

(1)

**SCZ Judgment No. 1/2015**

**IN THE SUPREME COURT OF ZAMBIA**

**APPEAL NO. 29/2011**

**HOLDEN AT KABWE**

**SCZ/8/23/2011**

(Civil Jurisdiction)

**BETWEEN:**

**AUDREY NYAMBE**

**APPELLANT**

**AND**

**TOTAL ZAMBIA LIMITED**

**RESPONDENT**

CORAM: Mwanamwambwa Ag DCJ, Kaoma JS, and Lisimba Ag JS

On 8<sup>th</sup> April, 2014, and 13<sup>th</sup> January, 2015.

For the Appellant: Mr. M. Chiteba - Mulenga Mundashi, Kasonde  
Legal Practitioners

For the Respondent: Mr. A. Chisenga - Corpus Legal Practitioners

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## **JUDGMENT**

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Kaoma JS, delivered the Judgment of the Court

### Cases referred to

1. *Leopard Ridge Safaris Limited v Zambia Wildlife Authority* (2008) Z.R. 97
2. *Konkola Copper Mines Plc v NFC Africa Mining Plc – Appeal No. 118/2006*
3. *Zambia National Holdings Limited and another v The Attorney General* (1993/1994) Z.R. 115
4. *Heyman & another v Darwins Limited* (1942) 1 ALL ER 337
5. *Ashville Investments v Elmer Constructors Limited* (1988) 2 ALL ER 577

Statute referred to:

1. *Arbitration Act No. 19 of 2000*

This is an appeal against the decision of the High Court, staying proceedings before it and referring the matter to arbitration, under section 10 of the Arbitration Act No. 19 of 2000 (the Act). The sole ground of appeal is that the learned trial judge misdirected herself in law and fact when she ordered that the proceedings be stayed and the matter sent to arbitration.

The background to the matter is that on 1<sup>st</sup> April, 2003 the appellant and respondent entered into a Marketing Licence Agreement (the Agreement) in which the appellant was to, inter alia, sell the respondent's products and conduct ancillary business at the respondent's filling station. The Agreement contained an arbitration clause in Article IX (iv), which provided that disputes arising during the continuance of the contract would be resolved by arbitration.

The appellant alleged that during the subsistence of the agreement she experienced problems with the tanks, pumps and other equipment at the filling station, which resulted in losses of fuel and despite being informed about the problems, the respondent

(3)

failed or neglected to rectify the same. Instead on 1<sup>st</sup> June, 2004, the respondent terminated the Agreement without notice.

The appellant commenced proceedings in the High Court, seeking, *inter alia*, a declaration that the purported termination of the Agreement was wrongful, illegal and null and void. The respondent denied the appellant's claims and counterclaimed, *inter alia*, damages for breach of contract and special damages.

The trial proceeded before Mr. Justice T.K. Ndhlovu, who heard the matter in full, but did not render his judgment at the time of retirement. The matter was then reallocated to another Judge, who ordered that it be heard de novo. But before trial could commence, the respondent applied under section 10 of the Act for stay of proceedings and reference of the matter to arbitration.

Upon hearing both parties, the learned Judge stayed the proceedings and referred the matter to arbitration. She applied the case of *Leonard Ridge Safaris Limited v Zambia Wildlife Authority*<sup>1</sup> where this Court held that in considering an application for stay of proceedings under section 10 of the Act, the learned Judge had no choice but to refer the dispute to arbitration as provided for in the

(4)

agreement between the parties. Dissatisfied with the decision, the appellant appealed to this Court.

Both the appellant and respondent have relied entirely on their written heads of argument. The gist of the appellant's arguments is that the order by the lower court, staying proceedings and referring the matter to arbitration in line with the provisions of section 10 of the Act, was a misdirection in law.

Counsel for the appellant has cited section 10 of the Act and submitted that the lower court misdirected itself in interpreting this provision and failed to appreciate its full meaning. He has also directed us to the first line of Article IX (iv) and to the phrase "**during the continuance of this agreement**" and argued that the arbitration clause limits itself to the time during the continuance or subsistence of the agreement; and is not applicable after the termination of the Agreement. It is argued that the respondent terminated the Agreement, without notice, on 1<sup>st</sup> June, 2004, so the arbitration clause is inoperative or incapable of being performed.

(5)

It is contended that the learned Judge should have directed her mind to the fact that much as the doctrine of severability of an arbitration clause is accepted, it is the construction of the arbitral clause itself as opposed to the contract that she was supposed to consider.

That it is clear from the arbitration clause that when the respondent terminated the Agreement, it effectively ousted the arbitration clause and as such it could not be relied on as it had become inoperative or incapable of being performed.

It is also argued that there was a time limit within which arbitration could take place or an arbitrator appointed. That an aggrieved or affected party was required to give written notice of not less than 21 days to the other party and each party was required within 14 days of the date of expiry of the written notice to appoint an arbitrator. However, if arbitration proceedings are not brought within the time frame stipulated then there would be no arbitration; and in fact from the date of termination of the agreement there was no reference to arbitration within the stipulated period of time.

(6)

Counsel for the appellant has further submitted that the matter actually went to trial and was concluded but the retired Judge did not deliver judgment. After the matter was allocated to another judge the respondent then applied that the matter proceeds to arbitration, but the application was made well after the time limits had expired and the arbitration agreement had become inoperative or incapable of being performed.

On the other hand, counsel for the respondent has submitted, in response, that the appeal is without merit and is misconceived in that the learned Judge was on firm ground, both in law and in fact to refer the matter to arbitration; and the appellant has not demonstrated how the learned Judge misdirected herself and has raised the ground of appeal in *vacuo*. That there are a plethora of authorities that are in line with section 10 of the Act; and in *Konkola Copper Mines Plc v NFC Africa Mining Plc*<sup>2</sup>, emphasis was placed on the fact that a court has discretion not to stay proceedings and refer the parties to arbitration, where the plaintiff demonstrates that the arbitration agreement is null and void, inoperative, or incapable of being performed.



It is argued that it is trite law that though the High Court has unlimited jurisdiction to hear and determine any dispute, such jurisdiction is not limitless and must be exercised in accordance with the law as confirmed in the case of *Zambia National Holdings Limited and another v The Attorney General*<sup>3</sup>; and that in cases where parties have agreed to settle any dispute between them by arbitration, the court's jurisdiction is ousted unless the agreement is null and void, inoperative, or incapable of being performed.



It is submitted that this principle of law reinforces the freedom that the parties have to arbitrate as opposed to being forced to litigate whenever there is a dispute. The case of *Leonard Ridge Safaris Limited v Zambia Wildlife Authority*<sup>1</sup> is also relied on.

Counsel for the respondent has submitted further that even if the appellant was to contend that the termination of the contract rendered the arbitration clause inoperative, it is trite law that an arbitration clause or agreement is separate and independent, and survives the agreement embodying it. To buttress his point, he referred us to the case of *Heyman & another v Darmins Limited*<sup>4</sup>, in which Lord MacMillan put the matter as follows at page 347:

***“I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other ... but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the other party has undertaken to the other such dispute shall be settled by a tribunal with their own constitution ..... the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract. ”***

We have examined the ruling appealed against and considered the submissions by both parties and the authorities cited for which we are grateful. The only question that arises for determination from the sole ground of appeal is whether or not, in view of the wording of the arbitration clause in the Agreement, the proceedings were properly stayed and referred to arbitration.

Quite clearly, the law is settled as far as the jurisdiction of the High Court is concerned in matters where a contract embodies an arbitration clause. Section 10 of the Act provides as follows:

***"A court before which legal proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the***



(9)

***agreement is null and void, inoperative or incapable of being performed."***

Counsel for the respondent is right that we have passed a number of decisions where we have given effect to section 10 of the Act. However, in determining whether a matter is amenable to arbitration or not, it is imperative that the wording used in the arbitration clause itself are closely studied.

In this case the arbitration clause which was embodied in Article IX (iv) of the Agreement reads as follows:

***"If at any time during the continuance of this agreement, any dispute, differences or questions relating to the construction, meaning or effect of this agreement or any clause herein shall arise between the parties, then the aggrieved party shall give written notice or the affected party shall give written notice of not less than 21 days to the other party herein. Each party shall within 14 days of the date of expiry of the written notice aforementioned appoint an arbitrator. The matter shall therefore be referred to the two arbitrators."***

Using the literal rule or plain meaning rule of interpretation, which says that ordinary words must be given their ordinary meaning, we agree with counsel for the appellant that the words "***At any time during the continuance of this agreement...***" in Article IX (iv) means that the parties had limited the disputes to be referred

to arbitration to disputes arising between them during the continuance or subsistence of the agreement.

Furthermore, the parties had agreed that written notice of not less than 21 days had to be given to the other party, from the time the dispute arises between them, and within 14 days of the date of expiry of the written notice each party was to appoint an arbitrator.

We find the words of Article IX (iv) to be clear, precise and unambiguous and thus should be taken in their natural and plain meaning. We are fortified by the words of May, LJ in the case of *Ashville Investments v Elmer Constructors Limited*<sup>5</sup>, at page 58:

***“In seeking to construe a clause in a contract, there is scope for adopting either, a liberal or a narrow approach, ... the exercise which has to be undertaken is to determine what the words used mean”.***

In this case, the dispute between the parties relates to the manner, in which the Agreement was terminated. Therefore, the dispute between the parties occurred after the termination of the Agreement and not during its continuance. Whilst we agree with counsel for the respondent that an arbitration clause is separate and independent, and survives the agreement embodying it, and the words of Lord MacMillan in *Heyman & another v Darmins Limited*<sup>4</sup>,

(11)

are apt, as counsel for the appellant has rightly submitted, the learned Judge should have first considered the wording of the arbitration clause as opposed to its severability.

In our view, this matter is distinguished from the cases cited by counsel for the respondent. For instance, in *Leopard Ridge Safaris Limited v Zambia Wildlife Authority*<sup>1</sup>, the issue was not interpretation of the arbitration clause, but whether the application for leave to apply for judicial review were proceedings to warrant the trial court, upon being requested by the respondent, to refer the parties to arbitration; and whether the declaration of the dispute should have been preceded by the three stages of good faith negotiations, mediation and arbitration. There were no such restrictions in the arbitration clause as are in the case at the bar.

It is clear that even if the Arbitration Act gives a guide on the form of an arbitration agreement, it does not dictate what terms the parties should include in their arbitration clause. We have no doubt that the parties before us were within their contractual rights when they agreed to limit arbitration to any disputes arising during the

continuance of the agreement and to limit the time period within which the arbitration could be commenced.

We have no doubt that at the time the dispute between the parties arose, and indeed at the time the matter was referred to arbitration, the arbitration clause had become inoperative and incapable of being performed. In view of all the foregoing, we find that the learned Judge erred when she stayed the proceedings before her and referred the matter to arbitration.

Therefore, we set aside the order of the learned Judge. Instead we order that the matter be heard by the High Court before another Judge. All in all, we allow the appeal and award costs to the appellant to be taxed in default of agreement.

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**M. S. MWANAMWAMBWA**  
**Ag. DEPUTY CHIEF JUSTICE.**

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**R. M. C. KAOMA**  
**SUPREME COURT JUDGE.**

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**M. LISIMBA**  
**Ag. SUPREME COURT JUDGE.**

