IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0205**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

GLOBAL BANNERS LIMITED **APPLICANT**

AND

CEINSA ZAMBIA LIMITED **RESPONDENT**

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.

For the Applicant: *Mr S. Chisulo SC & Mr Mwiche Biyaruhanga- Messrs Sam Chisulo & Company.*

For the Respondent: *Mr D. Jere - Messrs Mvunga & Associates.*

RULING

LEGISLATION REFERRED TO:

1. **The High Court Act, Cap 27 of the Laws of Zambia.**
2. **The Arbitration Act No. 19 of 2000.**
3. **The Arbitration (Court Proceedings) Rules of 2001.**
4. **The Rules of the Supreme Court of England 1965 (White Book) 1999 Edition**

CASES REFERRED TO:

1. **Steak Ranch Limited V Steak Ranches International BV (2011/HP/0183) (2012) ZMHC (2 April, 2012).**

2. **Sebastian Saizi Zulu and Dr Rodger Masauso Alivas Chongwe, SC V Attorney General and Nikuv Computers (Israel) Limited SCZ/8/75/96.**

3. **Nyambe V Total SCZ Judgment No. 1/2015.**

4. **Zambia National Holdings Limited and United National Independence Party (UNIP) V The Attorney General (1993-1994) ZR 115.**

5. **Kelvin Hang'andu and Company (A Firm) V Webby Mulubisha (2008) ZR 82.**

6. **Crush Crusaders Franchising PTY Limited V Shakers & Movers (Z) Limited (2012 Vol. 3) ZR 174.**

7. **Pouwels Construction Zambia Limited, Pouwels Hotels and Resorts Limited V Inyatsi Construction Limited SCZ/9/118/2014.**

8. **Vangelatos V Vangelatos Appeal No. 7 of 2006.**

9. **Leopard Ridge Safaris Limited V Zambia Wildlife Authority (2008 Vol. 2) ZR 97.**

10. **Zambia Revenue Authority V Tiger Limited and Zambia Development Agency SCZ Judgment No. 11 of 2016.**

11. **China Henan International Cooperation Group Company Limited V G and G Nationwide (Z) Limited SCZ/8/242/2016.**

This is a Ruling on a Notice of Intention to Raise Preliminary Issues pursuant to the provisions **of Order 14A and 33/3 of the Rules of the Supreme Court, 1965 (White Book) 1999 Edition** on the following points of law:

1. *That this Court has no jurisdiction to alter an Arbitration Agreement, which was duly and unconditionally agreed upon by the Parties on their own free will and accord.*

2. *That this Honourable Court has no power at law to change the seat of Arbitration as well as the Forum which the Parties to the Arbitration Agreement agreed upon on their free will and accord.*

3. *That this Honourable Court has no power to appoint an Arbitrator contrary to the Arbitration Agreement which the Parties voluntarily agreed on their own free will and accord.*

The background to the Preliminary Issues Raised is this: On 28th April 2017 the Applicant filed an Originating Notice of Motion seeking the following remedies:

(i) A declaration that despite the provisions in the Contract, the Court has jurisdiction to hear an application based on the ground of *"Forum Convenient"*.

(ii) A declaration that the appropriate Forum Convenient for arbitration of this matter be at a place to be decided by this Court in Zambia, other than the International Arbitration Tribunal before the Spanish Court of Arbitration as stipulated in the Contract.

(iii) To approve the name of the arbitrator suggested in the Affidavit or the name agreed by the parties, or by the Order of the Court.

(iv) That costs be in the cause.

The application to Raise Preliminary Issues is supported by Skeleton Arguments filed into Court on 30th June, 2017 by Counsel for the Respondent. He began by stating that this Court had no jurisdiction or power to alter the Arbitration Agreement, which was voluntarily entered into by the Parties on their free will and accord. That doing so would be defeating the very fundamental principle of Arbitration, which is that of Party autonomy.

That he wished to reproduce the Arbitration Clause which had been exhibited by the Plaintiff before they advanced their arguments as it was drafted in clear terms and not ambiguous to require any legal interpretation. The Clause states thus:

ARBITRATION

"20.1 The parties undertake to interpret and comply with the present Contract in good faith, resolving by means of negotiations and amicable agreement any differences which may arise between them with respect to the application, development, compliance interpretation and execution thereof.

20.2 Notwithstanding the above, any difference or litigation in relation to the Contract, particularly in regard to the interpretation, compliance or breach thereof, whether occurring before or after expiration of the Subcontract, which is deemed by one of the parties to be unable to be resolved by mutual agreement within four (4) weeks as from notification of the difference by one of the parties to the other, shall be definitively resolved by arbitration in law, before the Spanish Court of Arbitration, in accordance with the regulations and by laws thereof. This Chamber is in charge of the administration of the arbitration and the appointment of the arbitrator.

20.3 The arbitration shall be conducted by a single arbitrator.

20.4 The seat of arbitration shall be the International Arbitration."

Counsel also submitted that the Arbitration Act No. 19 of 2000 and the Arbitration (Court Proceedings) Rules of 2001, which are the guiding laws for any Arbitration in Zambia did not clothe this Court with powers to alter the Arbitration Agreement as agreed upon by the Parties. He also added that these were complimented by the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law.

Further that **Section 9 of the Arbitration Act of Zambia** was clear as to what constituted an Arbitration Agreement and the Court had not been given any powers to substitute the agreed Arbitration Clause or Agreement which the parties had agreed to on their free will and accord.

He also submitted that the only power, which the Courts had in matters of arbitration were contained in Section 11 of the Act, which gave it jurisdiction to make interim measures such as orders for the preservation of goods or to issue interim injunctions while waiting for the Arbitral Tribunal to be constituted.

Further that the only time in which the Court had power to intervene with the Arbitration is when the Award had been given and one party intended to set it aside pursuant to Section 17 of the Arbitration Act. That nowhere in the Act was this Court clothed with powers to alter the Arbitration Agreement which the parties entered into of their free will and accord.

Counsel also cited the United Nations Commission on International Trade Law (UNCITRAL) Notes on Organising Arbitral Proceedings in Note 3 which states that:

> **"Arbitration rules usually allow parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions under their rules to be conducted at a particular place, usually the location of the institution. If the place had not been so agreed, the rules governing arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make determination, it may wish to hear views of the parties before doing so."**

Lastly, he submitted that the Reliefs sought by the Applicant could not be obtained from this Court as it was in want of jurisdiction. He thus prayed that the action herein be dismissed with costs.

In opposing the application Counsel for the Applicant submitted the following Skeleton Arguments. He began by citing Article 134 of the Constitution of Zambia, Cap 1 of the Laws of Zambia as amended by Act No. 2 of 2016 which states that:

"The High Court has, subject to Article 128-

(a) Unlimited and original jurisdiction in civil and criminal matters."

He also cited the **Rules of the Supreme Court of England 1965 (White Book) 1999 Edition**.

Order 11/ 1/12 'Discretion'- the applicant must satisfy the court that it is proper to exercise its discretion to grant leave; moreover, the Court retains an inherent discretion to decline jurisdiction on grounds such as forum non conveniens.

Order 11/1/13 'Discretion and forum conveniens'- the question which is the appropriate Court or forum convenience is a matter to be considered by the Court in exercising its jurisdiction under this Order. Where the Plaintiff in this order is asking for the exercise of the discretion of the Court in his favour, he must show that English Court is the forum conveniens.

Order 11/4/10 'Comparative cost and convenience'- of all parties to action, the chief considerations of convenience are the residence of the parties and the witnesses, the inconvenience of double litigation and the fact of one of the Courts having already acquired *seisin* of the case, probability of dispatch or delay, and enforcement of the remedy sought in the action.

Counsel also relied on the case of **STEAK RANCH LIMITED V STEAK RANCHES INTERNATIONAL BV (1)** where it was held that:

> **"(6) Forum Conveniense means that a matter should be determined in the Court where it is most convenient for the parties to it.**
>
> **(7) The presumption is that the Court in which the action is commenced has jurisdiction, unless the party challenging jurisdiction can prove otherwise. In doing so he must demonstrate that the forum in which an action has been commenced is not convenient, and that an alternative convenient forum exists.**

(8) In ascertaining the Forum convenience, the principal determining factor is not the elements to be considered.

(9) The agreement has its closest connection to Zambia.

(10) Article 94 of the Constitution vests original jurisdiction in the High Court in all matters (Now Article 134)."

He also relied on the Zambian case of **SEBASTIAN SAIZI ZULU AND DR RODGER MASAUSO ALIVAS CHONGWE, SC V ATTORNEY GENERAL AND NIKUV COMPUTERS (ISRAEL) LIMITED (2) (Unreported)** where it was held that:

"We are satisfied that Clause 29 of the contract is merely an arbitration agreement and does not attempt to oust the jurisdiction of the Zambian Courts. We therefore set aside the finding of the learned trial Commissioner and restore the Clause to the contract".

In his arguments Counsel repeated the arguments filed in support of the substantive Originating Notice of Motion before this Court dated the 28th April, 2017 and emphasized the point that the Supreme Court in this Country in reference to a clause in a contract providing for arbitration out of the jurisdiction and before a foreign arbitrator decided as indicated above.

During the hearing on 13th July, 2017, Counsel for the Applicant as well as Counsel for the Respondent were before Court and each of them relied on their respective Skeleton Arguments already filed into Court.

To augment these, Counsel for the Respondent argued that this Court did not have jurisdiction to grant the reliefs being sought and what was in issue was an Arbitration Clause which was straight forward.

According to him an Arbitration Clause was a contract and parties contracted that whatever dispute would arise they would subject to Arbitration. That in

this case parties chose the Spanish Court of Arbitration and the Contract had a Forum Clause which was binding on the parties.

Counsel urged this Court to take note of Articles 7 and 8 of the UNCITRAL Model Law which provided for circumstances when an Arbitral Agreement may be disturbed by the Court.

He also added that although the High Court had unlimited jurisdiction it was limited in certain circumstances. That although the cause of action arose in Zambia, the parties are Zambian and the witnesses are in Zambia, the arbitration must take place in Spain.

It was submitted that Forum Conveniens could only be used if it was with respect to the competing Court and that the Applicant ought to have thought of the difficulties of going to Spain before executing the Contract.

Counsel for the Applicant Mr Chisulo SC referred this Court to **Article 8 (1) and Section 10 of the Arbitration Act, No. 19 of 2000**. He argued that the Court must in the initial stage establish whether or not the Arbitral Clause was null and void and that Courts had the right to hear the matter.

Mr Jere in response stated that the Spanish Court of Arbitration was not a Court of Law but an Arbitral Tribunal.

I have considered the preliminary issues raised by Counsel for the Respondent as well as the Skeleton Arguments advanced by both parties.

Before I determine the points of law raised I consider that it is necessary to explain the relationship between **the Arbitration Act, No. 19 of 2000** and **the Model Law** which is the First Schedule to the Act. I am compelled to do so because of the position taken by Counsel for the Respondent that the Arbitration Act No. 19 of 2000 and the Arbitration (Court Proceedings) Rules of 2001 are the guiding laws for any arbitration in Zambia which are complimented by the Model Law on International Commercial Arbitration.

The position is that when the old **Arbitration Act, Chapter 40 of the Laws of Zambia** was repealed and replaced by the **Arbitration Act No. 19 of 2000**, Zambia adopted the Model Law with modifications which are contained in the Sections in the Arbitration Act. That is to say Sections in the Arbitration Act vary the application of the Model Law (which is in the First Schedule to the Act) by substituting certain Articles in the Model Law with Sections in the Arbitration Act.

The effect of the foregoing , as has been stated by the Supreme Court in the cases of **ZAMBIA REVENUE AUTHORITY V TIGER LIMITED AND ZAMBIA DEVELOPMENT AGENCY (10)** and **CHINA HENAN INTERNATIONAL COOPERATION GROUP COMPANY LIMITED V G AND G NATIONWIDE (Z) LIMITED (11)**, is that our Arbitration Law is in effect the **Model Law**.

To this extent, the argument by Counsel for the Respondent that the Model Law compliments the Arbitration Act, No. 19 of 2000 and the Arbitration (Court Proceedings) Rules of 2001 is untenable.

The law is settled as far as the jurisdiction of the High Court is concerned in matters where a contract embodies an arbitration clause. **Section 10 (1) of the Arbitration Act No. 19 of 2000** provides as follows:

> **"A court before which legal proceedings are brought in a matter which is subject to 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."**

The Supreme Court of Zambia in the case of **AUDREY NYAMBE V TOTAL ZAMBIA LIMITED (3)** stated that,

> **"we have passed a number of decisions where we have given effect to Section 10 of the Act. However, 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 Arbitration Clause that was agreed upon by the parties in this matter has been quoted above. As guided by the Supreme Court in the case of **AUDREY NYAMBE V TOTAL ZAMBIA LIMITED (3)** I have closely examined the Arbitration Clause which is Clause 20 of the Contract of Service Agreement between the Respondent Company and the Applicant Company dated 11th May, 2015. I find that the Arbitration Clause is operative and capable of being performed. It is not in any way null and void.

In my view a close examination of the Arbitration Clause outlined above indicates that all the issues to do with the seat and forum of the Arbitration as well as who should appoint an Arbitrator when the need would arise were settled therein.

Although Counsel for the Applicant contends that the High Court has original and unlimited Jurisdiction, this Jurisdiction is however not limitless as was set out in the cases of **ZAMBIA NATIONAL HOLDINGS LIMITED** AND **UNITED NATIONAL INDEPENDENCE PARTY (UNIP) V THE ATTORNEY GENERAL (4)** and **KELVIN HANG'ANDU AND COMPANY (A FIRM) V WEBBY MULUBISHA (5)**. In the Hang'andu case it was held that:

"The jurisdiction of the High Court is unlimited, but not limitless, since the Court must exercise its jurisdiction in accordance with the law",

It is trite that where parties freely and independently agree to an arbitration agreement the effect of this is to oust the jurisdiction of the Court. In the case of **CRUSH CRUSADERS FRANCHISING PTY LIMITED V SHAKERS & MOVERS (Z) LIMITED (6)**, Mutuna J (as he then was) observed that:

"once the parties have decided to have their dispute adjudicated upon by way of arbitration, they are in fact saying that they do not

wish to avail themselves of the Courts save in the limited circumstances provided by law".

As stated by the Supreme Court in the case of **POUWELS CONSTRUCTION ZAMBIA LIMITED, POUWELS HOTELS AND RESORTS LIMITED V INYATSI CONSTRUCTION LIMITED (7)** the philosophy underlying the Arbitration Act No. 19 of 2000 is underpinned by its preamble as being *"to redefine the supervisory role of the courts in the arbitral process"*. The Act is intended to restrict the court's involvement in arbitration to the extent only of providing a complimentary role to the arbitral process. Unlike the repealed **Arbitration Act No. 3 of 1933 (Chapter 40)** which gave courts unfettered powers to interfere in and control the arbitral process, the **Arbitration Act, 2000** was intended by the legislature to foster commerce by giving parties to a commercial transaction the freedom to choose arbitration as their preferred dispute resolution forum. The courts would only interfere with the parties' choice of forum if the arbitration agreement is null and void, inoperative or incapable of being performed.

I have read the case of **SEBASTIAN SAIZI ZULU AND DR. RODGER MASAUSO ALIVAS CHONGWE SC V ATTORNEY GENERAL AND NIKUV COMPUTERS (ISREAL) LIMITED (2)** cited by the Applicant. I find that this case does not in any way aid the Applicant when it contends that the Court has jurisdiction to hear the application and make a declaration that the appropriate forum for arbitrating the matter herein is Zambia. In that case the Supreme Court held, *inter alia*, as follows:

"In our view the learned trial Commissioner misunderstood the import of clause 29 of the contract. There is nothing contained in our Arbitration Act, Cap 180 which prohibits a party to a contract from referring a matter to foreign arbitration. On the other hand Section 27 of Cap 180 makes provision for the effect of foreign awards and Section 28 for the enforcement of foreign awards.

Counsel for the 1st Respondent has also referred us to the 18th Edition of RUSSELL on Arbitration at page 55 where it is stated that, *"a clause in a Contract providing for arbitration out of the jurisdiction and before a foreign arbitrator is an arbitration agreement within the meaning of the Act so as to give the court jurisdiction under the Act to Stay an action to give effect to it". We are satisfied that Clause 29 of the contract is merely an arbitration agreement and does not attempt to oust the jurisdiction of the Zambian courts. We therefore set aside the finding of the learned trial Commissioner and restore the Clause to the contract".*

This holding of the Supreme Court meant that Clause 29 of the contract which was an arbitration agreement which provided for arbitration out of Zambia and before a foreign arbitrator was valid and gave the court jurisdiction under the Arbitration Act to stay an action before the Court, to give effect to that arbitration agreement.

The holding aforesaid therefore supports the Respondent's submission that this Court has no jurisdiction under the Arbitration Act, 2000 to alter a valid arbitration agreement entered into by the parties.

The Applicant's submissions on Forum Conveniens are a misconception. Forum Conveniens and Forum Non Conveniens refer to Judicial discretion to reject jurisdiction where an alternate forum in another jurisdiction is available to try the action. It is a legal doctrine used in litigation directing competing jurisdictions to defer to the Court in the jurisdiction most suitable to the ends of justice in any particular case. The legal doctrine of Forum Conveniens and/or Forum Non Conveniens does not apply to arbitration since the parties choose the arbitrator(s) to adjudicate their dispute. Jurisdiction is conferred on the arbitral tribunal by the parties and is never left to judicial discretion.

I agree with Mr. Jere's argument that although the dispute arose in Zambia, the parties are Zambian and the witnesses are in Zambia the arbitration will be

held in Spain unless the parties decide otherwise with mutual consent or acquiescence.

Authorities abound where the Supreme Court have stated that a judge has no choice but to stay legal proceedings and refer the parties to arbitration where there is a valid arbitration agreement. The cases of **VANGELATOS V VANGELATOS (8) and LEOPARD RIDGE SAFARIS LIMITED V ZAMBIA WILDLIFE AUTHORITY (9)** are examples.

In the circumstances, the preliminary issues raised on points of law have succeeded.

This Court lacks jurisdiction to alter the Arbitration Agreement agreed upon and signed by the Parties. Further this Court has no power to change the Seat of Arbitration as well as the Forum which the Parties to the Arbitration Agreement agreed upon.

I therefore order that this matter be Stayed and sent to Arbitration. Costs to the Respondent to be taxed failing agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 7th day of March, 2018.

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WILLIAM S. MWEEMBA
HIGH COURT JUDGE