

**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT COMMERCIAL REGISTRY
AT LUSAKA**

2017/HPC/0433

(Civil Jurisdiction)

BETWEEN

EXPORT TRADING LIMITED



AND

CHIMANGA CHANGA LIMITED

DEFENDANT

Before the Hon Madam Justice Irene Zeko Mbewe

For the Plaintiff : Mr. Paul Kapikisha of Messrs Milner & Paul Legal Practitioners

For the Defendant : Mr. M. Mukupa of Messrs Isaac and Partners

RULING

Cases Referred To:

1. *Heyman v Darwins Limited [1942] 1 ALL E R 337*
2. *Leopard Ridge Safaris Limited v Zambia Wildlife Authority [2008] ZR 97*
3. *Cash Crusaders Franchising Pty Limited v Shakers & Movers Limited [2012] ZR 3 ZR 174*
4. *Aubrey Nyambe v Total Zambia Limited SCZ Judgment No 1 of 2015*

5. *Premium NAFTA Products and Others v Fili Shipping Limited and Others* [2007] UKHL 40
6. *Woolf v Collis Removals Service* [1948] 1 K.B 11 (CA)

Legislation Referred To:

1. *Arbitration Act No 19 of 2000*
2. *High Court Rules, Cap 27 of the Laws of Zambia*

This is the Defendant's application for summons for an Order to refer the matter to arbitration. The supporting affidavit is deposed to by Sokwani Peter Chilembo the Legal Counsel in the Defendant Company. It is deposed that the Plaintiff commenced an action against the Defendant on 27th September 2017 claiming for -

- i. *An order for specific performance of the Contract executed between the Plaintiff and the Defendant dated 4th May 2017.*
- ii. *Payment of ZMW9,032,713.05 being the sum due on the quantum meruit for the value of 3,169,379 metric tonnes of white maize delivered by the Plaintiff and received by the Defendant pursuant to a written contract dated 4th May 2017*
- iii. *Damages for breach of contract.*

It is deposed that the Plaintiff's claim is based on a Contract executed between the Plaintiff, the Defendant and the Food Reserve Agency on 10th May 2017 (Exhibit "SPC1"). That the said Contract contains an arbitration agreement in clause 34 providing for any dispute arising between the parties under or in connection with the Contract, to be referred to arbitration. According to the Defendant, the commencement of an action by way of Writ of Summons and Statement of Claim is an irregularity as the parties by express agreement in the Contract of 4th May 2017 agreed to refer any dispute to arbitration. That the Plaintiff will not suffer any prejudice if this order is granted, but to the contrary the interests of justice will be served if the matter proceeds to arbitration.

The Defendant opposed the application by way of affidavit dated 15th November 2017 deposed to by Alok Dikshit a Director in the Defendant Company. It is deposed that the Plaintiff commenced legal action by way of Writ of Summons and Statement of Claim. According to the deponent, the arbitration agreement in the Contract does not provide that any party, or all disputes between the parties, under or in connection with the Contract are to be

referred to arbitration. That Clause 34 provides only for disputes relating to the maize supplied by the Food Reserve Agency to the Purchaser, to be resolved amicably by direct negotiations failing which such disputes would be referred to arbitration in accordance with the **Arbitration Act No 19 of 2000**. According to the Defendant, the action in this matter has nothing to do with the maize supplied by the Food Reserve Agency to the Purchaser but relates to maize supplied by the Plaintiff to the Defendant for which the Defendant accepted delivery but has neglected to pay. It is deposed that the Contract dated 10th May 2017 executed by the parties has no provisions at all for reference of the dispute between the Plaintiff and Defendant to arbitration (Exhibit" AD1"). That the application lacks merit as there is no arbitral agreement between the Plaintiff and Defendant. It is deposed that an arbitration agreement is a pre-condition to arbitration and in this case there is no precondition of the existence of an arbitration agreement between the Plaintiff and Defendant to make the matter capable of resolution by way of arbitration.

In the Defendant's skeleton arguments filed into Court on 27th October 2017, reliance is placed on Section 10 of the **Arbitration Act No 19 of 2000**. Counsel for the Defendant argues that there is a valid arbitration agreement as provided in Clause 34.2. That the said clause refers to the parties and argues that the word "parties" refers to the Plaintiff, Defendant and the Food Reserve Agency. Counsel for the Defendant argues that this is a proper case for the Court to refer the matter to arbitration and drew the Court's attention to the case of **Heyman and Another v Darwins Limited**¹ and **Leopold Ridge Safaris Limited v Zambia Wildlife Authority**².

The Plaintiff filed skeleton arguments on 15th November 2017 and contends that there is an arbitration agreement where consent is pivotal to show acceptance by both parties to have all or some of their disputes resolved by arbitration. Counsel for the Plaintiff argues that neither party can impose an arbitral process on the other unless it is established that they are bound to the said Agreement. Counsel for the Plaintiff placed reliance on the case of **Cash Crusaders Franchising Pty Limited v Shakers and Movers (Z) limited [2012] ZR 174**³ and **Heyman and Another v Darmins**

Limited [1942] 1 ALL E R 337¹. Counsel submits that the parties herein did not consent to submit to arbitration as stated in Clause 34 of the Contract. That the wording of Clause 34 must be construed as to determine whether the clause applies to the Plaintiff or not, and in this respect, the Court's attention was drawn to the case of **Aubrey Nyambe v Total Zambia Limited SCZ Judgment No 1 of 2015⁴** and **Premium NAFTA Products and Others v Fili Shipping Company Limited [2007] UKHL 40⁵**. Counsel for the Plaintiff argues that the Plaintiff is not bound by the arbitration agreement contained in the Contract as it did not consent to have disputes with the Defendant resolved by arbitration. It is deposed that the arbitration agreement is severable and can exist on its own beside the main Contract. It was the Plaintiff's prayer that the Defendant's application be dismissed with costs.

I have considered the affidavit evidence, skeleton arguments, list of authorities and oral submissions of both Counsels.

The issue for determination in this case is whether or not there is an arbitration agreement to warrant a stay of proceedings and refer

the matter to arbitration. The Defendant's application is anchored on Section 10 of the **Arbitration Act No 19 of 2000** which provides 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 finds 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."

The legislative mandate under Section 10 of the **Arbitration Act No 19 of 2000** only allows the Court to decline the referral of a dispute to arbitration if the agreement is found to be null and void, inoperative or incapable of being performed. The general principle is that each contract or agreement must be interpreted in light of its own language and in its context as a whole, and in light of the circumstances in which it is made as articulated in the case of

Heyman v Darwin Limited [1942] 1 ALL E R 337¹ cited by Counsel for the Plaintiff. As a general principle, arbitration agreements are interpreted broadly in favour of arbitration. The Court is required to take a pragmatic approach and not a technical one while interpreting or construing arbitration clauses and must try to give effect to the intention of the parties to arbitrate.

Therefore the wording of an arbitration clause is an important factor in determining whether a dispute is to be referred to arbitration. The Defendant argues that there is an arbitration agreement and that parties are expected to abide by it. The logical starting point is to analyse the arbitration agreement itself as contained in Clause 34 of the Agreement. Counsel for the Plaintiff argues that the arbitration agreement is found in the tripartite Agreement executed between the Plaintiff, Defendant and the Food Reserve Agency (Exhibit "SPC1"). Conversely, Counsel for the Defendant argues that the arbitration agreement does not cover any dispute between the Plaintiff and Defendant.

I note that the Plaintiff has exhibited an incomplete contract and I have relied on the complete contract exhibited by the Defendant (Exhibit "AD-1") where the arbitration agreement reads as follows:

"34.1 The Purchaser and Agency to the extent of maize only supplied by the Agency shall make every effort to resolve disputes amicably by direct informal negotiations on any disagreement or dispute arising between them under or in connection with the Contract.

34.2 If the parties fail to resolve such a dispute or difference by mutual consultation within thirty days, either party may refer such dispute or difference to Arbitration which shall be conducted in accordance with the Arbitration Act Number 19 of 2000 of the Laws of Zambia and the decisions of the arbitration panel shall be binding on the parties."

To put matters in perspective, under the parties' clause of the Agreement, the Agency is the Food Reserve Agency, the Purchaser is Chimanga Changa Limited the Defendant herein, whilst the Seller is Export Trading Limited, the Plaintiff herein. In determining whether or not a matter is amenable to arbitration, I am guided by the case of **Aubrey Nyambe v Total Zambia Limited SCZ Judgment No 1 of 2015³**, where the Supreme Court held as follows:

"However, in determining whether or not a matter is amenable to arbitration or not, it is imperative that the wording used in the arbitration clause itself are closely studied."

Counsel for the Defendant argues that according to the Tripartite Agreement between the parties, arbitration shall be the mode of dispute resolution, and applies to all the parties to the said Agreement. Parties to an arbitration agreement have a broad measure of autonomy in identifying disputes that may be amenable to arbitration proceedings and may introduce a range of limitations on arbitration jurisdiction. I opine that the claim as endorsed in the Writ of Summons relates to maize supplied by the Plaintiff to the Defendant. The issue is whether this dispute falls within the scope of the arbitration agreement as envisaged in Clause 34? In my considered view, the scope of the arbitration agreement is clear in that any disputes relating to maize purchases made between the Plaintiff and the Food Reserve Agency are amenable to arbitration. I am further bolstered in my finding by Clause 34.2 that reads as follows:

"if the parties fail to resolve such a dispute or differences by mutual consideration within thirty days, either party may refer such dispute or difference to arbitration....."

My interpretation of the said arbitration clause is that where the Plaintiff and Food Reserve Agency fail to resolve disputes amicably by direct informal negotiations, then Clause 34.2 kicks in and such a matter is then referred to arbitration. The intention of the parties is clear and unambiguous in that arbitration will only arise where there is a dispute between the Purchaser and the Food Reserve Agency in respect to maize supplied by the Food Reserve Agency. I opine that any dispute falling outside that parameter is not amenable to arbitration and in this respect I am persuaded by the English case of **Woolf v Collis Removal [1948] 1 KB 11 CA** where the arbitration clause provided for claims by only one of the parties to be subject to arbitration. I concur with Counsel for the Plaintiff that the arbitration clause does not bind the Plaintiff herein.

Counsel for the Defendant raised an issue on the irregularity of the Writ of Summons and Statement of Claim anchored on the fact that the matter is amenable to arbitration. Arising from my finding that

the dispute herein does not fall within the scope of matters to be referred to arbitration, this issue fails.


The upshot is that for reasons stated aforesaid, I see no basis to grant the Order as prayed, and I dismiss the application for stay of proceedings and referral of the matter to arbitration.

A scheduling conference shall be held on 5th March, 2018 at 8.45 hours.

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

Leave to appeal granted.

Dated at Lusaka this 19th day of February, 2018



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HON IRENE ZEKO MBEWE
HIGH COURT JUDGE