Court to find that the failure by the Arbitrator to disclose a potential conflict of interest, coupled with the failure to withdraw from the proceedings renders the award contrary to public policy.

The Respondent stalwartly opposed the application by advancing a bouquet of arguments. Firstly, the Respondent contended that conflict of interest and perception of bias is not a ground for impugning an Award under section 17 of the Arbitration Act. The contention was made on the strength of the case ***Konkola Copper Mines Plc vs. Copperfields Mining Services Limited (2010) ZR Vol. 3, 156***[4], where my learned elder brother, Judge Mutuna, sitting as a High Court Judge, held that a challenge relating to the independence and impartiality of arbitration was not a ground for setting aside an award.

Although the Respondent conceded that disclosure of interest was a mandatory requirement under the Regulations, it took the view that arbitral proceedings could proceed by consent of the parties,

notwithstanding a perceivable conflict of interest. The Respondent argued that, *in casu,* the parties were satisfied that there was no conflict, the satisfaction being ostensibly evidenced by the participation of the Applicant in the proceedings.

With respect to bias, the Respondents mooted the application of the objective test for determining the existence of bias. Reliance was placed on the English case of ***Porter and Another vs. Magill (2002) ALLER 465***[5] where the Court alluded to:

> *"... a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

Further reliance was placed on the case of ***R vs. Gough (1993) 2 ALL ER 724***[6] in which the Court, in propagating the test as one which looks through the eyes of a reasonable man culled the possibility rather than the probability of bias as the indicator which required the Court's consideration. Consequently, the Respondent intriguingly questioned whether the possibility of bias against the Applicant could

exist in the circumstance where the client-advocate relationship existed between the arbitrator and the Applicant.

Additionally, the Respondent illumed that the Regulations prescribed a mechanism for making allegations of non-compliance with the Regulations and that there was no evidence before Court to show that the Applicant had utilized the set procedure. I took the argument to suggest that by not utilizing the prescribed procedure for challenging the Arbitrators' alleged misconduct, the Applicant could not use the said alleged misconduct to impugn the Award under section 17 of the Arbitration Act.

On the credence of the Supreme Court case of ***China Henan International Corporation Group Company Limited vs. G & G. Nationwide (Z) Limited***[7], the Respondent proffered the argument that the Regulations can only be resorted to where the UNICITRAL Model Law, which is housed in the First Schedule to the Arbitration Act, and/or the Arbitration Act did not make provision. To that end, the Respondent reproduced Article 13 of the Model Law which speaks to the procedure for challenging an arbitrator. I will not reproduce the

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Article, suffice to note that the Article gives an aggrieved party a period of fifteen days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of circumstances referred to in Article 12 (2), to initiate the challenge procedures.

Article 12 (2) sets the grounds for challenge and reads, in part, as follows:

> *"An arbitrator may be challenged only if circumstance exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."*

My attention was also drawn to Article 12 (1) which places a continuing obligation on an Arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence by stating:

> *"When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him." (Court emphasis)*

Returning to the Respondent's argument, I took the liberty to examine the cited case of ***China Henan International vs. G & G. Nationwide (Z) Limited.*** The Judgment gives an indispensable insight into the history and status of the Zambian Arbitration Law. Consequently, I will refer to and quote from it *in extensio.*

In that case, the Supreme had occasion to illuminate the relationship between the Arbitration Act and the UNCITRAL Model Law.

The Court explained that when the Arbitration Act, Chapter 40 of the Laws of Zambia was repealed and replaced by the existing Arbitration Act, Zambia adopted the Model Law with modifications which are contained in the sections in the Arbitration Act. Resultantly, the Court acknowledged that sections in the Arbitration Act varied the application of the Model Law by substituting certain Articles in the Model Law with the sections in the Arbitration Act. The Supreme Court guided that the articles of the Model Law that are not applicable to Zambia are clearly indicated as *"modified by"* specified sections of the Act.

Having explained the foregoing, the Court went on to pronounce that the current Zambian Arbitration Law was in effect the Model Law and directed as follows:

> *"... in applying the Arbitration Act one must at all times look at the First Schedule, first, and only where a particular Article is not applicable, should one resort to the section in the Act that has modified the Article.*

Turning back to the Respondent's contentions, it was averred that the Applicant's omission in challenging the arbitrator in accordance with Article 13, coupled with their willing participation in the arbitral proceedings rendered the application to set aside the award to an afterthought.

I have considered the affidavit evidence and arguments tendered by counsel. The industry and ingenuity employed by counsel to articulate their arguments disencumbered my consideration of this matter which is evidently fraught with complexity. For that, I express immense gratitude.

Before turning to the substantive determination, I take pause to assure the parties that I stand quite clear eyed on the Court's

obligation under ***section 2(3) of the Act*** to have regard to the desirability of achieving international uniformity in the interpretation of the Model Law.

I now turn to the merits of this application. To begin with, I observed that the Respondent took considerable effort to demonstrate that the neither actual nor perceived impartiality was a ground for setting aside an award. To this end I examined section 17 of the Arbitration Act and will give it granular attention to achieve intelligibility.

Section 17 (1) of the Act reads as follows:

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

I have indubitably understood section 17 (1) to provide one remedy against an arbitral award, namely, an application to a court for setting aside in accordance with subsections (2) and (3). This means that it is only through an application to court that one can challenge an award. The application to court must comply with subsections (2) and (3).

Subsection (2) of section 17 limits the grounds upon which the Court may set aside an arbitral award to the following instances:

i. where the party making the application furnishes proof that a party to the arbitration agreement was under some incapacity;

ii. where the party making the application furnishes proof that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;

iii. where the party making the application furnishes proof that 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;

iv. where the party making the application furnishes proof that 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;

v. where the party making the application furnishes proof that 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 the Act or the law of the country where the arbitration took place;

vi. where the party making the application furnishes proof that 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;

vii. if the court finds the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia;

viii. if the court finds the award is in conflict with public policy;

ix. if the court finds the making of the award was induced or effected by fraud, corruption or misrepresentation.

Subsection (3) on the other hand limits the timeframe within which an application for setting aside may be made, being within 3 months from the date on which the party making that application had received the award or, if a request has been made under ***Article 33 of the First Schedule***, from the date on which that request had been disposed of by the arbitral tribunal. Article 33 of the Model Law provides for the correction of an award.

Having probed section 17 subsections (1), (2) and (3), I am satisfied and agree with the Respondent that impartiality of the arbitral tribunal, whether perceived or actual, is not, *per se,* itemized as a ground for setting aside an award, ergo the holding in the case of ***Konkola Copper Mines Plc vs. Copperfields Mining Services Limited***.

I also applied my mind to Articles 12 (2) and 13 of the Model Law. Article 12 (2) speaks to the grounds for challenging an arbitrator and Article 13 provides for challenge procedures. It is important to note that these articles govern challenges against the appointment of an arbitrator and not challenges against an award. The distinction, though fine, is pertinent because, as earlier alluded to, the only recourse for challenging an award is by application to court. The

procedure for challenging an arbitrator, on the other hand, is governed by Article 13 of the Model Law. Article 13 allows the parties to set their own challenge procedure, absent which a challenge is initiated by a written statement of the reasons for the challenge to the arbitral tribunal as prescribed therein.

In the case at hand, the record reflects that the application before Court is a challenge against the award for being inconsistent with public policy owing to the Arbitrator's failure to make disclosure. Recalling my examination of section 17, there is no doubt in my mind that inconsistency with public policy is a recognized ground under section 17 (2) (b)(ii) of the Act. Consequently, the real question, when not blurred by the dust of conflicting arguments, is whether the Arbitrator's failure to make disclosure constitutes an inconsistency with Zambian public policy.

This brings me to the laws that birth the requirement for disclosure, particularly Articles 12 (1) of the Model Law and Rule 2 (1) of the Regulations. To recap, Article 12 (1) commits an arbitrator that is approached in connection with his possible appointment as an

arbitrator to disclosing any circumstances likely to occasion justifiable doubts as to his impartiality or independence.

Once appointed, Article 12 (1) goes on to place a continuing obligation on the arbitrator to expeditiously disclose any such circumstances to the parties unless they have already been informed of them by him. This obligation is akin to that prescribed in Rule 2 of the Regulations. The Respondent has invited the Court to find that these legal provisions carry consequences for breach thereby ousting the availability of recourse to section 17 of the Arbitration Act.

In perusing the Model Law, I observed that although the disclosure requirement sits in Article 12, failure to make disclosure is not listed as a ground for challenging an arbitrator under Article 12 (2). The two prescribed grounds for challenge are: (i) the existence of circumstances that give rise to justifiable doubts as to his impartiality or independence; and (ii) want of possession of the qualifications agreed to by the parties. The Respondent has not pointed out where, in the Model Law, the law prescribes a remedy specifically for nondisclosure. Moreover, no authority was cited to support the hypothesis that section 17 was ousted.

Similarly, I have considered ***Rule 23*** of the Regulations which classifies a contravention of the provisions of the Act and the Regulations as professional misconduct. ***Rule 24*** of the Regulations goes on to require that a person who has reasonable ground to believe that an arbitrator has violated the Code to make a written complaint with details of the alleged misconduct to the Zambia Association of Arbitrators for determination.

As with Article 13 of the Model Law, I perceive that this remedy is one which attaches to the arbitrator rather than the award. I see no reason why these provisions cannot exist in tandem with section 17 of the Act which addresses recourse against an award. In terms of the award the question remains whether non-disclosure offends public policy.

Before I turn to responding the lingering question, I take pause to discourse disclosure under the Regulations. In terms of Rule 2(3), the burden of disclosure is firmly rested on the arbitrator, who can only proceed upon satisfying rule 2(4) which reads as follows:

> "After appropriate disclosure, the arbitrator may serve if both parties so desire, provided that if the arbitrator believes or perceives that there is a

clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desires of the parties."

I have discerned that rule 2 (4), without exception, prohibits the arbitrator from proceeding where the arbitrator perceives that there is a clear conflict of interest. On the other hand, where appropriate disclosure has been made the arbitrator can proceed only where both parties so desire. The condition that both parties must desire the arbitrator to proceed, to me, stimulates an obligation on the part of the arbitrator to enquire into whether the parties so desire. In this case, the first irregularity, as I see it, is that the Arbitrator did not volunteer disclosure. She addressed her relationship with one of the parties only after being prompted to do so by invitation of the Applicant.

Secondly, in responding to the invitation to comment on the relationship, although the Arbitrator penned her conviction that she considered herself impartial notwithstanding the existence of a prior relationship between her firm and the Applicant, there is no record of an enquiry as to whether her continued service as arbitrator was desired by both parties. There is no evidence before Court that either party expressed a desire for the arbitrator to proceed. I do not see

any implied term that consent may be given by conduct. As to the improbability of bias against her own client, the law merely compels disclosure of any prior existing relationship. Accordingly, I find these infractions to support my conclusion that the arbitrator failed to carry its burden, thereby failing to fulfil her obligation to make disclosure.

I now turn to consider the question whether the arbitrator's nondisclosure offends public policy. To do this, I must first give a face to the term public policy. Recognizing that our Zambian legislation does not define the term, I am bound by the decision in the case of ***Zambia Revenue Authority vs. Tiger Limited and Zambia Development Agency***, where the Supreme Court adopted the ratiocination of Gubbay CJ, in the Zimbabwean Supreme Court case of ***Zimbabwe Electricity Supply Authority vs. Maposa, (1992) 2ZLR 452***[8] where the Court reasoned as follows:

> *" where, however, the reasons or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes an inequity that is so far reaching and outrageous in its defiance of logic or accepted standards that a sensible and fair minded person would consider that the concept of justice in*

Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it"

Given the position taken by the Supreme Court, I stand fast on my assertion, in the case of ***Fratelli Locci SRI Estrazion Minerarie vs. Road Development Agency, 2016/HC/ARB/0493***[9], that public policy consists of a set of rules, principles or standards which the Courts consider to be for the wellbeing of the public at large, which consideration is premised on the state's concerns, whether written or unwritten.

A convenient starting point in evaluating whether the disclosure rules ought to be considered as serving the wellbeing of the Zambian public at large, I recall the unequivocal words of the Supreme Court in ***Zambia Telecommunications Co. Limited vs. Celtel (Z) Ltd*** that:

"In this case the learned Chairman's involvement in this case without disclosing his interest in the other arbitral proceedings could easily be perceived as being contrary to public policy because the perceptions from the objective test, would have been that a likelihood of bias or possible conflict of interest could not be ruled out."

The decision and intrinsic rationale posited by the Supreme Court undoubtedly places non-discourse at the heart of inconsistency with Zambian public policy.

Having concluded that the arbitrator in this case fell short of satisfying its disclosure obligation, I am bound by *stare decisis* to hold that the non-disclosure is and was offensive to public policy.

The second limb to the Applicant's application is that the Arbitral Award and the contents therein lead to commercial absurdity contrary to public policy. The gist of the Applicant's argument under this tenet is that the Award contains contradictory awards particularly on the remuneration of the estate agent resulting in a manifestly unjust award of commission to an agent regardless of whether the agent had performed their mandate, which was to secure the sale or lease of the units.

This ground, in my mind, glaringly beckons the Court to interrogate the merits of the award. Recalling my obligation to strive for international uniformity, I am persuaded by the train of thought expressed by the Supreme Court in Sri Lanka in the case of ***Light Weight Body Armour Vs. Sri Lanka Army, (2007) Sri LR, 412***[10], where the Court held, inter alia,

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"In exercising jurisdiction under section 32 the Court cannot sit in appeal over the conclusions of the Arbitral Tribunal by scrutinizing and reappreciating the evidence considered by the Arbitral Tribunal. The Court cannot re-examine the mental process of the Arbitration Tribunal contemplated in its findings nor can it revisit the reasonableness of the deductions given by the arbitrator - since the arbitral tribunal is the sole judge of the quantity and quality of the mass of evidence led before it by the parties - the only issue that needs consideration is whether the purported fundamental flaws of the award in question would tantamount to a violation of public policy."

In this case, the Respondent drew my attention to paragraph 24 of the Award which contains the basis of the arbitrator's findings of fact and law. The paragraph demonstrates that the Arbitrator considered the evidence before her and arrived at a conclusion. In view of the caution heeded, I agree that no matter the state of bewilderment that an Award may incite, the Court's role is not to revisit the merits of the award.

As to commercial absurdity, I take the view that the iniquity, if any, cannot be deemed to transcend the Applicant's individual interest such that it would conjure injustice in terms of the wellbeing of Zambians at large. Employing the definition adopted by the Supreme Court, I cannot lucidly conclude that the alleged commercial absurdity in this instance creates an inconsistence with public

policy. The second limb of the Applicant's Argument is therefore rendered untenable.

Notwithstanding the failure of the second limb, having found that that the arbitrator's non-disclosure offends public policy, the application to set aside the award is granted in accordance with section 17 (2) (b) (ii) of the Act.

Costs are awarded in favour of the Applicant, to be taxed in default of agreement.

Delivered at Kitwe this 2nd day of August, 2018

JUSTICE B.G. SHONGA