

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0167

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN

SIMBA DRILLING AND EXPLORATION LIMITED

PLAINTIFF

And

KEREN MOTORS LIMITED

DEFENDANT

Before the Hon. Madam Justice Irene Zeko Mbewe

For the Plaintiff:

Mr. S. Sikota SC of Messrs Central Chambers

For the Defendant:

Mr. B. Gondwe of Messrs Buta Gondwe & Associates

R U L I N G

Cases Referred To

1. *East Midlands Gas Board v Doncaster Corporation [1953] 1 All ER 54*
2. *Upeo Zambia Limited v ZCON Construction Limited 2016/HPC/0362*
3. *Leopold Ridge Safaris Limited v ZAWA [2008] ZR 97*
4. *Nyambe v Total Zambia Limited SCZ Judgment No. 1/2015*
5. *Ashville Investments v Elmer Contractors Limited CA [1988] 2 ALL E R 577*

Legislation and Other Works Referred To:

1. *Arbitration Act No. 19 of 2000.*
2. *Garner "Black's law Dictionary" 5th Edition, Thomson Reuters*

This is a Ruling on the Defendant's notice of request for the matter to be referred to arbitration filed into Court on 23rd October, 2017. It is made pursuant to Section 10 of the **Arbitration Act No.19 of 2000**. The said Notice was accompanied by a supporting affidavit deposed to by Mr. Buta Gondwe an Advocate for the Defendant Company. It is deposed that this matter ensues from an Agreement which contains an arbitration clause under clause 14 and that the parties be referred to arbitration (Exhibit "BG1").

In opposing the Notice, the Plaintiff filed an affidavit dated 8th November, 2017 deposed to by Mr. Chisha Mwambazi an Advocate for the Plaintiff Company. The salient facts are that on 5th April, 2017, the Plaintiff filed a Writ of Summons and Statement of Claim and on 27th April, 2017, the Plaintiff received a letter from the Defendant advising it that the Defendant had been placed under receivership and was working on a turnaround strategy to improve its operations. That the Defendant planned to come up with an

achievable repayment plan for the debt owed to the Plaintiff (Exhibit “CM1”). According to the Plaintiff, there is no dispute that the Defendant is indebted to the Plaintiff nor is there a dispute in respect to the amount owed. That the contract entered into by the parties provides for disputes to be settled by arbitration. That there is no dispute that the parties have failed to settle amicably for them to refer to arbitration.

The Defendant in its skeleton arguments filed herein, in aid of the argument that the parties be referred to arbitration, I was referred to the English case of **East Midlands Gas Board v Doncaster Corporation (1953) 1 All ER 54¹**. Counsel for the Defendant submits that in *casu*, the parties in Clause 14 of the Agreement agreed that where there is a dispute, the same should be referred to arbitration and governed by the Laws of Zambia. My attention was drawn to Section 10 of the **Arbitration Act No 19 of 2000**. In light of the foregoing, Counsel submits that this is an appropriate case to stay proceedings and refer parties to arbitration.

The Plaintiff in its skeleton arguments cites Section 10 of the **Arbitration Act No 19 of 2000** and submits that before the Court

can stay the proceedings and refer the matter to arbitration, it has to closely study the wording in the arbitration clause to determine whether a dispute is amenable to arbitration or not. In articulating this argument, my attention was drawn to the case of **Upeo Zambia Limited v ZCON Construction Limited 2016/HPC/0362²**. It is the Plaintiff's submission that there is no difference or dispute in this matter which needs to be arbitrated and as such, the Defendant's application be dismissed with costs.

When the matter came up for hearing of the application, Counsel for the Defendant placed reliance on the affidavit in support and skeleton arguments filed herein. It was his submission that the Agreement in issue has an arbitration clause and going by the provisions of the **Arbitration Act No 19 of 2000**, the parties are obliged to submit to arbitration a fact which the Plaintiff acknowledges. The case of **Leopold Ridge Safaris Limited v ZAWA (2008) ZR 97³** was cited in aid of the argument that the matter ought to be stayed and parties referred to arbitration.

In response, Counsel for the Plaintiff submits that there is a clause in the Agreement which provides for referral to arbitration and that

it is clear from the said clause that arbitration will only be resorted to if there is a dispute which cannot be resolved. Counsel for the Plaintiff contends that where there is a claim for a specific amount of money and the Defendant admits its indebtedness as it did in the letter dated 26th April 2017, this shows that there is no dispute between the parties as the Defendant is only requesting for time within which to pay the amount claimed. My attention was drawn to the case of **Upeo Zambia Limited v ZCON Construction Limited 2016/HPC/0362²** cited in the Plaintiff's skeleton arguments. That there is no dispute in this matter as both parties have agreed that money is owed to the Plaintiff. It is prayed that this application be dismissed with costs.

Counsel for the Defendant submits that the question which begs an answer is, if there is no dispute why is the matter before Court. Counsel also questioned whether the arbitral clause is operative going by the authorities cited by both parties and that parties be referred to arbitration.

I have considered the affidavit evidence, skeleton arguments as well as oral submissions advanced by both Counsels of which I am

indebted. In determining this matter, I have also considered the list of authorities cited by the respective Counsels.

The issue for determination is whether there is a dispute amenable to arbitration.

The Defendant's application is made pursuant to Section 10 of the **Arbitration Act No 19 of 2000** which provides 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 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.”

A brief background leading to this application is that the parties herein entered into a drilling agreement on 16th November 2015.

That the Plaintiff performed its obligation under the agreement by drilling, and upon completion issued an invoice in the sum of US\$92,581.85 to the Defendant. The record reveals that there was no dispute as regards the invoiced sum and the Defendant promised to settle the same but failed. This failure to pay the amount owed prompted the Plaintiff to commence this action on 5th April 2017. On 26th April 2017 the Receiver and Manager of the Defendant wrote to the Plaintiff stating that the Defendant would come up with an achievable repayment plan for the amount owed to the Plaintiff. On 23rd October 2017, the Defendant made this application to have the matter referred to arbitration in accordance with Clause 14 of the Agreement.

Having given the genesis of the action, the following is my Ruling. To gain an insight into the contested issue as to whether or not there is a dispute amenable to arbitration, **Black's Law Dictionary, 5th Edition Thomson Reuters** defines a "dispute" as follows:

"dispute means a conflict or controversy especially one that gives rise to a particular lawsuit."

Counsel for the Defendant argues that there is a dispute as discerned from the commencement of court proceedings. Conversely, Counsel for the Plaintiff contends that the Defendant admits its indebtedness to the Plaintiff hence there is no dispute. I am alive to the fact that the Defendant in a letter dated 26th April, 2017 expressed that it would come up with an achievable repayment plan to offset the debt. Can this be said to have resolved the issues between the parties? The answer is in the negative. From a cursory glance of the endorsement in the Writ of Summons, and supported by the averments in the Statement of Claim, paragraph 11 specifically states as follows:

"14. Without a justifiable reason and in breach of the Agreement, the Defendant has failed or neglected to pay the amount owing to the Plaintiff despite several remainders on the same."

In my considered view, this is indicative of a matter in dispute. The Plaintiff's argument that there is no dispute between the parties is untenable as the reason why this matter was commenced is

because there was and still is a dispute between the parties and this negates the hallmark of a non dispute.

The law is settled in as far as the jurisdiction of the Court is concerned in matters where there is an arbitration clause, a party therein cannot invoke the jurisdiction of this Court. This limitation is construed in the context of Section 10 of the **Arbitration Act, Act No 19 of 2000**. Counsel for the Defendant prays that the proceedings be stayed and the parties referred to arbitration. In determining whether or not parties should be referred to arbitration, the Supreme Court in the case of **Nyambe v Total Zambia Limited SCZ Judgment No. 1/2015⁴** echoed the words of May LJ in the case of **Ashville Investment v Elmer Contractors Limited [1988] 2 ALL E R 577 CA⁵** at page 58 where he 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.”

In *casu*, the arbitration clause reads as follows:

“Any dispute or difference that cannot be settled amicably between the two parties, will be settled by Arbitration, in accordance to Arbitration Rules of the Zambia Association of Arbitrators (association) or any other Specialised Arbitration Body agreed by both parties.”

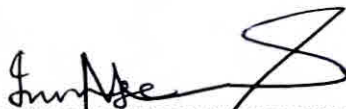
Arising from the evidence on record, I have come to the inescapable conclusion that the arbitration clause herein clearly states that any dispute between the parties that cannot be settled amicably will be settled by arbitration.

Having found that there is a dispute between the parties amenable to arbitration, the upshot is that the Defendant’s application is hereby granted and I hereby Order the stay of proceedings and refer parties to arbitration.

As a consequence of the decision to stay proceedings and refer parties to arbitration, I hereby discharge the ex parte injunction granted on 26th February, 2018.

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

Delivered at Lusaka this 26th day of March, 2018.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE