IN THE HIGH COURT FOR ZAMBIA **2014/HPC/0478**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MOLALATAU FARMS LIMITED	**1ST PLAINTIFF**
JACOBUS KLOPPER	**2ND PLAINTIFF**
ANNA CORNELLA KLOPPER	**3RD PLAINTIFF**

AND

ORIX HOLDING LIMITED	**DEFENDANT**

Before the Honourable Mrs. Justice Irene Zeko Mbewe in Chambers

For the Plaintiffs:	*Mr. J. Zimba & Ms. T. Nkoma of Messrs Makebi Zulu & Advocates*
For the Defendant:	*Mr. M. Munansangu of Messrs Munansangu & Company*

RULING

Cases Referred to:

1. *Hick and Kent v Romney Marsh Sheepbreeders Association (1915) 1 Ah D*
2. *Ituna Partners v Zambian Open University Appeal No.117/2008*
3. *Foss v Harbottle (1843) 67 ER 189*
4. *Burland v Earle (1902) AC 83*

5. *Zurich Australian Insurance Limited t/a Zurich New Zealand v Cognition Education [2014] NZSC 188*
6. *Royal British Bank v Turquand (1856) 6 E & B 327*
7. *Cook v Deeks (1916) 1 AC 554*
8. *Prudential Association Company Limited v Newman Industries Limited (No.2) (1982) 1 All ER 354*
9. *Bellamano v Ligure Lombarda Limited (1976) Z.R. 267 (S.C.)*
10. *Heyman & Another v Darmins Limited [1942] 1 ALL E R 337*

Legislation and Other Works Referred to:

1. *Arbitration Act No. 19 of 2000*
2. *High Court Rules, Cap 27 of the Laws of Zambia*
3. *Rules of the Supreme Court of England (White Book) 1999 Edition*
4. *Oxford Dictionary of Law, 5th Edition, 2003*
5. *Halsbury's Laws of England, 4th Edition, Volume 7(2), 1996 Reissue*

This is the Defendant's notice of intention to raise a preliminary issue filed into Court on 20th October, 2017. The application is made pursuant to **Order 33 Rule 7 Rules of the Supreme Court of England, 1999 Edition**. It raises the following questions for determination:

1. *That the writ of summons issued herein be set aside on the ground that the same was issued without the resolution of the*

company authorizing appointment of Messrs Makebi Zulu and Advocates as the Advocates for the 1st Plaintiff.

2. *Whether the minority shareholders are entitled to sue in the company name without a company resolution to that effect.*
3. *That the matter before Court is premature and contrary to the Defendants company articles of association that strictly demands that where there is a dispute the matter ought to be referred to arbitration.*

In the supporting affidavit dated 20th October, 2017 deposed to by Jeffery Masauso Tembo a director in the Defendant Company, it is stated that the 1st Plaintiff company never passed a resolution to appoint Messrs Makebi Zulu Advocates as its Advocates or its company secretary nor did it authorise the 2nd and 3rd Plaintiff to commence an action on its behalf against the Defendant. That the 1st Plaintiff's Articles of Association strictly demand that any dispute that arises in the Company as regards its directors, members and or representatives ought to be dealt with by an Arbitrator (Exhibit "JMT1"). That the matter at hand is irregular and premature, and as such it ought to be dismissed with costs.

In furtherance of this application, the Defendant filed skeleton arguments on 20th October, 2017 in which it placed reliance on **Order 33 Rule 3 and Order 14A Rule 1 and 2 Rules of the Supreme Court, 1999 Edition**, and Section 5 (1) of the **Arbitration Act No.19 of 2000.** Counsel drew the Court's attention to the case of **Hick and Kent v Romney Marsh Sheepbreeders Association [1915] 1 Ah D[1] and Ituna Partners v Zambian Open University Appeal 117/2008[2]**. Counsel submits that the 1st Plaintiff did not at any point call for a meeting to pass a resolution as to whether or not to appoint Messrs Makebi Zulu and Advocates as its Advocates nor was there a resolution to allow for the commencement of this action against the Defendant. Further that the 1st Plaintiff's Articles of Association clearly states that where there is a dispute between the directors or members, it should be referred to an appointed arbitrator. Counsel argues that according to the **Arbitration Act No 19 of 2000**, where a clause stipulates that matters be resolved by arbitration then such matters are subject to arbitration. Further, that in this case the Articles of Association constitute a contract between the company and each member on the one hand, and between members themselves on the other hand. Counsel went on

to submit that the Court in the case of **Hickman and Kent [1915] 1 Ah D**[1] held that the Plaintiff was bound by the clause in the Articles of Association which refer the matter to arbitration as opposed to instituting legal action. That this being the case, this matter is prematurely before this Court and ought to be determined by way of arbitration. It is prayed that the matter be dismissed with costs.

In respect to a resolution being passed to appoint Messrs Makebi Zulu and Advocates as Counsel for the Plaintiff, the case of **Ituna Partners v Zambia Open University Appeal 117/2008**[2] was cited. It was prayed that the application has merit and should be granted with costs.

In opposing the preliminary issue raised herein, the 2nd and 3rd Plaintiff filed skeleton arguments into Court dated 28th November, 2017. The Court's attention was drawn to the case of **Foss v Harbottle (1843) 67 ER 189**[3] in support of the proposition that in any action by a company, the proper claimant is the company itself. Counsel argues that the 'derivative action' is an exception to this general rule and allows a shareholder to bring a claim in his name

on behalf of the company. Counsel submits that under this exception, the oppressed minority such as the 2nd and 3rd Plaintiff in this matter or shareholders without de facto control of the company can bring an action to redress wrongs committed against the company. Counsel contends that the Courts have established circumstances that would lead to protection of minority shareholders as follows:

1. A personal action can be taken against the company based on its breach of duty; or
2. A derivative action can be filed, provided that there has been fraud perpetrated against the company which is controlled by wrongdoers. In this case minority shareholders file a claim on behalf of the company.

Counsel argues that in the circumstances, there are exceptions and that the Court should not shun minority shareholders in a company as their interests are as important as the majority shareholders interests. To support this argument, the case of **Burland v Earle (1902) AC 83**[4] was cited where the Court considered the possibility of minority shareholders suing in the

company name in the absence of such a resolution. Counsel states that the 2nd Plaintiff, 3rd Plaintiff and the Defendant are shareholders in the 1st Plaintiff Company but due to the nature of the dispute it was impossible to have a meeting where a resolution could be passed allowing the 2nd and 3rd Plaintiff to sue in the company name. The Court is urged to consider the circumstances of this case as falling within the ambits of the exception rule discussed above.

In respect to the issue of arbitration, Counsel submits that it is trite law that where a matter which is subject to an arbitration clause is brought before Court, the Court ought to stay proceedings and refer the parties to arbitration and not dismiss it altogether. My attention was drawn to Section 10(1) of the **Arbitration Act No 19 of 2000.** In aid of its argument, Counsel cited the case of **Zurich Australian Insurance Limited t/a Zurich New Zealand v Cognition Education [2014] NZSC 188**[5] where it was held that:

> *"If the parties have agreed to arbitrate their disputes, in principle a court should first consider and determine whether to stay any court proceedings and refer the matter to arbitration...*

the supreme court held that to go any further than this narrow interpretation (that is to allow courts to determine the merits of disputes before or in conjunction with considering a stay of proceedings) would undermine the purposes of the Arbitration Act, which include limiting judicial involvement."

Counsel submits that this matter should not be dismissed but that it should be referred to arbitration as per **Order 33 Rule 7 Rules of the Supreme Court, 1999 Edition.** Counsel further relied on the case of **Royal British Bank v Turquand [1856] 6 E & B 327**[6] where it was held:

"That third parties who had dealings with the company need not inquire into the regularity of the indoor management but could assume that its requirements had been complied with."

Counsel argues that parties transacting with companies are entitled to assume that internal company rules are complied with, even if they are not. Counsel submits that Messrs Makebi Zulu and Advocates was a third party dealing with the company and worked on the assumption that every internal procedure was followed in the appointment of Advocates for the company. That irregularities in a

company cannot affect third parties dealing with the company and as such the authority of the director was not questioned at the time instructions were given neither were the internal dealings of the company quizzed. That in view of the authorities cited herein and in the interest of justice, it is prayed that the matter be heard on its merit as there are a number of triable issues and that the preliminary application be dismissed with costs.

At the hearing of the application, Counsel for the Defendant Mr. Munansangu entirely placed reliance on the notice of intention to raise a preliminary issue and affidavit in support filed into Court on 20th October, 2017 and the skeleton arguments dated 28th October, 2017.

For the Plaintiffs, Mr. Zimba relied on the skeleton arguments filed on 28th November, 2017 and cemented the arguments by adding that the action before this Court falls in the realm of representative action and the law as it stands allows minority shareholders to commence matters in this manner. In aid of this proposition, he referred to the case of **Cook v Deeks (1916) 1 AC 554**[7]. Counsel contends that the case of **Ituna Partners v Zambia Open**

University Appeal No 117/ 2008[2] referred to by the Defendant is distinguishable and not similar to the case before Court as the persons who sued in that case were majority shareholders with controlling powers and obtained a resolution to proceed with the matter. That if the Court is to go by the Defendant's argument, then it shall sanction that minority shareholders should never bring an action, which is contrary to the law. Counsel prays that the issues raised by the Defendant should fail, and that section 10 (1) of the **Arbitration Act No 19 of 2000** allows such a matter to be referred to arbitration and stay proceedings.

I have addressed my mind to the affidavit evidence, skeleton arguments, list of authorities and argument advanced by the parties herein.

The starting point is to deal with whether the matter herein is amenable to arbitration as that will determine the outcome of the other two preliminary issues raised. Arbitration proceedings are governed by Section 10 (1) of the **Arbitration Act No 19 of 2000** which provides as follows:

"A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so request 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."

It is trite law that where there is an arbitration clause, parties are bound by it. I am persuaded by the case of **Heyman & Another v Darmins Limited [1942] 1 ALL E R 337**[10], in which Lord MacMillan at page 347 stated as follows:

"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."

Counsel for the Defendant argues that the matter is prematurely before Court and contrary to the Defendant's Articles of Association as there is an arbitration clause. The effect of an Article of Association is that it binds the company and its members. A perusal of the record shows that pursuant to clause 24 of the Articles of Association, the parties agreed that in case of any differences that may arise between the Company and its directors and members, the matter shall be referred to arbitration. Clause 24 of the Articles of Association states as follows:

"Whenever any differences arise between the Company and the Directors on the one hand, and any of the members or representatives on the one hand, or between any member or classes of members, or between 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, then such difference shall be referred to

arbitration, to the decision of two arbitrators of whom one shall be appointed by each of the parties in difference, and shall reference shall be subject to all the provisions of the Arbitration Act and any statutory modification thereof for the time being in force."

Arising from the aforesaid, I opine that where the parties have agreed to refer their disputes to arbitration, and in accordance with the provisions of section 10(1) of the **Arbitration Act No 19 of 2000,** the Court is obligated upon application by one of the parties to stay proceedings and refer the matter to arbitration. Counsel for the Defendant having raised the preliminary issue that the matter be referred to arbitration, I accordingly stay these proceedings and refer the matter to arbitration. To this extent, the preliminary issue raised is successful.

Counsel for the Defendant raised two other preliminary issues, namely the setting aside the Writ of Summons on grounds that no resolution was passed appointing Messrs Makebi Zulu and Company, and similarly that no resolution was passed authorising

the Plaintiffs to commence this action. Following the referral of the matter to arbitration, this Court has no jurisdiction to determine the said issues.

The upshot is that the proceedings are stayed and the matter is referred to arbitration.

Costs to the Defendant to be taxed in default of agreement.

Dated at Lusaka this 13th day of March 2018

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HON IRENE ZEKO MBEWE

HIGH COURT JUDGE