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

2016/HPC/0362

BETWEEN:

UPEO (ZAMBIA) LIMITED **PLAINTIFF**

AND

ZCON CONSTRUCTION LIMITED **DEFENDANT**

Before Lady Justice B.G Lungu on 6th March, 2017

For the Plaintiff, Mr. D M. Chakoleka, Messrs Mulenga Mundashi Kasonde Legal Practitioners

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J U D G M E N T

Cases referred to:

1. ***Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2008) Volume 2 Z.R.97;***
2. ***Heyman & another v Darmins Limited (1942) AC 356;***
3. ***Audrey Nyambe vs. Total Zambia Limited, SCZ Judgment No. 1 of 2015;***
4. ***Ashville Investments v Elmer Constructors Limited[5], at page 58;***
5. ***Michele Amoruso e Figli v. Fisheries Development Corp, 499 F. Supp. 1074, 1080 (S.D.N.Y. 1980);***
6. ***Collins & Aikman Products Co. v. Building Systems Inc, 58 F.3d 16 (2d Cir. 1995);***
7. ***Harbour Assurance (UK) Ltd. v. Kansa General International Insurance, [1993] Q.B. 701;***
8. ***Chikuta v Chipata Rural District Counsel, (1974) Z.R, 241.***

Legislation and Other Materials referred to:

1. ***Section 10 of the Arbitration Act, No. 19 of 2000***

This is an application made by the Defendant for an order to stay proceedings and refer the matter to arbitration.

The application was made by way of Summons, stated to be issued pursuant to ***Section 10 of the Arbitration Act, No. 19 of 2000***, which reads as follows:

> ***"(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.***
>
> ***(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"***

The Summons was filed together with an Affidavit in Support and Skeleton Arguments, all filed on 10th October, 2016.

The Affidavit in Support was sworn by one Bwalya Emmanuel, a learner legal practitioner under the tutelage of the firm representing the Defendant. I will, at an opportune time, comment on the perils of affidavits being sworn by lawyers.

The Affidavit in Support reveals that the Plaintiff's cause of action against the Defendant arose from a contractual relationship entered between the parties in July, 2009. It was deposed that the contract between the parties contained a dispute resolution clause that

prescribed the method of resolving disputes by way of an adjudicator, and if that failed by way of arbitration.

The argument tendered to buttress the application was that the law mandates the Court to refer a matter to arbitration and to stay proceedings upon the request of a party, save where the contract is incapable of being performed or is inoperative.

Aside the statutory authority, the Defendant cited the case of ***Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2008) (vol.2) Z.R, 97***[1] where the Supreme Court held that in considering an application for stay of proceedings under section 10 of the Arbitration Act, the learned Judge had no choice but to refer the dispute to arbitration as provided for in the Agreement.

Reliance was also placed on the case of ***Heyman & another v Darmins Limited (1942) AC 356***[2], in which Lord MacMillan stated, at page 347, the following:

> ***"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."***

The record reflects that as at the date of Ruling, there were no arguments advanced in opposition to the application, albeit Counsel

for the Plaintiff had undertaken to file in their arguments on or before Friday 10th March, 2017.

In view of the absence of any opposition, my determination is premised on my analysis of the submissions of the Defendant and the law as it stands.

In considering the authorities cited by the Defendant, I had the benefit of the vantage point of the Supreme Court in the case of ***Audrey Nyambe vs. Total Zambia Limited, SCZ Judgment No. 1 of 2015***[3]. I will refer to the case of ***Audrey Nyambe vs. Total*** *in extensio* because I consider that it provides apt guidance for the issues under my consideration.

In that case, the Appellant appealed 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 brief background leading up to the appeal was that on 1st April, 2003, the Appellant and Respondent entered into a Marketing Licence Agreement. On 1st June, 2004, the Agreement was terminated without notice by the Respondent.

The Appellant took issue with the termination of the Agreement and commenced proceedings in the High Court. The learned High Court Judge noted that the Agreement between the parties contained an arbitration clause which provided that disputes arising during the continuance of the contract would be resolved by arbitration. Consequently, acting on the authority of the case of ***Leopard Ridge Safaris Limited v Zambia Wildlife Authority***, the High Court Judge stayed the proceedings and referred the matter to arbitration, following an application made by the Respondent.

On appeal, the Supreme considered both cases that the Defendant herein is relying on and guided that ***"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."***

The Court studied the Arbitration clause before it and noted that the clause was couched in a manner which limited the disputes to be referred to arbitration to disputes arising between them during the continuance or subsistence of the Agreement. The Court then observed that the dispute between the parties related to the manner in which the Agreement was terminated and as such occurred after the termination of the Agreement and not during its continuance. Consequently, the Court set aside the order of referral by the High Court, on the ratiocination that at the time the dispute between the parties arose the arbitration clause had become inoperative and incapable of being performed.

Coming to the application before me, I have taken heed of the guidance of the Supreme Court and studied clauses 24 and 25 of the extract of the agreement between the parties, which was exhibited by the Defendant as exhibit ***"EB1"*** to the Affidavit in Support.

Clause 24.1 reads as follows:

> ***"If the Contractor believes that a decision taken by the Principal Agent was either outside the authority given to the Principal Agent by the Contractor or that the decision was wrongly taken, the decision shall be referred to the adjudicator within 14 days of the notification of the Principal Agent's decision."***

Clause 25 reads, in part, as follows:

> ***"25.1 The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.***

25.2 ...Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding..."

My role is simply to interpret the meaning of the arbitration clause, a process which will invariably lead to ascertaining its scope. The scope will in turn guide whether the claim before this Court indeed falls within the ambit of disputes that command an obligation to arbitrate.

In interpreting the clause, I adopted the literal rule method that was used by the Supreme Court in the ***Audrey Nyambe*** case. The literal rule or plain meaning rule of interpretation requires that ordinary words be given their ordinary meaning. In using that method, I aim to discern the intention of the parties using the linguistic nuances of the clause.

Before construing the arbitration agreement, I call to mind the words of May, LJ in the case of ***Ashville Investments v Elmer Constructors Limited[4], at page 58***, who stated that:

> ***"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".***

This means aside using the literal rule of interpretation, I must be chary and deliberate in adopting either a narrow or liberal approach in my journey of interpretation. As such, I take pause to consider international jurisprudence on the use of either the narrow or liberal approach.

Internationally, courts adopt a narrow approach when the wording used in an arbitration agreement limit the scope of arbitration to specific types of disputes or claims. When a clause appears all

encompassing, a liberal or broad approach is taken. The American case of ***Michele Amoruso e Figli v. Fisheries Development Corp, 499 F. Supp. 1074, 1080 (S.D.N.Y. 1980)***[5] is illustrative of this proposition. The court in that case took the position that arbitration provisions containing phrases *"arising out of or relating to this agreement"* must be treated as broad.

The ratio was echoed by the Court of Appeals for the Second Circuit in ***Collins & Aikman Products Co. v. Building Systems Inc, 58 F.3d 16 (2d Cir. 1995)***[6] where the question whether the phrase *"arising out of or relating to"* covered tortious and collateral claims. There the Court opined that broad arbitration clauses raised the presumption that all the asserted claims are arbitrable.

The English Court took a similar approach in the case of ***Harbour Assurance (UK) Ltd. v. Kansa General International Insurance, [1993] Q.B. 701***[7] where the Court of Appeal held that claims on invalidity of the main contract *ab initio* was arbitrable on the grounds that the arbitration language which was referring to the *"disputes arising out of"* the said contract had sufficient breadth to encompass such claims.

In the case before me the wording in the relevant clauses are expressed as follows:

"Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision". *(Court emphasis)*

With respect to the nature of decisions to be referred to an Adjudicator, the contract reads as follows:

> ***"If the Contractor believes that a decision taken by the Principal Agent was either outside the authority given to the Principal Agent by the Contractor or that the decision was wrongly taken, the***

decision shall be referred to the adjudicator within 14 days of the notification of the Principal Agent's decision."

Clearly, the nuance of the arbitration clause invites a narrow interpretation in that the scope of arbitrable disputes is limited to decisions rendered by an Adjudicator.

Further, I observe that even the type of disputes that were amenable to adjudication by an Adjudicator were restricted to decisions of the Principal Agent that were considered to be *ultra vires* the Agents authority. Moreover, in order to activate dispute resolution before an Adjudicator under the clause, there needed to be a referral to adjudication within 14 days of a decision having been taken by the Principal Agent.

In casu, there is nothing in the Affidavit in Support of the application to show that the legal proceedings before Court are associated with any decision taken by any Principal Agent, let alone that such decision was referred to an Adjudicator within the prescribed time of 14 days. Cardinally, there is no proof of any determination of an Adjudicator which the applicant seeks the Court to refer to arbitration. Additionally, the Writ of Summons and Statement of claim on record reveal that the Plaintiff's claim before Court is one for damages for breach of contract, a claim that is to me totally detached from the scope of the arbitration clause.

Before I pronounce myself substantively on the application, I will dwell momentarily on the practice by Advocates, and even more dire, learner legal practitioners, to swear affidavits in the stead of their clients.

I do not consider an application to refer a dispute to arbitration to be a routine application whose affidavit Counsel ought to swear

with ease. It has always been undesirable for Counsel to swear affidavits on behalf of a client in contentious matters as was articulated by Doyle C.J in the case of ***Chikuta v Chipata Rural District Counsel, (1974) Z.R, 241***[8].

The gaps in the Affidavit evidence herein provide a typical example of why the practice is frowned on. The inability of the deponent to attest to factual matters that would have underpinned the application can only be attributed to the fact that the deponent was not privy to the contract or in any other way associated with it. By swearing the affidavit with those limitations, the application was exposed to being ill-fated.

Turning back to the application, given the scope of the arbitration clause, and bearing in mind the absence of any evidence of a determination made by an Adjudicator that would have activated or established a nexus between the claim before Court and the request to refer the case to arbitration, the Court has no basis upon which to place the claims before it within the scope of disputes amenable to arbitration pursuant to the arbitration clause relied on.

In view of the above, I find that the legal proceeding before court fall outside the scope of the arbitration clause between the parties. Consequently, the existing arbitration clause is rendered inoperable as regards the matter before Court. Thus, I decline to refer the matter to arbitration and the application fails in totality.

Costs are awarded to the Plaintiff, to be taxed in default of agreement.

The Defendant is given 14 days from the date of this Ruling to cause an appearance to avoid entry of judgement in default thereof.

Leave to appeal is granted.

Dated the 19th day of September, 2017

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Justice B.G.Lungu

HIGH COURT JUDGE