# KENNETH VAN DER WESTHERZEN
# v
# ROTA RABELS LIMITED
# YING DUAN
# LI LING

HIGH COURT.
DR. MATIBINI, SC, J.
8TH SEPTEMBER, 2010
2010/HP/387

*Civil Procedure - Arbitration - Whether a party can at any stage of the proceeding refer a matter to arbitration.*

This was an application made by the defendants to stay the proceedings in this matter. The application was made pursuant to section 10 of the Arbitration Act Number 19 of 2000.

**Held:**

1. A party may under the Arbitration Act make an application at any stage of the proceedings to stay the proceedings and request the Court to refer a matter to arbitration.

2. Section 10 of the Arbitration Act Number 19 of 2000, does not constrain any party that has taken steps in the proceedings.

3. When an action has been referred to arbitration, it may pend before the Court while arbitral proceedings are commenced, and continued leading to a award being made.

4. When a ward is made and the parties are satisfied with the outcome, the pended action in Court can later be discontinued.

5. Conversely, if a party is dissatisfied with the award on any of the grounds set out in section 17 of the Arbitration Act, he or she may resurrect the pending action.

6. Since the parties chose arbitration as their forum or mode of dispute resolution, the parties ought to go that forum to resolve their differences.

**Cases referred to:**

1. Chapel v North [1891] 2 Q.B.D. 252.
2. Richard v Le Maitre [1903] 2 Ch. D. 222.
3. Edward Grey and Company v Tolme and Another [1914 - 1915] 5. The Times Law Report 137.
4. Ochs v Ochs Brothers [1990] 2Ch D. 121.
5. Parker Gaines and Company Limited v Turpin [1918] 1 K.B. 358.
6. Pitchers Limited v Plaza Queenbury [1940] 1 ALL E.R. 151.
7. Camilla Cotton Company v Grandex S.A. Tracornin S.A [1976] 2 10. Lloyds Rep. 10.
8. Vangelatos v Vangelatos, Appeal Number 7 of 2006 (unreported).
9. Leopard Ridge Safaris Limited v Zambia Wildlife Authorities (2008) Volume 2 Z.R. 97.

**Legislation referred to:**

15. 1. Companies Act, cap 388, ss. 21, 45 (2) and 271.
2. Arbitration Act Number 19 of 2000 ss. 6, 10, and 17.
3. Arbitration Act of 1889, s. 4.
4. Rules of the Supreme Court (White Book) Order 53.

**Works referred to:**

20. 1. Manro Robino Summaritano, *International Arbitration; Law and Practice*, (Kluwer Law International, 2001).
2. Julian D.M. Lew, Lukas A. Mistellis, and Stefan M. Kroll, *Comparative International*, (Kluwer Law International, 2003).

P. Chibundi of Messrs Chibundi and Company for the plaintiff.

25. D. Findley Ms., of Messrs N. M. Mulikita and Partners for the defendants.

**DR. MATIBINI, SC, J.:** This is an application made by the defendants to stay proceedings in this matter. The application is made pursuant to section 10 of the Arbitration Act Number 19 of 2000. Section 10 is expressed in the following terms:

30. *"(1) A Court before which legal proceedings are brought in a matter which is the subject of 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 agreement is null and void, inoperative, or incapable of being performed.*

35. *(2) Where proceedings referred to in sub section (1) have been brought, arbitral proceedings may nonetheless be commenced or continued, and an award may be made, while the issue is pending before the Court."*

This application is supported by a very short affidavit deposed to by Mr. Ying Duan, the 2nd defendant in this matter. In paragraph 6 of the affidavit in support, Mr. Duan brought to my attention section 24 of the Articles of Association of Rota Labels Limited, the subject of the litigation in these proceedings. Section 24 is expressed in the following terms:

*"Whenever any differences shall arise between the company and the directors on the one hand, and any of the members or representatives on the other hand, or between any members or classes of the members or between the directors with regard to anything done, executed, omitted or suffered in pursuance or the act or with regard to any breach or alleged breach to these presents or the Act, or with regard to any breach or alleged breach of these presents any claim or account of any such or alleged breach or otherwise relating to the premises or to these premises, or to any of the affairs of the company, then such differences shall be referred to the decision of the two arbitrators of whom one shall be appointed by each of the parties in difference, and any such reference shall be subject to all the provisions of the Arbitration Act, any statutory modification hereof for the time being in force."*

Mr. Duan contends that the Articles of Association of the 1st defendant are subscribed to by the plaintiff as member, and director of the 1st defendant. Thus, on the basis of section 24 referred to above, Mr. Duan is of the opinion that the differences that arise with the plaintiff must be referred to arbitration.

This application is opposed. The affidavit opposing the application was deposed to by Mr. Siakamwi, an advocate in the firm of Messrs Chibundi and company, representing the plaintiff. Mr. Siakamwi in the affidavit in opposition has raised various issues relating to the shareholding; made allegations of fraudulent transfer of shares; asserted that on the face of it, the plaintiff is not a member of the company, and hence this action to regularize the position of the plaintiff in the company. All these matters and contentions are not however in my view relevant to the application at hand. The substantive objection taken in this matter is that the defendants should have made this application before taking any steps in defending this action. In view of the foregoing, the plaintiff contends that the application is a porous defence, and raised in order to avoid responding to the main issues touching on fraud. The plaintiff has therefore urged me to dismiss the application, and allow the matter to proceed to trial.

In reply, Mr. Duan contends that an application to stay proceedings, and refer the matter to arbitration can be made at any stage of the proceedings, regardless of whether one has taken any steps in defending

the matter. Further, Mr. Duan contends that the act of incorporating a company has a contractual effect between the company and its members, as well as between or amongst members themselves. Furthermore, Mr. Duan contends that the arbitration clause which forms part of the Articles of Association is in itself an agreement to refer a matter to arbitration. Finally, Mr. Duan contends that in any case, the matters in dispute in the main action, are covered by the arbitration clause referred to above.

At the hearing of the application held on 16th July, 2010, the affidavit evidence of the parties was augmented by oral arguments by counsel. Ms. Findley submitted on behalf of the defendants that Mr. Duan incorporated the 1st defendant. In so doing, the parties to this action subscribed to the Articles of Association. Ms. Findley submitted that by the parties subscribing to the Articles of Association, they entered into a binding agreement. The resulting agreement, Ms. Findley submitted, contains an arbitration clause which specifies that the parties deliberately chose arbitration as a mode of resolving their differences; should differences arise.

Ms. Findley drew my attention to section 21 of the Companies Act, chapter 388 of the Laws of Zambia. Section 21 provides that:

*"Subject to this Act, the incorporation of a company shall have the same effect as a contract under seal between the company and its members from time to time, and between those members themselves, in which they agree to form a company whose business will be conducted in accordance with the application for incorporation, the certificate of share capital from time to time, the articles of the company from time to time and this Act."*

Ms. Findley submitted that the effect of section 21 of the Companies Act is that on incorporation of a company, a binding agreement results between members themselves, and members and the company.

In the course of the arguments, Ms. Findley also drew my attention to section 6 of the Arbitration Act No.19 of 2000. In so doing, Ms Findley submitted, firstly, that section 6(1) provides that subject to sub sections (2) and (3), any dispute which the parties have agreed to submit to arbitration may be determined by arbitration. Secondly, section 6(2) provides that disputes in respect of the following matters shall not be capable of determination by arbitration. Namely:

(a) An agreement that is contrary to public policy;

(b) A dispute which in terms of any law, may not be determined by arbitration;

(c) A criminal matter or proceeding except in so far as permitted by written law, or unless the Court grants leave for the matter, or proceeding to be determined by arbitration;

(d) A matrimonial cause;

(e) A matter incidental to a matrimonial cause, unless the Court grants leave for the matter to be determined by arbitration;

(f) The determination of paternity, maternity, or parentage of a person; or

(g) A matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.

In view of the foregoing provisions, Ms. Findley submitted that the matters in dispute in this action are amenable to arbitration. In addition, Ms. Findley, drew my attention to the decision of the Supreme Court in *Vangelatos v Vangelatos*. I will refer to this case in more detail later. Ms. Findley submitted that in the *Vangelatos* case, the Supreme Court held that the Articles of Association is a binding agreement which the Court has to respect. And further, Ms. Findley submitted that the issues relating to the administration and management of the company are covered by Article 24 of the Memorandum and Articles of Association. Ms. Findley therefore urged me to give effect to the agreement between the parties in this case, and ultimately refer this matter to arbitration.

Mr. Chibundi opposed this application vehemently. In opposing the application, Mr. Chibundi relied on the affidavit in opposition dated 28th June, 2010. The steps in Mr. Chibundi's arguments may be stated as follows. First, Mr. Chibundi contends that the arbitration clause specifically provides that if any differences arise between the company and directors on one hand, and any members of the company on the other hand, then those differences should be referred to arbitration. Second, that the Plaintiff's claim in the main action is for a declaration that the Plaintiff be recognized as a member because he was removed by fraudulent means. Third, since the Plaintiff is not a member of the company, then he cannot be bound by the arbitration clause.

As regards the *Vangelatos* case, Mr. Chibundi submitted that the case is distinguishable. It is distinguishable because it concerned an aggrieved party who applied for winding up of a company as a result of irreconcilable differences that arose amongst the major shareholders of the company. In contrast to the instant case, Mr. Chibundi submitted that the Plaintiff seeks to be declared as a member so that he can later be bound by the Articles of Association. Mr. Chibundi drew my attention to the case of *Camilla Cotton Oil Company v Granadex S.A. Tracornin S.A. (7).* On the basis of the preceding authority, Mr. Chibundi submitted that it is one thing to agree to arbitration when dealing with an honest person. Quite another when dealing with a dishonest person. Mr. Chibundi argued that allegations of dishonesty render it inappropriate for this dispute to be heard by an arbitrator.

However, the major objection taken in this matter by Mr. Chibundi is premised on the authority of *Chappel v North (1).* I will address this authority at length in the course of this ruling. In any case, Mr. Chibundi culled from the *Chapel* case the proposition that a defendant is debarred from staying proceedings after taking steps in any action. Thus, Mr. Chibundi contends that by filing the defence in this action, the 2nd and 3rd defendants waived their right to stay the proceedings and to refer the matter to arbitration. Further, by taking that step, Mr. Chibundi submitted that the 2nd and 3rd defendants affirmed my jurisdiction in this matter.

Lastly, Mr. Chibundi referred me to the case of *Edward Grey and Company v Tolme and Runge,* where the question between the parties was whether as a matter of law, the contracts were alive or dead. In that case a stay was refused. Mr. Chibundi submitted that the question before me is also a matter of law. Namely, whether the Plaintiff was properly removed from being a member of the company. Therefore, since a question of law has been raised, the application ought to be refused. Finally, Mr. Chibundi submitted that the issues that have been catalogued in the statement of claim are issues that cannot be decided in arbitration. Mr. Chibundi in closing, reiterated that the application is misconceived, and should therefore be refused.

In reply, Ms. Findley raised three issues. First, she referred me to section 45(2) of the Companies Act. Section 45(2) provides that:

*"On incorporation of a company with share capital and until the first allotment of shares by the company, the members shall be those subscribers to the application for incorporation who have not given the company written notice of their ceasing to be members."*

In view of the foregoing provision, Ms. Findley submitted that there is no evidence that the Plaintiff gave written notice stating that he was no longer a member of the company. Ms. Findley therefore contends that the Plaintiff is a member of the company, and is bound by section 24 of Memorandum Articles of Association; housing the arbitration agreement. The second issue raised by Ms. Findley, related to the argument advanced by Mr. Chibundi that the 2nd and 3rd defendants are barred from invoking section 10 of the Arbitration Act after taking steps in this action. Ms. Findley submitted that section 10 of the Arbitration Act provides that a matter may on request be referred to arbitration at any stage of the proceedings. The third issue relates to the arbitrability of the disputes in this action. Ms. Findley referred me again to section 6 of the Arbitration Act, and submitted that this matter is not excluded by the Arbitration Act.

I am indebted to counsel for the spirited arguments, and submissions. As I see it, the major objection taken to the application is that the 2nd and 3rd defendants should have made the application before taking any steps in defending this action. To support this contention, the Plaintiff has relied on the case of *Chappel v North (1)*. The facts in this case were that the plaintiff brought an action for work done under a building contract which contained a general submission to arbitration of all disputes arising out of breaches of contract. After delivery of the counter-claim, the defendant took out a summons for directions for the purpose of obtaining discovery from the plaintiff. On the hearing of the summons, he applied for, and obtained leave to administer interrogatories to the defendant. The plaintiff later discontinued his action, and proposed to refer the whole matter to arbitration. And, upon the defendant refusing to allow the counter-claim to be referred to arbitration, took out summons under section 4 of the Arbitration Act 1889, to stay the proceedings on the counter-claim.

By section 4 of the Arbitration Act 1889, it is provided that:
*"If any party to a submission.....commences any legal proceedings in any Court against any other party to such legal proceedings may at any time after appearance, and before delivery of any pleadings, or taking any other steps in the proceedings apply to that Court to stay the proceedings."*

The trial judge dismissed the summons referred to above, on the ground that he had no justification to make the order. The plaintiff then appealed from chambers. On appeal, Denman, J, was of the opinion that the decision of the trial judge at chambers must be affirmed. Of note, it

was argued that the plaintiff had since the delivery of the counter-claim taken "steps in the proceedings", and three different matters were relied on as being such steps. The first was that the plaintiff had obtained a series of consents from the defendant for the extension of time for the delivery of the reply. This step was discounted and could not be regarded as a step taken. The second matter relied on was that the plaintiff had taken out a summons for particulars of the counterclaim. Denman, J, was of the view that that did amount to a step in the proceedings. Third, subsequent to the amendment of the counterclaim, and upon the hearing of the defendant's summons for directions, the plaintiff applied for and obtained leave to administer interrogatories to the defendant. Denman, J, held that that clearly amounted to a step by the plaintiff in the proceedings, and consequently, the trial judge at chambers was right in holding that he had no jurisdiction to make the order asked for. As a result, the appeal was dismissed.

The case of *Chappel v North (1)* does not aid the plaintiff because section 10 of the Arbitration Act, Number 19 of 2000, is worded differently. In fact, and in effect, a party may under the Arbitration Act, make an application at any stage of the proceedings to stay the proceedings and request the Court to refer a matter to arbitration. Unlike section 4 of the Arbitration Act of 1898, construed in the *Chappel* case, section 10 of the Arbitration Act, Number 19 of 2000, does not constrain any party that has "taken steps in the proceedings".

In addition to the *Chappel case*, Mr. Chibundi relied on a line of cases that include *Richard v Le Maitre (2); Ochs v Ochs Brothers (4); Parker Gaines and Company Limited v Turpin (5)*; and *Pitchers Ltd v Plaza Queensbury (6)*. All these cases settle the principle that to preserve a right to arbitrate, it is essential that no step shall be taken in the action before an application is made to stay it. I have already decided that s.10 of the Arbitration Act does not constrain any party that has taken steps in the proceedings from referring a matter to arbitration.

Ms. Findley, in the course of the arguments referred me to the case *Vangelatos v Vangelatos Appeal Number 7* of 2006 (unreported). The facts in this Vangelatos case were that the respondent filed a winding up petition pursuant to section 271 of the Companies Act, before the High Court claiming that because of the differences and disputes that had arisen between the two major holders in the Dar Farms Transport Company Limited, a company which was not party to the proceedings, that company should be dissolved. The appellant in that action applied for an

order that the proceedings be stayed, and be referred to arbitration as provided for in section 10 of the Arbitration Act Number 19 of 2000.

In making the application, the appellant deposed that Article 24 of the Memorandum and Articles of Association provided that:

> *"Whenever any differences shall rise between the company, the Directors on the one hand and any of the members or representatives on the other hand, or between any members or class of members or between the Directors with regard to anything done, executed, or omitted or suffered in pursuance of these presents or the Act or with regard to any breach of these or any claim or account of any such decision of an arbitrator or to the decision of two Arbitrators of whom one shall be appointed by each of the parties in difference and any such difference shall be subject to all the provisions of the Arbitration Act and any such statutory modication thereof for the time being in force."*

It is noteworthy that both the number of this section, and the contents of the arbitration clause, are identical with the clause under discussion in the current proceedings. To continue with the narration, the trial judge in *Vangelatos v Vangelatos*, rejected the appellant's application stating that the disputes in question related to differences arising from the breaches of the Memorandum, and Articles of Association. In the end, trial judge held that:

> *"I do not believe that such differences can be extended to usurp the Court's jurisdiction and the power to wind up a company which is expressly conferred by legislation."*

On appeal, the Supreme Court held that clause 24 of the Memorandum and Articles of Association of Dar Farms and Transport Limited is couched in very broad terms. Accordingly, the Supreme Court held that the parties agreed to submit themselves to an alternative dispute resolution mechanism of any dispute or differences that would arise between them as members of Dar Farms and Transport Limited. In a word, the Supreme Court held that the trial judge misdirected himself in holding that the issues before him were not arbitrable.

Further, section 10 of the Arbitration Act was again a subject of interpretation by the Supreme Court, in the case of *Leopard Ridge Safaris Limited v Zambia Wildlife Authority (9)*. The facts giving rise to the appeal were that on 28th January, 2008, the respondent, Zambia Wildlife Authority, Munyamadzi Community Resources Board, and Leopard Ridge Safaris Limited, entered into a Hunting Concession Agreement.

As the agreement was being administered by the parties, the Zambia Wildlife Authority took the view that certain parts of the Agreement were not complied with by Leopard Ridge Safaris Limited. Consequently, on 3rd August, 2006, Zambia Wildlife Authority terminated the Agreement. In response, on 4th August, 2006, Leopard Ridge Safaris Limited launched an action in the High Court by way of an *ex parte* application for leave to apply for judicial review pursuant to Order 53 of the Rules of the Supreme Court.

After perusing the *ex parte* application, the trial judge ordered in his ruling of 9th August, 2006, that the application should be heard *inter partes*. On the hearing of the application *inter partes*, the respondent raised a preliminary application on a point of law. The preliminary issue was raised pursuant to section 10 of the Arbitration Act. Namely, that clause 12 of the Hunting Concession Agreement provided that the mode of settlement of the dispute was by way of arbitration. It was therefore contended that the action before the High Court should be stayed to enable the parties resolve the dispute through their own choice of forum. In response, Leopard Ridge Safaris Limited, argued that Zambia Wildlife Authority had rendered the lease agreement inoperative, or incapable of being performed by its cancellation. In his ruling, the trial judge held that the parties were bound by the arbitration clause in the agreement. Further, the trial judge held that since one party had requested for arbitration, there was no ground upon which the action could not be referred to arbitration.

On appeal Silomba, JS, delivering judgment of the Supreme Court, observed that in terms of section 10 of the Arbitration Act, there were proceedings before the trial judge in form of an *ex parte* application for leave to apply for judicial review. Justice Silomba observed that the application for leave to apply for judicial review was never determined as a result of the preliminary application. The Supreme Court did not therefore see any injustice because section 10(2) permitted such a situation to prevail. Justice Silomba went on to explain that when an action has been referred to arbitration, it may pend before the Court while arbitral proceedings are commenced and continued leading to an award being made. If an award is made, and the parties are satisfied with the outcome, the pended action in Court can later be discontinued. Conversely, if a party is dissatisfied with the award on any of the grounds set out in section 17 of the Arbitration Act, he or she may resurrect the pending action.

On the facts of this case, I therefore find that by clause 24 of the Articles of Association, the parties entered into an agreement that whenever differences arise, such differences would be referred to arbitration. The significance or import of an arbitration agreement, or arbitration clause is clearly illustrated by the observation of Manro Robino Summartano in a book entitled, *International Arbitration Law and Practice* (Kluwer Law International 2001) at p. 195 as follows:

> *"The agreement to refer a dispute to arbitration whether in a submission agreement or in an arbitration clause, consists in the agreement of the parties to refer to arbitration one or more disputes which have already arisen or which may arise. According to the prevailing opinion such an agreement is a contract between persons or bodies acting in a private capacity to which the arbitrator who at the time is generally not even appointed is at least at that time not a party."*

Further, Julian D.M. Lew, Loukas A. Mistellis, and Stefan M. Kroll, in *Comparative International Commercial Arbitration,* (Kluwer International, 2003) postulate this view at p. 129 as follows:

> *"An arbitration agreement is the expression of the intent of the parties to withdraw their disputes from a national Court system and submit them to arbitration. The arbitration agreement will deliver the intended results if it is enforceable. Only if it was validly entered into and covers the dispute in question will Courts deny jurisdiction."*

Thus, on the facts of this case, I hold that the 2nd and 3rd defendants are entitled, to request me to refer this matter to arbitration at any stage of the proceedings. Accordingly, since the parties chose arbitration as their forum or mode of dispute resolution, I order that the parties go to that domestic forum to resolve their differences. These proceedings shall therefore be stayed pending conclusion of the arbitration. Costs follow the event.

*Leave to appeal is granted.*