IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0042**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

LOUIS DREYFUS COMMODITIES METALS SUISSE AS	PLAINTIFF
AND	
IGNATIUS MWAPE (Sued as Receiver/ Manager of Berdale International Zambia Limited)	1ST DEFENDANT
ALLESSANDRA VALENZA	2ND DEFENDANT
HETRO MINING AND ORES LIMITED	3RD DEFENDANT
SHAWI FAWAZ	4TH DEFENDANT
TUNTA MINING ZAMBIA LIMITED	5TH DEFENDANT

Before the Hon. Lady Justice Irene Zeko Mbewe

For the Plaintiff:	*Mr. M Mwenye SC and Mr. Joshua Kabwe of Messrs Mwenye Mwitwa*
For the 2nd Defendant:	*Mr. E B Mwansa SC of Messrs EBM Chambers*

For the 3rd, 4th and 5th Defendant: Mr. Chikuba of Messrs BCM Legal Practitioners

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R U L I N G

Cases Referred To:

1. *Intermarket Banking Corporation Zambia Limited v Munkanta 2012/HPC/0268*
2. *Colgate Palmolive Zambia Inc. v Abel Shemu Chuka and 10 Others SCZ Judgment No 11 of 2005*
3. *Printing Numerical Registering Co. v Sampson (1875) 19 Ex.462*
4. *Sebastian Holding Inc v Deutsche Bank [2010] EWCA Civ 99*
5. *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal & Another [2011] EWHC 1842*

Legislation Referred To:

1. Arbitration Act No 19 of 2000

This is a Ruling on the 2nd and 4th Defendant's application for an Order to stay and refer the matter to arbitration pursuant to Section 10 of the **Arbitration Act No. 19 of 2000**.

The 2nd Defendant filed a supporting affidavit dated 15th August, 2017 deposed to by his Advocate Mr. Emmanuel Bupe Mwansa SC. It is deposed that that the Plaintiff commenced this action against the 1st and 2nd Defendant as representatives of Berdale International

Limited being a Company that signed two Agreements with the Plaintiff from which the said claims arise. That the Agreements in issue particularly in Article 14 of the Offtake Agreement provides that all disputes arising out or in connection with the Agreements are to be referred to arbitration. The deponent states that the Plaintiff commenced this action without referring the dispute to arbitration as agreed upon by the parties which is in breach of the arbitration clause. That the Plaintiff should abide by what the parties agreed upon.

In the skeleton arguments filed on 15th August, 2017, Counsel for the 2nd Defendant submits that bearing in mind the Off-take agreement signed by the Plaintiff and Berdale International Zambia Limited, it is only just and fair that these proceedings be stayed and the matter be referred to arbitration in accordance with section 10 of the **Arbitration Act No. 19 of 2000**. The 2nd Defendant prays for costs and incidental costs incurred in this matter.

The 4th Defendant in his supporting affidavit dated 17th August, 2017 deposed that this matter emanates from an agreement dated 24th June, 2010 executed between the Plaintiff and Berdale

International Zambia Limited. That one of the terms and conditions of the Agreement is the arbitration clause which is couched in mandatory terms, thereby both parties are bound to resolve all disputes by way of conciliation and or arbitration. The 4th Defendant urges this Court to refer the proceedings to arbitration in accordance with the arbitration clause.

The 4th Defendant filed skeleton arguments on 17th August, 2017 in which Counsel relies on Section 10 of the **Arbitration Act No.19 of 2000.** Counsel submits that in determining whether a matter is amenable to arbitration or not, it is imperative that the wording of the arbitration clause is closely studied. Counsel submits that Article 7.7 of the Offtake Agreement is clear that parties are to refer disputes to arbitration. Further that where parties have agreed to settle any dispute between them by arbitration, the Court's jurisdiction is ousted unless the agreement is null and void, inoperative, or incapable of being performed. The 4th Defendant prays that this matter be stayed and referred to arbitration and that costs be awarded to the Defendants herein.

The Plaintiff filed an affidavit in opposition dated 7th September, 2017 deposed to by Misozi Hope Musengu an Advocate representing the Plaintiff Company. It is deposed that as the record shows that on 1st February, 2016, the Plaintiff filed a Writ of Summons and Statement of Claim against the Defendants claiming inter alia:

(1) *As against the 1st, 2nd, 3rd, and 4th Defendants payment of the sum of US$692, 126.61;*

(2) *As against the 1stDefendant damages for breach of contract;*

(3) *As against the 1st, 2nd and 4th Defendants damages for misrepresentation;*

(4) *As against the 1st, 2nd, 3rd and 4th Defendants an order to trace the location and state of the charged assets and an order for the delivery of the said assets to the Plaintiff or a person appointed as receiver by the Court; and*

(5) *As against the 1st, 2nd, 3rd and 4th Defendant an account for the use of the machinery and charged assets and delivery up of profits arising out of the use of the said charged assets.*

It is deposed that the Plaintiff executed three agreements with Berdale International Zambia Limited namely, the Offtake Agreement, the Prepayment Facility Agreement which were executed on 24th June, 2010, and the security for the Facility being the Fixed and Floating Charge (hereinafter referred to as the "Charge") which was executed on 28th June, 2010. That the Plaintiff commenced this action on the premise of the Charge as shown by the nature of the Plaintiff's claims and the reliefs sought against the 3rd, 4th and 5th Defendant.

Further that Clause 13.11 and 13.12 of the Charge reveals that this Court has exclusive jurisdiction to settle any dispute arising out of or in connection with the Charge. The deponent avers that she is aware that neither the Charge, the Offtake Agreement nor the Prepayment Facility Agreement provide that the said Agreements should be read as one Agreement or that one Agreement takes precedence over the other. It is deposed that the Plaintiff invokes the provisions of the Charge and that the arbitration clause in the Prepayment Facility Agreement does not therefore come into play and is of no effect. That premised on the foregoing it is unnecessary

and unwarranted for this Court to stay proceedings and refer this matter to arbitration and that the 3rd, 4th and 5th Defendant will not suffer prejudice if this matter is not referred to arbitration but that to the contrary the justice of this matter will be served. That this is a proper matter for the Court to dismiss this application as the same is inconsequential to these proceedings.

The Plaintiff in its skeleton arguments dated 7th September 2017 submits that this action is premised on the Charge pursuant to which the money advanced by the Plaintiff to Berdale International Zambia Limited was secured. That this fact is demonstrated by the nature of the Plaintiff's claim and reliefs sought against the Defendants as evidenced in the Statement of Claim and Writ of Summons. Counsel for the Plaintiff submits that in this respect, Clause 1.02, sub-clauses (a), (l) and (n) of the Charge are pertinent to the Plaintiff's case as the said clauses were invoked due to the Defendants breach of their obligations under the Charge. Further that the Plaintiff is entitled to commence proceedings against the Defendants on the basis of Clauses 13.11 and 13.12 of the Charge which stipulate that the Court has exclusive jurisdiction to settle

any dispute arising out of or in connection of the Charge. To support this argument, my attention was drawn to the Ruling of my learned brother High Court Judge Mutuna (as he then was) in the case of **Intermarket Banking Corporation Zambia Limited v Munkanta 2012/HPC/0268**[1] in which he stated that:

> *"Further, whilst it is not disputed that the documents arise out of the same transaction, they must be understood in their proper context which is that, the mortgage deed is the primary security securing the funds and offers the applicant the luxury of possession of the property charged. On the other hand, the personal guarantee is a secondary or additional security which permits the applicant to pursue the respondent personally and beyond the security offered...*
>
> *Arising from what I have stated in the preceding paragraph it is therefore clear that <u>the applicant has an option to pursue two remedies, namely under the mortgage or the personal guarantee</u>. The applicant may also choose to invoke both remedies. If it invokes the remedy via the personal guarantee or both, then, the arbitration clause comes into play. <u>If it invokes</u>*

the remedy via the mortgage, the arbitration clause does not come into play. I have stated in the earlier part of this ruling that the endorsement in the originating summons clearly indicates that the applicant has invoked its rights under the mortgage deed only, as such the arbitration clause is of no effect."

(underlining for emphasis purposes only)

Counsel for the Plaintiff avers that although this matter is primarily premised on the Charge, the Prepayment Facility Agreement and the Offtake Agreement give a very useful background to the terms of the Charge. That the relevance of the Agreements dated 24th June, 2010 are mentioned in the Charge. Counsel submits that notwithstanding that the Plaintiff seeks to enforce the Charge against the Defendants, the Charge refers to the provisions of the Prepayment Facility Agreement and the Offtake Agreement in various respects. The Plaintiff contends that neither the Prepayment Facility Agreement nor the Offtake Agreement provide that the said Agreements should be read as one Agreement. Counsel contends that this matter is not subject of an arbitration

clause as alleged by the Defendants and therefore this Court is bound to give effect to the provisions of Clause 13.11 and 13.12 of the Charge, and hear and determine this matter as agreed by the parties. I was referred to the Supreme Court decision in the case of **Colgate Palmolive Zambia Inc. v Abel Shemu Chuka and 10 Others**[2] in which the Court reaffirmed the principle of the sanctity of contracts in the often quoted dictum of Sir George Jessel MR in **Printing Numerical Registering Co. v Sampson (1875) 19 Ex.462**[3] as follows:

> *"If there is one thing more than another which public requires it is that men of full age and competent understanding shall have utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice."*

In light of the foregoing, Counsel for the Plaintiff submits that the Defendants' application lacks merit as such it should be dismissed with costs to the Plaintiff and the matter be allowed to proceed to trial.

At the hearing of the application, Counsel for the 2nd Defendant placed reliance on the 2nd Defendant's affidavit in support and skeleton arguments filed on 15th August, 2017 herein.

Counsel for the 4th Defendant equally placed reliance on the affidavit in support and skeleton arguments filed on 17th August, 2017.

Counsel for the Plaintiff relied on the affidavit in opposition and skeleton arguments dated 7th September, 2017. Counsel in his oral submission contends that the relevant section in this application should have been Section 22(1) of the **Arbitration Act No 19 of 2000** and not Section 20(1) as cited by Counsel for the 2nd Defendant. He went on to state that there are six parties to this matter and that the Defendants' application is based on an Agreement that was signed by two parties. It was Counsel's submission that the question that arises is, if these proceedings were stayed and the matter referred to arbitration, what will happen to claims against the other four parties. Counsel contends that there is a legal Charge which the Defendants have not referred to in

their documents as shown in exhibit "MHM 2" in the affidavit in opposition.

Counsel questioned what would happen to the enforcement of the Charge if these proceedings are stayed and the matter referred to arbitration as the charge has placed jurisdiction before this Court. Counsel submits that in the case of **Intermarket Banking Corporation Zambia Limited v Munkanta 2012/HPC/0268**[1] it was clear that the primary issue is the substance of the claims and where a party elects to pursue its grievance under one Agreement, the fact that there is an arbitration clause in other Agreements is inconsequential. Counsel submits that in the English case of **Sebastian Holding Inc. v Deutsche Bank [2010] EWCA, Civ 99**[4] it was held that emphasis should be placed on the agreement most closely connected with the claim. This position was reaffirmed in the case of **PT Thiess Contractors Indonesia v PT Kaltim Prima Coal & Another [2011] EWHC 1842**[5], where the Court refused to stay proceedings and refer the matter to arbitration. In the same case, the Court decided that where there are parties in the matter not covered by the arbitration clause, the Court should not stay the

proceedings and refer the matter to arbitration as it would leave the Plaintiff without any recourse. Counsel submits that in the present case the arbitration clause only binds the Plaintiff and 1st Defendant as such staying proceedings would mean there will be no recourse against the 2nd, 3rd, 4th and 5th Defendant.

In reply, Counsel for the 2nd Defendant submits that the applicable law is Section 21(1) of the **Arbitration Act No 19 of 2000** and that the Charge should take precedence to the Facility as regards the first claim against the 2nd, 3rd, 4th and 5th Defendant for the sum of US$692,126.61. Further that the Prepayment Facility Agreement executed by the 2nd Defendant has an arbitration clause, and that the Charge covers the issue of the assets of the 1st Defendant. Counsel submits that the Prepayment Facility Agreement deals with actual money advanced whilst the Charge covers the assets of the 1st Defendant and based on the aforesaid, it is prayed that this matter be referred to arbitration. In respect to the 3rd, 4th and 5th Defendant, Counsel submits that they are not covered by the Charge and that a separate action maybe commenced as they are not privy to the said Charge. Counsel further contends that the

case of **Intermarket Banking Corporation Zambia Limited v Munkanta 2012/HPC/0268**[1] referred to by Counsel for the Plaintiff is not binding but persuasive and that the facts are different from the case at hand. Counsel argues that the Offtake and Prepayment Facility Agreements were signed on 24th June, 2010 and 28th June, 2010 respectively and that the issue of the later Agreement taking precedence does not apply as both documents are important.

In reply to Counsel for the Plaintiff's submission, Counsel for the 4th Defendant submits that a perusal of the Statement of Claim will show that this matter is not only premised on the Charge but the Offtake Agreement as indicated in paragraph 6, 7, 8, 9, 10, 13, 14 and 16. Counsel submits that the case of **Intermarket Banking Corporation Zambia Limited v Munkanta 2012/HPC/0268**[1] is not applicable in this matter as the application in that case was to enforce a mortgage by way of Originating Summons, whereas in *casu* it is by way of Writ of Summons which is not the mode of enforcing a Charge. That enforcement of any right accrued by the Plaintiff should be by arbitration against the 1st Defendant and that

the Plaintiff has not accrued any rights to bring an action against the 2nd, 3rd and 4th Defendant.

I have considered the affidavit evidence, skeleton arguments, list of authorities and submissions advanced by the parties herein. The issue for my determination is whether these proceedings should be stayed and the matter referred to arbitration. The 2nd and 4th Defendant's application is anchored on Section 10 of the **Arbitration Act No 19 of 2000** which states as follows:

> *"10. (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 request at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it find that the agreement is null and void, inoperative or incapable of being performed.*
>
> *(2) Where proceedings referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court".*

It is trite law that where parties have an arbitration clause in their agreement, they bind themselves to submit to arbitration in the event of a dispute arising. The 2nd and 4th Defendant's contention is that these proceedings emanates from the two Agreements signed by the Plaintiff and Berdale International. It is further the 2nd and 4th Defendant's argument that the Offtake Agreement dated 24th June 2010, has an arbitration clause which states that all disputes arising between the parties should be resolved by conciliation and or arbitration. On this premise, the Defendants' have prayed that these proceedings should be stayed and the matter be referred to arbitration as the action was commenced in breach of the provisions of the arbitration clause agreed upon by the parties.

The Plaintiff on the other hand contends that this action does not emanate from the two Agreements dated 24th June 2010 but that it arises from the Charge dated 28th June 2010. That the said Charge gives this Court exclusive jurisdiction to hear and determine this matter. It is therefore the Plaintiff's submission that these proceedings should not be stayed and referred to arbitration.

Having perused the record, the arbitration clause in the Offtake Agreement executed between the Plaintiff and Berdale International Zambia Limited, it reads as follows:

> *"All disputes arising out of or in connection with this Agreement shall be exclusively settled under the rules of conciliation and arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said rules........"*

In the Charge executed on 28th June 2010 between the Plaintiff and Berdale international Zambia Limited, it reads as follows:

> *"The Commercial Court shall have exclusive jurisdiction to settle any disputes arising out of or in connection with the Charge. (including a dispute regarding the existence, validity or termination of the Charge or the consequences of its nullity) (a dispute). This clause is for the benefit of the Lender only, As a result the Lender shall not be prevented from taking proceedings relating to a Dispute in any of the Courts of Zambia or any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions."*

In the Prepayment Facility Agreement, the arbitration clause reads as follows:

> *"...... Any disputes between the Parties shall be exclusively settled under the rules of conciliation and arbitration of the International Chamber by one arbitrator appointed in accordance with the said rules. The arbitration to take place in London and the costs of the arbitral proceedings including costs for legal representation........"*

It goes without saying that there are three Agreements namely the Prepayment Facility Agreement, Offtake Agreement and the Charge. That the Plaintiff and Berdale International Zambia Limited executed the Offtake Agreement and the Prepayment Facility Agreement on 24th June 2010. It is a fact that the Plaintiff advanced US$800,000.00 to Berdale International Zambia Limited pursuant to the Prepayment Facility Agreement which was to be repaid under the Offtake Agreement. Further on 28th June 2010 Berdale International Zambia Limited through the 2nd Defendant signed the Charge in favour of the Plaintiff to secure the sum of US$800,000.00 and to discharge all obligations and liabilities under

the Prepayment Facility Agreement as contained in Clause 1.01 and 3.01 of the Charge (Exhibit "MHM 2" in the Plaintiff's affidavit in opposition).

The Statement of Claim herein reveals that the Plaintiff's action emanates from the 2nd and 4th Defendant's alleged failure or neglect to pay back the debt as agreed. That the 2nd, 3rd and 4th Defendant is alleged to have misappropriated the charged assets which misappropriation has caused the Plaintiff to suffer damage, loss and or injury. It is against this background that the Plaintiff commenced these proceedings against the Defendants herein.

From the brief background given above, I am inclined to agree with Counsel for the Plaintiff that these proceedings do not arise from the Offtake Agreement but rather from the Charge executed on 28th June 2010. I say so as the breach that is alleged by the Plaintiff ensues from the agreement contained in the Charge. I am of the view that it is in the said Charge that Berdale International Zambia Limited executed an agreement to secure US$800,000.00 and to discharge all obligations under the Prepayment Facility Agreement. I further find that the alleged misappropriation of assets on the part

of the 2nd, 3rd and 4th Defendant arises from the charged assets. I find the case of **PT Thiess Contractors Indonesia v PT Kaltim Prima Coal & Another [2011] EWHC 1842**[5] cited by Counsel for the Plaintiff persuasive and directory. In that case the English Commercial Court refused a stay of court proceedings in favour of arbitration, holding that where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the Court would be required to identify the contract under which the substance of the dispute arose, rather than formal nature of the proceedings in order to determine which dispute resolution clause would apply. I adopt the said principles as my own.

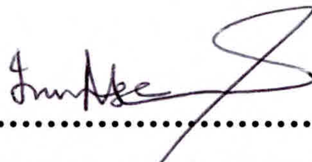
In the present case, I identify the Charge as the Agreement under which the substance of the dispute arises and it makes reference to the financing documents which are the Offtake Agreement and Prepayment Facility Agreement. This being the case, and as guided by Section 10 of the **Arbitration Act No 19 of 2000**, I find that this is not a proper case for me to stay these proceedings and refer the matter to arbitration as the Charge from which this action flows clothes this Court with exclusive jurisdiction to deal with this

matter. In light of the foregoing, I find that this application has no merit and I therefore dismiss it accordingly.

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

Leave to appeal is hereby granted.

Dated this 30th day of January 2018.



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HON IRENE ZEKO MBEWE

HIGH COURT JUDGE