IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 78/2021**

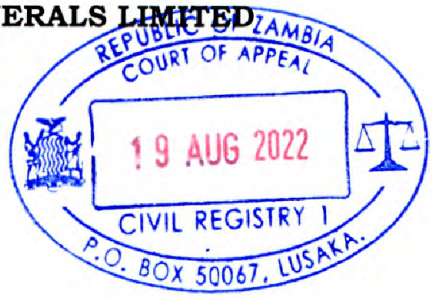
HOLDEN AT LUSAKA **CAZ/08/62/2021**

(Civil Jurisdiction)

BETWEEN:

FIRST QUANTUM MINERALS LIMITED **APPELLANT**

AND



PAUL LLOYD **RESPONDENT**

CORAM: KONDOLO SC, MAJULA AND NGULUBE, JJA

On 19th January, 2022, and 19th August, 2022

For the Appellant : Ms. E.L. Sitali of Corpus Legal Practitioners

For the Respondent : Mr. N. Muyatwa of Messrs KBF and Partners

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J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

1. **Ody's Oil Company Limited v The Attorney General, Constantinos James Papoutsis (2012) 1 ZR 164**
2. **Zambia National Holdings and Another v The Attorney General (1993-1994) ZR 115**
3. **Vedanta Resources Holdings Ltd v ZCCM Investments Plc and Konkola Copper Mines Plc CAZ Appeal/181/2019**
4. **Beza Consulting Inc. Limited v Bari Zambia Limited & Gedy Genremariam Eg Egziabher CAZ/171/2018**

5. **General Entertainment and Music Inc. v. Gold Line Telemanagement Inc., 2022 FC 418 (CanLII)**

LEGISLATION REFERRED TO:

1. **Arbitration Act No. 19 of 2000**
2. **Arbitration (Court proceedings) Rules, Statutory Instrument No. 75 of 2001.**

1. INTRODUCTION

1.1. When this matter was heard, we sat as a panel of three Judges. Our sister Majula JA is presently indisposed; this is therefore a majority judgment.

1.2. This is an appeal against the decision of the High Court delivered by Newa J, dismissing the Appellant's application to stay proceedings and refer the parties to arbitration.

1.3. When the matter was heard, there were two Defendants, namely, First Quantum Minerals Limited (1st Defendant) and First Quantum Mining & Operations Limited (2nd Defendant).

1.4. The appeal is by the 1st Defendant, who shall be referred to as the Appellant. The Plaintiff was Paul Lloyd, the Respondent herein and shall be referred to as such.

2. BACKGROUND

2.1. The Respondent commenced an action in the High Court by filing a writ of summons, seeking various reliefs including the following plus interest on all amounts found due and costs;

1. ***An Order that the Plaintiff's [Respondent] dismissal and/or termination of his contract of employment by the 2nd Defendant was wrongful and/or breach of employment.***
2. ***Damages for breach of contract of employment and/or wrongful dismissal in the amount equivalent to the plaintiff's 2 years' salary.***

2.2. The Statement of claim averred that the Respondent was employed by the Appellant but seconded to work at the 2nd Defendant. His employment contract was with the Appellant. However, the 2nd Defendant instituted disciplinary proceedings against him, which led to his dismissal from employment.

2.3. The Appellant reacted to the Respondent's action by applying to stay the proceedings.

3. APPELLANT'S APPLICATION

3.1. The Appellant moved the Court to stay proceedings and refer the parties to arbitration pursuant to **Section 10 (1) of the Arbitration Act No. 19 of 2000** and **Rule 4 of the Arbitration (Court proceedings) Rules, Statutory Instrument No. 75 of 2001.**

3.2. The Appellant's affidavit in support of the application attested essentially that the Respondent accepted the Appellant's offer of employment by executing a contract of employment. The Appellant then seconded the Respondent to work at the 2nd Defendant.

3.3. That the Appellant terminated the Respondent's employment by dismissal on 3rd December, 2019.

3.4. It was pointed out that clause 10 of the contract of employment executed between the Appellant and the Respondent contained an arbitration clause and the Respondent acknowledged that fact in paragraph 29 (e) of the statement of claim.

4. RESPONDENT'S RESPONSE

4.1. The Respondent attested that he was dismissed by the 2nd Defendant and not by the Appellant and he was advised,

by his advocates, that this matter could not be referred to arbitration because the 2nd Defendant was not a party to the arbitration agreement.

5. HIGH COURT DECISION

5.1. The trial Judge cited the law under which the application was brought and stated that where an action is commenced in court and the parties to the action had signed a contract containing an arbitration clause, any of the parties to the agreement can apply to stay the proceedings and refer the parties to arbitration. When such an application is made, the court shall grant the application unless it finds that the agreement is null and void, inoperative or incapable of being performed.

5.2. The trial Judge, at page R14 (page 21 of the record of appeal), accepted that the arbitration clause contained in clause 10 of the employment contract provided that any dispute between the parties arising from the contract of employment should be referred to arbitration.

5.3. The lower Court held as follows;

"It is clear, that the plaintiff alleges that the disciplinary proceedings that resulted in his

dismissal were instituted by the 2nd defendant, and that his contract of employment that had an arbitration clause, was between him and the 1st Defendant. As can be seen from the decision of the Supreme Court in the case of Ody's Oil Company Limited v The Attorney General, Constantinos James Papoutsis (1) a non-party to an arbitration agreement cannot claim benefit under it, and the 2nd defendant not having been a party to the arbitration agreement, entails that the arbitration agreement has become inoperative."

5.4. The court found that it had jurisdiction to hear and determine the matter and dismissed the application.

6. THE APPEAL

6.1. Dissatisfied with the Ruling, the Appellant has advanced 2 grounds of appeal;

1. The Judge in the Court below erred in law and in fact in the Ruling of the Court dated 1st February 2021 at page R15, when she wrongly stated that the Appellant was a non-party to the arbitration

agreement with the Respondent (Plaintiff) in the Court Below; and

2. **The Judge in the Court below erred in law and in fact in the Ruling of the Court dated 1st February 2021 at page R15, when she dismissed the Appellant's application to stay proceedings against the Appellant (1st Defendant) in the Court below and refer the matter to arbitration on account that the arbitration clause was inoperative.**

7. ARGUMENTS BY THE PARTIES

7.1. **Ground One**

7.2. The Appellant, in its heads of argument, pointed out that the employment contract it had entered into with the Respondent provided that all disputes arising from the agreement would be referred to arbitration.

7.3. We were referred to **section 10 (1) of the Arbitration Act (supra)** as read with **Rule 4 of Statutory Instrument No. 75 of 2001 (supra)** which provide that when legal proceedings are commenced in a matter which was the subject of an arbitration agreement, the court shall stay the proceedings, if so requested by any of the parties,

unless it finds that the agreement is null and void, inoperative or incapable of being performed.

7.4. It was submitted that, as shown at pages 47 to 53 of the record of appeal, the parties were bound by an arbitration clause and yet the lower court held that the Appellant was a non-party to the arbitration clause.

7.5. It was pointed out that the record showed that the Appellant was a party to the arbitration clause, and the court should have stayed the proceedings as dictated by the Arbitration Act, as well as by the Supreme Court in the case of **Zambia National Holdings and Another v The Attorney General** (2).

7.6. The Respondent's main argument in response to ground one, was that the trial Judge did not find that the Appellant was a non-party to the arbitration clause but pages R14 to R15 of the Ruling show that it was actually the 2nd Defendant who the lower court found to be a non-party to the arbitration clause.

7.7. **Ground Two**

7.8. Under ground two, on the holding that the arbitration clause was inoperable, the Appellant argued that there

were no circumstances to justify such a finding by the Judge.

7.9. The Appellant cited the case of **Vedanta Resources Holdings Ltd v ZCCM Investments Plc and Konkola Copper Mines Plc** [3] where, according to Counsel, this Court distinguished the **Vedanta Case (supra)** from the **Ody's Case (supra)** cited by the trial Judge, for the reason that in the latter case, the arbitration agreement was tainted with illegality and the fact that the third party was not a party to the arbitration agreement was a secondary consideration. Counsel further quoted this Court as having said that the **Odys Case** was inapplicable because there was no illegality in the Vedanta case.

7.10. It was pointed out that the contract of employment, and thus the arbitration clause, was between the Appellant and the Respondent and it covered any dispute between the two parties.

7.11. The Appellant further submitted that the present case did not fall within any of the exceptions set out in **section 6 of the Arbitration Act** which would render the arbitration clause inoperable. We were implored to reverse the Ruling

of the lower Court and beseeched to order that the proceedings against the Appellant be stayed and the parties referred to arbitration.

7.12. The Respondent launched its defence against ground two by pointing out that the Appellant's quote from the Vedanta Case (supra) was a submission made by Counsel in that case and not part of the *ratio decidendi*, which was actually as follows;

> ***"Our considered view is that the decision in the Ody's Oil Company Case is distinguishable. In that case the court refused to refer the matter to arbitration because the contractual agreement was tainted with illegality. In addition to this, another party which was a stranger to the arbitration agreement was involved. The Court was of the view that referring part of the case to arbitration would lead to multiplicity of sanctions, which could result in conflicting decisions. This is not the scenario in the present case, as stated above, the grievances of the 1st Respondent have***

arisen from the SHA [shareholder's agreement] none of them lie outside the SHA, secondly, the dispute is among the shareholders, ZCCM-IH seeks a remedy available to a minority shareholder ....."

7.13. The Respondent cited the **Odys Case** where the Court stated as follows;

"Further, the fact that the 1st Respondent is not party to the arbitration agreement and therefore, not bound by its terms of the outcome, also makes the arbitration inoperative in this matter"

7.14. Our holding in **Beza Consulting Inc. Limited v Bari Zambia Limited & Gedy Genremariam Eg Egziabher** [4] was also seized upon where we stated as follows;

"Further, ... the fact that the 2nd respondent is not a party to the arbitration agreement renders the arbitration agreement inoperative. This is in line with case of Ody's Oil Company Limited v The Attorney General & Constantinos James Papoutsis. The decision in that case

renders the arbitration agreement inoperative for the reason that a party to proceedings, who is not a party to the arbitration agreement, ought to be heard and the Court is the forum at which he can be heard and not at arbitration."

7.15. The Respondent submitted that the dispute before the High Court was between the Respondent (Plaintiff) on one hand and on the other hand the Appellant (1st Defendant) and the 2nd Defendant, who was a non-party to the arbitration agreement, thus making it inoperable. Therefore, the correct forum to hear the matter was the High Court.

7.16. In reference to the **Odys Case**, the Respondent submitted that it was not in the interest of justice to sever the dispute to the effect that the segment between the Appellant and the Respondent is referred to arbitration whilst the segment between the Respondent and the 2nd Defendant is determined by the Court.

7.17. Further, the 2nd defendant had filed a defence and ought to be heard in that regard and the correct forum was the High Court.

7.18. When the matter came up for hearing, in response to questions by the Court as to why the Respondent had sued the 2nd Defendant at all, we can summarise the Respondent's argument as being that the Respondent was employed by the Appellant and seconded to the 2nd Defendant and his employment was, in effect, terminated by the 2nd Defendant. That is why he sued both parties.

8. DECISION

8.1. We have considered the record of appeal and the arguments advanced by the parties in their respective heads of argument, as well as in open court.

8.2. With regard to ground one, we agree with the Respondent that the lower Court did not find that the Appellant was a non-party to the arbitration clause.

8.3. The finding is found at page 22 (R15) of the record of appeal and it reads as follows;

" ..... a non-party to an arbitration agreement cannot claim benefit under it and the 2nd defendant not having been a party to the arbitration agreement, entails that the arbitration agreement has become inoperative"

8.4. The Appellant misapprehended the finding of the lower Court on which ground one was predicated. We find no merit in this ground and it is accordingly dismissed.

8.5. In determining ground two, we are mindful that the Appellant and the Respondent entered into an exclusive contract of employment which, in essence, provided that all disputes between the parties arising from the contract of employment would be settled by arbitration.

8.6. We are also mindful that parties cannot easily step out of arbitration clauses where one party seeks that the matter proceeds to arbitration, as agreed.

8.7. In the Canadian case of **General Entertainment and Music Inc. v. Gold Line Telemanagement Inc.,** [5], the Court found that parties face a high bar to escape an arbitration clause and further stated as follows;

> ***"An arbitration clause is null and void, inoperative or incapable of being performed only where it is manifestly tainted. In order to be manifestly tainted, the alleged invalidity of an arbitration agreement must be "incontestable", such that no serious***

debate can arise about the validity [Uber Technologies Inc. v. Heller 2020 SCC 16]. An "incontestable" invalidity must not require anything more than a superficial review of the record."

8.8. The decision to find an arbitration clause or agreement inoperable can be based on law, on fact or mixed law and fact. With regard to law, the finding would be based on the application of provisions contained in the Arbitration Act and other statutes, and findings based on facts and mixed law and fact would be informed by case law and other authorities.

8.9. We get the sense the trial Court held the opinion that the mere existence of a third party in litigation between parties who are bound by an arbitration clause which excludes the third party renders the arbitration clause inoperable. This was demonstrated when, at page 22 of the record of appeal (page R15), she said as follows;

"..... As can be seen from the decision of the Supreme Court in the case of Ody's Oil Company Limited v The Attorney General &

Constantinos James Papoutsis, a non-party to an arbitration agreement cannot claim benefit under it, and the 2nd Defendant not having been a party to the arbitration agreement, entails that the arbitration agreement has become inoperative."

8.10. The foregoing gives the impression that the 2nd Defendant was seeking to benefit from the arbitration agreement but the trial Judge did not explain the nature of the benefit. The application to refer the matter to arbitration was made by the Appellant, who was a party to the arbitration clause.

8.11. Further, the trial Judge did not explain what would prevent the Respondent from proceeding with the matter against the 2nd Defendant in the High Court.

8.12. We note the submissions by Counsel for the Respondent that it was not in the interest of justice to sever the dispute to the effect that the segment between the Appellant and the Respondent is referred to arbitration whilst the segment between the Respondent and the 2nd Defendant

is determined by the Court. We shall revert to this submission.

8.13. We wish to clarify that the mere presence of a third party in litigation involving parties bound by an arbitration agreement does not render the arbitration agreement inoperable. As earlier indicated, the decision is informed by the law, the facts or a mixture of law and fact. Where statutory provisions are not suitable to the particular circumstances, the decision cannot be made without addressing the facts.

8.14. We refer to our decision in the **Vedanta Case,** cited by the Respondent, which demonstrates that in a matter under litigation in the courts, the mere inclusion of third parties who are non-parties to an arbitration agreement does not make the arbitration agreement inoperable. It depends on the circumstances and facts of each case. This is what we said in the cited case;

> ***"..... We thus fail to conceive how the interests of third-party creditors can be brought to bear on the dispute between the parties to the SHA [shareholders agreement]. It is our view that***

the proposed public interest consideration on the stay application is farfetched. The third-party creditors are in fact not stopped from approaching the court in their own right. We in this regard adopt the persuasive reasoning by the Supreme court of Appeal in Tomolugen supra. It resonates our view that the dispute between the parties is contractual. The third-party interests the petition is said to implicate are not visible to us. Contrary to Bobo J's view, we find the arbitration agreement operative and capable of performance between the parties to the SHA ....."

8.15. The **Vedanta Case** simply demonstrates that each case of this nature must be considered on its own facts. We further held that our reasoning in the **Beza Consulting Case (supra)** did not apply in the Vedanta Case. This further reinforces our view that the peculiar facts of each case have a very strong influence on a court's decision to find an arbitration clause inoperable.

8.16. At page 43 of the record of appeal is the letter of employment referred to by both parties, dated 7th December, 2011, which confirms that the Respondent was employed by the Appellant. The contract of employment of even date is at page 47 of the record of appeal.

8.17. Clause 10 of the contract of employment at page 53 of the record of appeal shows an arbitration clause that essentially provides that any dispute arising from the contract shall be resolved by arbitration, including any difference or dispute arising between the parties as to the construction of the agreement.

8.18. We also refer to the letter of summary dismissal dated 3rd December, 2019 issued by the Appellant and appearing at Page 46 of the record of appeal.

8.19. On the face of it, the Respondent was employed and dismissed by the Appellant and the contract of employment provides that disputes between the two parties be referred to arbitration.

8.20. The Respondent's opposition to the matter proceeding to arbitration is that it was the 2nd Defendant who dismissed him. The argument seems to be that the Appellant simply

enabled the dismissal and supports the argument by stating that the signatories of the dismissal letter were actually employees of the 2nd Defendant.

8.21. It is not in dispute that Respondent was seconded to the 2nd Defendant. The Respondent did not point to any contractual relationship between himself and the 2nd Defendant.

8.22. It is clear that the contractual arrangement always remained between the Appellant and the Respondent. In short, only the Appellant was capable of dismissing the Respondent whether directly or indirectly.

8.23. Though a beneficiary of the contract of employment, the 2nd Defendant was a stranger to the contractual arrangements between the Appellant and the Respondent. The 2nd Defendant was thus incapable of terminating the contract of employment. The trial court did not address its mind to this fact.

8.24. The Appellant has not disputed that it terminated the Respondent's employment. In our view, the issue of termination of the Respondent's employment is purely between the Appellant and the Respondent. Insufficient

ground has been led as to why the dispute between the Respondent and the 2nd Defendant, a non-party to the arbitration clause, should in these circumstances render the arbitration clause inoperable.

8.25. All the Respondent's grievances against the Appellant arise from the contract of employment and we see no reason why the dispute between them should not proceed to arbitration as provided in the arbitration clause.

9. CONCLUSION

9.1. We repeat our reasoning in the **Vedanta Case** and order that the dispute between the Appellant and the Respondent be severed from the High Court proceedings and the said parties referred to arbitration.

9.2. The appeal having substantially succeeded, costs in this Court and in the Court below are awarded to the Appellant.

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M. KONDOLO, SC
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE