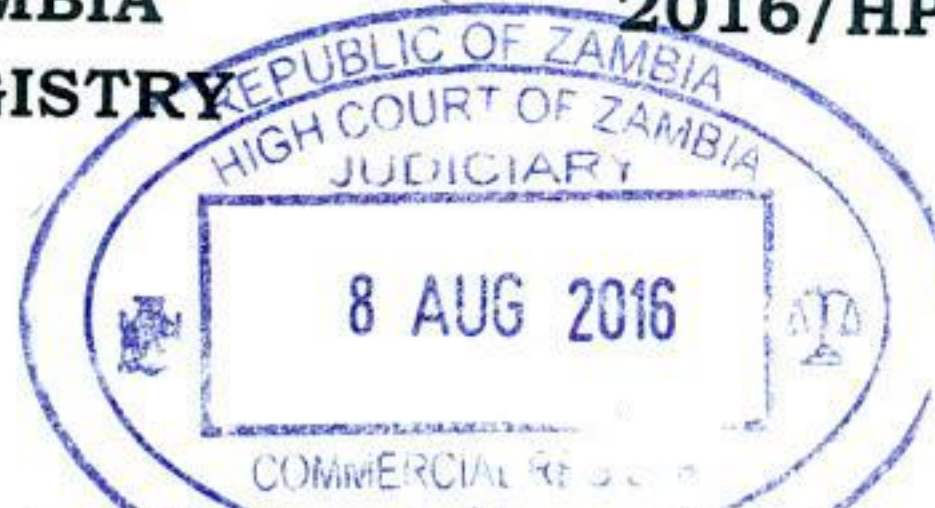


THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/HPC/ARB/0354



IN THE MATTER OF : A SUBCONTRACT AGREEMENT BETWEEN CHINA HENAN INTERNATIONAL COOPERATION GROUP CO. LIMITED AND G & G NATIONWIDE (Z) LIMITED DATED 14TH OCTOBER, 2013 AND ADDENDUM THEREOF DATED 22ND JUNE 2014

AND

IN THE MATTER OF : AN APPLICATION TO SET ASIDE ARBITRAL AWARDS

AND

IN THE MATTER OF : AN ARBITRAL AWARD ON JURISDICTION DATED 25TH APRIL 2016, ARBITRAL AWARD ON COSTS DATED 2ND JUNE 2016 AND CORRECTIONAL AWARD THEREOF;

AND

IN THE MATTER OF : SECTION 17 (2) (IV) OF THE ARBITRATION ACT NO. 19 OF 2000 AS READ TOGETHER WITH RULE 23 OF THE ARBITRATION (COURT PROCEEDINGS) RULES PROMULGATED PURSUANT TO STATUTORY INSTRUMENT NUMBER 79 OF 2001 AND ARTICLE 34 (2) (IV) OF THE UNCITRAL MODEL LAW, FIRST SCHEDULE TO THE ARBITRATION ACT NUMBER 19 OF 2000.

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COOPERATION GROUP CO. LIMITED AND
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THEREOF DATED 22ND JUNE 2014**

AND

**IN THE MATTER OF : AN APPLICATION TO SET ASIDE ARBITRAL
AWARDS**

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**IN THE MATTER OF : AN ARBITRAL AWARD ON JURISDICTION
DATED 25TH APRIL 2016, ARBITRAL
AWARD ON COSTS DATED 2ND JUNE 2016
AND CORRECTIONAL AWARD THEREOF;**

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**IN THE MATTER OF : SECTION 17 (2) (IV) OF THE ARBITRATION
ACT NO. 19 OF 2000 AS READ TOGETHER
WITH RULE 23 OF THE ARBITRATION
(COURT PROCEEDINGS) RULES
PROMULGATED PURSUANT TO STATUTORY
INSTRUMENT NUMBER 79 OF 2001 AND
ARTICLE 34 (2) (IV) OF THE UNCITRAL
MODEL LAW, FIRST SCHEDULE TO THE
ARBITRATION ACT NUMBER 19 OF 2000.**

BETWEEN:

**CHINA HENAN INTERNATIONAL
COOPERATION GROUP CO. LIMITED**

PLAINTIFF

AND

G AND G NATION WIDE (Z) LIMITED

DEFENDANT

*Delivered in Chambers before Hon. Mr. Justice Sunday B. Nkonde, SC at Lusaka
this 8th day of August, 2016*

For the Plaintiff : M. Nsapato of Chibesakunda & Company.
For the Defendant : D. Findlay and M. Kabimba of D. Findlay &
Associates

R U L I N G

CASES REFERRED TO:

1. *The Incorporated Owners of Tak Tai Building V. Leung Yau Building Limited (2005) HKC 87 (2005) 1 HKC*
2. *Yougo Limited v Pegasus Energy Zambia Limited (2011) ZR Page 280 Volume 2*
3. *Cash Crusaders Franchising (PTY) Limited v Shakers and Movers (z) Limited (2012) (HC) ZR 174 Volume 3*

LEGISLATION REFERRED TO:

1. *Arbitration Act, Number 19 of 2000*
2. *Arbitration (Court Proceedings) Rules, Statutory Instrument Number 79 of 2001*
3. *Supreme Court Practice Rules, 1999 Edition, Volume 1 United Kingdom (The White Book)*
4. *Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Act Number 2 of 2016.*
5. *High Court Rules, Chapter 27 of the Laws of Zambia.*

This is a motion by the Defendant raising preliminary issue pursuant to Order 33 Rule 7 of the Rules of the Supreme Court, Rule 11 of the Arbitration (Court Proceedings) Rules and Articles 13 and 16 of the First Schedule to the Arbitration Act as filed on 28th July, 2016.

The issues raised for determination are:

- 1. Whether the Plaintiff's Originating Summons to Set Aside Arbitral Award on Jurisdiction dated 25th April 2016, is properly before the Court, when the appropriate prescribed procedure for challenging Arbitrator's Jurisdiction has not been complied with and the requisite timeframe of thirty (30) days within which the aforesaid question may be referred to the Court following receipt of the aforesaid Arbitral Award on jurisdiction has since expired.***

- 2. Whether the Plaintiff's Originating Summons to Set Aside Arbitral Awards on Costs following the Award on Jurisdiction can therefore be entertained by the Court.***

The gist of the Defendant's argument is that this Court is wanting in jurisdiction to determine the Plaintiff's matter commenced by way of Originating Summons on 15th July, 2016 pursuant to section 17 of the Arbitration Act. The Defendant by Counsel contends that this is because the Arbitral Award of 25th April 2016 which the Plaintiff is challenging by the Originating process was an Award not on the merits and which was dealt with by the Arbitral Tribunal as a preliminary question on jurisdiction. It was not dealt with in the Final Award on the merits and therefore, Counsel further contends, in terms of Article 16 (3) of the First Schedule to the

Arbitration Act (**THE UNCITRAL MODEL LAW**), this Award on jurisdiction could only have been competently come before this Court if the Plaintiff had by request invited the Court to determine the matter within 30 days of the Plaintiff receiving the Notice of the Ruling on the preliminary question on jurisdiction dated 25th April, 2016. Counsel made extensive reference to Rule 11 of the Arbitration (Court proceedings) Rules and Article 13 and 16 of the UNCITRAL Model Law which state as follows;

Rule 11

(1) An application –

- (a) To decide on a challenge by a party; of an arbitrator, Under Article 13(3) of the First Schedule to the Act;**
- (b) To decide on any controversy regarding the termination of the mandate of an arbitrator under Arbitrator under Article 14 (1) of the First Schedule to the Act; or**
- (C) To decide on the jurisdiction of an arbitral tribunal under Article 16 (3) of the First Schedule to the Act
Shall be made by originating summons to a Judge of the High Court.**

(2) The application referred to in sub-rule (1) shall be supported by an affidavit-

- (a) Exhibiting a copy of the arbitration agreement;**
- (b) Stating the facts in support of the application including steps taken in the arbitral proceedings;**

- (c) Exhibiting any ruling or finding of fact made in the Arbitral proceedings; and*
 - (d) Stating the name, occupation and qualifications of the arbitrator.*
- (3) The affidavit shall be accompanied by such other evidence with respect with respect to the matters referred to in Articles 13 (3) and 14 (1) and 16(3) of the First Schedule to the Act as may be necessary...”*

Jurisdiction of Arbitral Tribunal

ARTICLE 13

- (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provision of paragraph (3) of this article.*
- (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of the circumstances referred to in Article 12 (2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*
- (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may*

request, within thirty days after having received notice of the decision rejecting the challenge, the Court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

ARTICLE 16

Competence of arbitral tribunal to rule on its jurisdiction

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter allegedly to be beyond the scope of its authority is raised during the arbitral proceedings.*

The arbitral tribunal may, in either case, admit a later plea if it consider the delay justified.

(3) The Arbitral Tribunal may rule on the plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the Arbitral Tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of the ruling, the Court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the Arbitral Tribunal may continue the arbitral proceedings and make an award.

In this regard, Counsel for the Defendant cited the **HONG KONG** Court of Appeal case of **THE INCORPORATED OWNERS OF TAK TAI BUILDING V. LEUNG YAU BUILDING LIMITED**¹ as authority that an Arbitral Award on jurisdiction decided as a preliminary question is not an Arbitral Award on the merits. Counsel for the Defendant also contends that the arguments on the law with respect to the Arbitral Award of 25th April 2016 applies to the Arbitral Award on costs dated 2nd June 2016 and the Correctional Award.

Counsel for the Defendant has further made reference to Article 13 (1) of the UNICITRAL Model Law on the jurisdiction of the Arbitral Tribunal which has been reproduced herein

On the other hand, Counsel for the Plaintiff contends that this Court has inherent jurisdiction as well as original and unlimited jurisdiction to exercise its discretion and by order stay the enforcement of Arbitral Awards and Arbitral proceedings pending determination of the application to set aside the Arbitral Awards if it becomes necessary to do justice in the action and that the original and unlimited jurisdiction of this Court is only limited by express provisions provided under laws that govern the exercise of that jurisdiction. Thus, the Plaintiff's submission that the Defendant's preliminary issue raised is without merit and should be dismissed.

The question to be determined is whether the Arbitral Award on jurisdiction dated 25th April, 2016 was an Arbitral Award on the merits.

There is no dispute, and I find as a fact that the Arbitral Award on jurisdiction dated 25th April, 2016 was dealt with by the Arbitral Tribunal as a preliminary question, and further that the Arbitral Tribunal was in order to proceed in that manner by virtue of Article 13 and Article 16 (3) of the UNICITRAL Model Law already referred to in this Ruling.

It is also not in dispute, and I further find as a fact that the Arbitral Award on jurisdiction and the subsequent Awards being challenged in this action were not yet registered by a competent Court at the time of the commencement of this action.

Thus, I am sufficiently persuaded by and agree with the arguments of Counsel for the Defendant, and on the authority of the **HONG KONG** Court of Appeal case cited by the Counsel, that the Arbitral Award on jurisdiction dated 25th April, 2016 was not an Arbitral Award on the merits.

It, therefore, follows that the Arbitral Award not being on the merits, it was not competent for the Plaintiff to have commenced this action pursuant to Section 17 of the Arbitration Act-dealing with setting aside Final Awards-instead of having recourse to the provisions of Rule 11 of the Arbitration (Court Proceedings) Rules and Article 13(3) and 16(3) of the UNICITRAL Model Law.

In any event, at the time of the commencement of this action, the Plaintiff was out of time of 30 days allowed for invoking the provisions of Rule 11 of the Arbitration (Court Proceedings) Rules, Article 13 (3) and 16 (3) of the UNICITRAL Model Law in challenging the Arbitral Award on jurisdiction dated 25th April, 2016.

On a further plane, I do not accept the forceful argument of Counsel for the Plaintiff that in arbitral process, the High Court has the power to grant any order if the interests of justice demand and this power is by virtue of the Court's inherent jurisdiction, the Court's original and unlimited jurisdiction under Article 134 (a) of the Constitution of Zambia as amended and Order 3 Rule 2 of the High Court Rules. To the contrary, the High Court's complimentary role in arbitral process is limited to instances permitted by the provisions of the Arbitration Act (and Rules made there under) – see **YOUGO LIMITED V PEGASUS ENERGY ZAMBIA LIMITED**² decided by Kajimanga, J as he was then and **CASH CRUSADERS FRANCHISING (PTY) LIMITED V SHAKERS AND MOVERS (Z) LIMITED**³ decided by Mutuna, J also as he was then.

In a nutshell, the preliminary issue raised by the Defendant is answered by this Court holding that it has no jurisdiction to determine the action herein as commenced by the Plaintiff. Consequently, the Exparte Order to stay

arbitral proceedings commenced between the Plaintiff and the Defendant and also enforcement of the Arbitral Award on costs dated 2nd June, 2016 and Correctional Award thereof granted to the Plaintiff on 18th July, 2016 is forthwith discharged and the entire action commenced by Originating Summons is accordingly wholly dismissed on account of want of jurisdiction on the part of this Court.

The Defendant shall have its costs, same to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 8th day of August 2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE