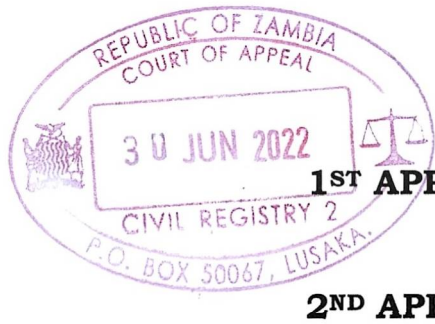
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 270 OF 2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MEGHA ENGINEERING AND INFRASTRUCTURE LIMITED **1ST APPELLANT**

THE ATTORNEY GENERAL **2ND APPELLANT**

AND

MARKS INDUSTRIES LIMITED **RESPONDENT**

CORAM: **Chashi, Siavwapa and Banda-Bobo, JJA**

ON: **14th and 30th June 2022**

For the 1st Appellant: *N/A*
For the 2nd Appellant: *N/A*
For the Respondent: *M. Muyatwa, Messrs. KBF & Partners*

J U D G M E N T

CHASHI, **JA**, delivered the Judgment of the Court.

Cases referred to:

1. **Phillip K.R Pascall and Others v ZCCM Investments Holdings PLC-CAZ Appeal No. 92 of 2018**
2. **The Attorney General v Marcus Kapumba Achiume (1983) ZR, 1**
3. **Vedanta Resources Holdings Limited v ZCCM Investments Holdings PLC and Konkola Copper Mines Limited-CAZ Appeal No. 181 of 2019**
4. **Sam Chisulo v Mazzonites Limited – CAZ Appeal No. 67 of 2019**

5. **Fanwell Kabulwebulwe & 11 Others v Zambia Pork Products & 3 Others –SCZ Appeal No. 30 of 2014**

6. **Nkhata and 4 Others v The Attorney General (1966) ZR, 124**

7. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR, 172**

8. **Philip Mhango v Dorothy Ngulube and Others (1983) ZR, 61**

9. **Yusuf Vally and Ismail Gheewala v The Attorney General – CAZ Appeal No. 50 of 2017**

Legislation referred to:

1. **The State Proceedings Act, Chapter 71 of The Laws of Zambia.**

2. **The Arbitration Act, No 19 of 2000 of The Laws of Zambia**

3. **Statutory Instrument No. 58 of 2020, The High Court (Amendment) Rules 2020**

Rules referred to:

1. **The Supreme Court Practice (White Book) 1999**

2. **The High Court Act, Chapter 27 of the Laws of Zambia**

1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Honourable Mr Justice Charles Zulu, delivered on 30th August 2021, wherein he declined to strike out the court action for irregularity and want of jurisdiction.

2.0 BACKGROUND

2.1 The Appellant, a company engaged in construction business, was by agreement dated 3rd July 2013, contracted by the Government of the Republic of Zambia, through the Ministry of Health to construct 195 Health Posts. Subsequently, the 1st Appellant sub-contracted the Respondent for site survey, clearance and land leveling works.

2.2 On 12th May 2021, the Respondent commenced an action by way of writ of summons against the 1st and 2nd Appellants. As against the 1st Appellant, the Respondent sought the following reliefs:

(i) The sum of US$307,944.12 being the balance payable for the value of work done under the sub-contract/work order calculated in accordance with the price schedule

(ii) The sum of US$120,000.00 being costs and expenses of demobilization and mobilization

(iii) Compensatory damages for loss of profits as a result of breach of contract

2.3 As against the 2nd Appellant, the relief sought was pursuant to Section 24 of **The State Proceedings Act**[1] for an Order of attachment of money in the sum of US$848,263.94 payable by the 2nd Appellant to the 1st Appellant for work done under the main Health Post project contract.

2.4 On 28th June 2021, the 1st Appellant took out summons to strike out the action for irregularity pursuant to Order 18/19 (1) of **The Rules of The Supreme Court (RSC)**[1] and Section 10 of **The Arbitration Act.**[2] The 1st Appellant sought to strike out the writ of summons and statement of claim and dismiss the action upon the following grounds:

(i) That the Respondent served the originating process on the 1st Appellant at its registered office in Hyderabad, India without leave of the court.

(ii) That the Respondent commenced an action in the High Court under a contract which

embodied an arbitration clause as a means for settlement of all disputes.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the application and the arguments, the learned Judge from the onset pointed out that the 1st Appellant made the application, without first entering conditional appearance as provided under Order 11/1 (4) of **The High Court Rules[2] (HCR)**. In view of that, the learned Judge opined that the application was *ab initio* irregular and incompetent.

3.2 The learned Judge however went on to consider the application, in case his resolve on the absence of conditional appearance was found wanting. The learned Judge then made the following findings of fact and law:

(i) In respect to the service of the originating process outside jurisdiction, without leave of the court; that the writ of summons and statement of claim were clearly issued and marked for service within Zambia, because the 1st Appellant's address of service endorsed

thereon was within Zambia and that therefore there was no need to apply for leave to issue the writ for service within Zambia

(ii) That alternatively, this was curable as was held by the Court of Appeal in the case of Phillip K.R Pascall and Others v ZCCM Investments Holdings PLC[1]

(iii) As regards the issue of arbitration, the learned Judge was of the view that, this as a ground for setting aside the action was misconceived. That the proper procedure was to apply for a stay of proceedings and refer the parties to arbitration and not to set aside the writ for want of jurisdiction. On that basis the learned Judge refused to venture into the issue of enforcing Section 10 of The arbitration Act.

4.0 THE APPEAL

4.1 Dissatisfied with the Ruling, the 1st Appellant has appealed to this Court advancing five grounds couched as follows:

(1) **The learned Judge erred and misdirected himself in law and fact when he held that the 1st Appellant's application to set aside the writ of summons and statement of claim in the court below was irregular on the basis that the 1st Appellant had not entered conditional appearance prior to making the application when the 1st Appellant had entered conditional appearance and the same was on record.**

(2) **That the learned Judge erred and misdirected himself in fact and law when he held that the writ of summons and statement of claim filed by the Respondent in the court below were issued for service in Zambia therefore there was no need for the Respondent to seek leave of court prior to serving the writ of summons and statement of claim outside the jurisdiction in India.**

(3) **That the learned Judge erred and misdirected himself in fact and law when he found that the 1st Appellant did not apply to stay proceeding and refer the matter to arbitration on the basis**

of the arbitration clause, when in fact the 1st Appellant had applied simultaneously that proceedings should be stayed and referred to arbitration.

(4) That the learned Judge erred and misdirected himself in fact and law when he neglected to consider the remoteness of the Respondent's claim against the 2nd Appellant.

(5) That the learned Judge erred and misdirected himself in fact and law when he failed to pronounce himself conclusively on all matters raised by the parties and left matters among the parties unresolved.

5.0 ARGUMENTS IN SUPPORT

5.1 The 1st Appellant's advocates were not before court. We however took into consideration it's heads of argument filed into Court on 9th November 2021.

5.2 In arguing the first ground, the Appellant submitted that the learned Judge in his Ruling, made an erroneous finding of fact that the 1st Appellant took out an application to strike out the writ of summons and

statement of claim without entering conditional appearance. Counsel drew our attention to page 39 of the record of appeal *(the record)* and submitted that the 1st Appellant did in fact enter conditional appearance. We were implored to reverse the erroneous finding of fact made by the court. The case of **The Attorney General v Marcus Kapumba Achiume**[2] was to that effect relied on and it was contended that this is a fit and proper case for us to reverse the finding of fact.

5.3 In arguing the second ground, Counsel submitted that the court below did not address its mind on how the documents were served and by failing to do so, reached a wrong conclusion. According to Counsel, the Respondent admitted serving the 1st Appellant's head office in India on the pretext that the 1st Appellant's office in Lusaka could not be located. It was further submitted that the Respondent neglected to make the requisite application for service of process outside jurisdiction before serving process in India, in accordance with Order 10/16 **HCR**

5.4 On the need to issue and serve process outside jurisdiction, the case of **Phillip KR Pascall & Others**[1] was cited and it was submitted that the court took a cavalier approach towards the breach of the rules of the court by simply stating that, *"in any case issuing originating process out of jurisdiction without leave of the court was curable"* without stating why such a breach should be cured.

5.5 In arguing the third ground, Counsel submitted that the 1st Appellants application in the court below was two-pronged; not only was the 1st Appellant seeking to set aside the court process due to irregularity of the service, but was equally applying to stay proceedings and have the parties referred to arbitration in accordance with Section 10 (1) of **The Arbitration Act**[2]. Counsel contended that the issue was adequately addressed on the need of the process.

5.6 It was Counsel's argument that, the court below upon reaching the decision that the irregular service was not fatal, should have proceeded to stay the proceedings and

refer the parties to arbitration. We were urged to uphold this ground.

5.7 Grounds four and five were argued together and submitted that the court below completely neglected to pronounce itself on the issue of the 2nd Appellant as a third party and therefore a stranger to the arbitration proceedings. Counsel cited the case of **Vedanta Resources Holdings Limited v ZCCM Investments Holdings PLC and Konkola Copper Mines Limited**[3] where the Court of Appeal held that, a third party must have sufficient interest in the matter for the arbitral clause to be rendered inoperative. It was submitted that the Respondent's claim against the 2nd Appellant was too remote for it to render the arbitral clause inoperative.

6.0 OPPOSING ARGUMENTS

6.1 In opposing the appeal, Mr Muyatwa, Counsel for the Respondent, relied on the filed written heads of argument dated 14th May, 2022, which he augmented with brief oral submissions.

6.2 In response to ground one, it was submitted that the conditional appearance appearing at page 39 of the record was not endorsed by the DR as guided by this Court in the case of **Sam Chisulo v Mazzonites Limited**[4]. In the absence of that endorsement, the conditional appearance had no effect. Therefore, the learned Judge cannot be faulted for finding that the 1st Appellant's application was irregular and incompetent.

6.3 In response to ground two, it was argued that a perusal of the court process shows that it was endorsed with the 1st Appellants principal place of business address in Zambia, therefore, the circumstances of the case do not fall within the ambit of Order X Rule 16 **HCR** as it was never issued for service outside jurisdiction. As such, there was no need to obtain leave of court prior to filing the originating process.

6.4 It was Counsel's further submission that if the 1st Appellant had an issue with the manner in which the court process was served, the proper application should

have been to set aside irregular service pursuant to Oder XI rule 21 **HCR**.

6.5 Further that in the event that we do find that the 1st Appellant's application was properly before the court, the said irregularity is one that is curable. In support thereof, Counsel cited the case of **Phillip KR Pascall** case and **Fanwell Kabulwebulwe & 11 Others v Zambia Pork Products & 3 Others[5].**

6.6 In response to ground three, Counsel submitted that it is clear that the 1st Appellant's application sought to set aside court process for irregularity and want of jurisdiction and not to stay proceedings and refer matter to arbitration. That it is for that reason that the lower court declined to consider whether or not the matter could be referred to arbitration, when the substantive application before it was to strike out court process for irregularity and not enforce Section 10 (1) of **The Arbitration Act[2]**. That therefore, the learned Judge cannot be faulted for arriving at that conclusion.

6.7 In addition, Counsel submitted that the 1st Appellant's argument that the application for stay of proceedings was contained in its skeleton arguments was misplaced on account that skeleton arguments cannot substitute a formal application.

6.8 In response to ground three and four, Counsel argued that a party who intends to stay proceedings and refer matter to arbitration ought to move the court by summons or notice of motion as provided for in Rules 6 and 7 of **The Arbitration (Court Proceedings) Rules, 2001**. That in the present case, the 1st Appellant never made such application before the learned Judge.

6.9 Citing the cases of **Nkhata and 4 Others v The Attorney General[6]**, **Wilson Masauso Zulu v Avondale Housing Project Limited[7]**, **Philip Mhango v Dorothy Ngulube and Others[8]** and **Yusuf Vally and Ismail Gheewala v The Attorney General[9],** Counsel submitted that the lower court made a proper finding of fact that the application before it was to set aside court process for irregularity and not to enforce Section 10 of **The Arbitration Act[2]**.

That this is not a proper case in which to reverse the findings of the lower court. We were urged to dismiss the appeal.

7.0 OUR ANALYSIS AND DECISION

7.1 We have considered the arguments and the Ruling of the learned Judge in the court below. The first ground attacks the finding of fact by the learned Judge, that at the time of making the application to strike out the action, the 1st Appellant had not entered conditional appearance as required under Order 11/1 (4) **HCR.**

7.2 It is evident that at the time the 1st Appellant was making the application to strike out the action, on 28th June 2021, the learned Judge was not aware that **Statutory Instrument No. 58 of 2020**[3] which came into effect on 19th June 2020, had amended Order 11 by deleting Order 11/1 **HCR** and substituting it with a new provision in respect to the mode of entering appearance.

7.3 Under the current Order 11/1, there is no requirement for entering of a conditional appearance. What that entails is that, if a party wishes to apply to court for

setting aside the writ on grounds that the writ is irregular or that the court has no jurisdiction, has to do so, by entering a memorandum of appearance and defence in accordance with the current Order 11 (1) (a) and (b) and promptly, make the necessary application to challenge the writ.

7.4 It follows therefore, that for purposes of challenging the writ for irregularity, the filing of the defence will not amount to a "fresh step" taken to waive the irregularity, as the law now requires that there must be a defence on the record before an application to challenge the writ maybe made.

7.5 We note that, what was being attacked in the 1st Appellants application is the issuance and service of the writ of summons and statement of claim out of jurisdiction without leave of the court. In view of the amendment aforestated, the learned Judge in the court below made a finding based on a provision of the law which was no longer applicable as it had been repealed.

7.6 In that respect, the application by the Appellant in the court below was irregular for failure to comply with Order 11 (1) (a) and (b) and therefore the finding by the learned Judge was perverse and is accordingly reversed. In the view that we have taken, ground one of the appeal succeeds not for the reasons advanced by the Appellant but based on what we have stated above. However, although the application by the Appellant was irregular for not having complied with Order 11 (1) (a) and (b), we will still proceed to address the rest of the grounds of appeal in view of the fact that the learned Judge in the court below proceeded to address the issues contained in the application despite being of the opinion that the application before him was *ab initio* irregular and incompetent.

7.7 The second ground attacks the holding by the learned Judge that the originating process according to the endorsed address was issued for service in Zambia and therefore leave was not required. We note that the writ of summons appearing at page 16 of the record of appeal is

not only endorsed with the 1st Appellant's address in Zambia, but also the address in India ***"(S-2) Technocratic Industrial Estates T.I.E)*** **Balanagas, Hyderabad Telangana, India)."**

7.8 In addition, it is not in dispute that service of the writ of summons was effected on the 1st Appellant's registered office in India. We are of the view that the issuance and service of the writ of summons, outside jurisdiction without leave of the court was irregular.

7.9 However, as we held in **Phillip KR Pascall** case, the defect or irregularity is curable. As we noted in that case, there was no prejudice suffered as there was no default Judgment obtained. Equally in *casu*, there was no default Judgment obtained by the Respondent. The 1st Appellant entered conditional appearance and then raised issues and therefore suffered no prejudice. In that respect, this is not a fit and proper case for setting aside or striking out of the writ of summons. We are of the view that the action be sustained. However, that the Respondent be sanctioned by being condemned in costs

for the proceedings in the court below, in respect to the 1st Appellant's application.

7.10 The third, fourth and fifth grounds are related and we shall therefore determine them together. These grounds are dealing with the issue of stay of proceedings and referral of the parties to arbitration. We have time and again emphasized that, the manner in which the court is moved is important as it determines whether the matter is competently before the court.

7.11 We note as shown on the summons appearing at page 40 of the record, that the court below was moved under Order 18/19 (1) **RSC** and Section 10 (1) of **The Arbitration Act** with the anticipated result being that the writ of summons and the statement of claim be struck out and the action dismissed.

7.12 It is clear from the affidavit in support of the 1st Appellant's application, that there was no request for stay of proceedings and referring the parties to arbitration. In that respect, we are of the view that the issue of stay of proceedings and referring the parties to

arbitration was not competently before the court below as it was not made in accordance with Section 10 (1) of **The Arbitration Act**. We therefore find no basis on which the learned Judge can be faulted for not staying proceedings and referring the parties to arbitration and declining to venture into the issues of arbitration as to whether the matter was arbitrable or not.

8.0 CONCLUSIONS

8.1 The sum total of this appeal is that it substantially fails. The following Orders are therefore accordingly made;

(i) The action in the court below having been sustained, we remit this matter back to the High Court before another Judge.

(ii) The 1st Appellant shall enter appearance and defence within 14 days from the date of this Judgment and shall be at liberty to make the application under Section 10 (1) of **The Arbitration Act**[2] thereafter.

(iii) As earlier alluded to, the 1st Respondent is condemned to costs for the application in the

court below in respect of the application to strike out the writ of summons for irregularity. The costs are to be paid forthwith and are to be taxed in default of agreement.

(iv) Costs of the appeal shall abide the outcome of the matter in the court below.

J. CHASHI
COURT OF APPEAL JUDGE

M.J. SIAVWAPA
COURT OF APPEAL JUDGE

A.M. BANDA-BOBO
COURT OF APPEAL JUDGE