IN THE HIGH COURT FOR ZAMBIA 2016/HP/1155
AT THE PRINCIPAL REGUSTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

KAPANDWE KASANSA DEVELOPMENT COMPANY **PLAINTIFF**

AND

SAFRICAS ZAMBIA LIMITED **1ST DEFENDANT**

BESA MFULA **2ND DEFENDANT**

Before the Hon. Lady Justice C. Lombe Phiri in Chambers

For the Plaintiff: *Mr L. Mwamba -Simeza, Sangwa & Associtės*

For the Defendants: *Mrs. M. Banda – Mutuna – Mesdames Mweshi Banda & Associates*

RULING ON APPLICATION FOR REFERRAL OF MATTER TO ARBITRATION

CASES REFERRED TO:

Ody's Oil Company Limited v The Attorney General Constantinos James Papoutsis (S.C.Z Judgment Number 4 of 2012

LEGISLATION REFERRED TO:

The Arbitration Act no. 19 of 2000

This is a ruling on the application by the Plaintiff to stay proceedings and refer the matter to arbitration pursuant to Section 10(1) of the Arbitration Act No. 19 of 2000 *(sic)* and Rule 4 (1) of the Arbitration (Court Proceedings) rules, 2001. The application is supported by an affidavit and skeleton arguments. The application has been opposed by the Defendants. The Defendants have equally filed their affidavit in opposition and skeleton arguments which the Plaintiffs have replied to.

The very brief facts of the case are that the Plaintiff has sued the Defendants for money owed to them in relation to money lent to the 1st Defendant. It is alleged that the 2nd Defendant, who is the Managing Director of the 1st Defendant, undertook to be held personally liable in the event of default in fulfilling the obligations of the loan agreement. The long and short of the Defendant's Defence is that they do not know and have never had any dealings with the Plaintiff. The Defendants have further brought a counterclaim against Kapandwe Kasansa Transportation Company Limited under a Bitumen Supply Agreement.

Following a lengthy preliminary process the matter was set down for trial on 30th June, 2020. Before the parties could be heard at trial the Plaintiff brought this application for reference of the matter to Arbitration.

In moving the motion to refer the matter to Arbitration the Plaintiff pointed out that the Agreement under which the dispute has arisen contains an Arbitration Clause. It was submitted that the Plaintiff now wishes to exercise the option to have the matter referred to Arbitration. The Court was referred to the mandatory provisions of Section 10 (1) of the Arbitration Act and Rule

4(1) of the Arbitration (Court Proceedings) Rules, 2001. Attendant to the application was an affidavit deposed to by one Bede Mphande, the General Manager of the Plaintiff Company. The Affidavit stated the circumstances under which the Agreement was entered. The disparity between the name of the Plaintiff (Kapandwe Kansnsa Development Company) and that of the party to the contract (Kapandwe Kansansa Transportation Company Limited) was explained. More importantly the Agreement under question was exhibited as exhibit "BM4". Further the Bitumen Agreement which is the basis of the dispute in the Defendant's Counterclaim was exhibited as exhibit "BM5". It was pointed out that both Agreements contain Arbitration Clauses which the Plaintiff was now seeking to invoke.

In the skeleton arguments in support of the Application the Plaintiff basically restated the provisions of the Arbitration Act upon which they place reliance in making the Application.

In response to the Application the Defendants equally filed into Court an affidavit in opposition deposed to by the 2nd Defendant. The gist of the affidavit was to challenge the assertions by the Plaintiff concerning the wrong description in the name of the contracting party in both Agreements. The Defendant maintained that the Plaintiff is not a party to the loan and Bitumen Supply Agreements. It was further averred that the 2nd Defendant was also not party to either Agreement. It was also averred that it was the Plaintiff who initiated the Court process instead of first taking the matter to Arbitration. Also that the matter had been in Court for over four years before the Plaintiff exercised this option of referral to Arbitration. It was stated that this was not a matter suitable for Arbitration.

In the skeleton arguments in opposition the Defendants' referred the Court to authorities that discuss the requirements that the Court ought to take into consideration before deciding whether or not to refer the matter to arbitration –

a) *the existence of an arbitration agreement;*

b) the parties to the arbitration agreement;

c) whether or not the agreement is operative and capable of being performed.

Case law was cited to support these arguments.

From the foregoing it is clearly not in dispute that the Loan and Bitumen Agreements exist. It is also not in dispute that the parties cited in the two Agreements are "Safricas Zambia Limited" and "Kapandwe Kansansa Transportation Co". However, at the very core of the dispute, as stated in the Defendants Defence is the description of the Plaintiff in the two Agreements. According to the Defendant they have never contracted with the Plaintiff as they are described in this suit. On the other hand, the Plaintiff has stated that the description in the name of the Plaintiff is a simple error in the inclusion of the word "Transportation" in the Agreements and exclusion of the word "Development".

It is my considered view, that the issue that arises is: whether as the Plaintiff is described in the two Agreements can it be said at this point that there is an agreement between the parties that would warrant this Court invoking its jurisdiction under Section 10 of the Arbitration Act?

Section 10 (1) of the Arbitration Act No. 19 of 2000 provides that:

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.

Further Rule 4(1) of the Arbitration (Court Proceedings) Rules of 2001 provides that:

(1) An application, under section 10 of the Act to the High Court, Industrial Relations Court or the Lands Tribunal for the stay of legal proceedings which are the subject of an arbitration agreement shall be made by summons in the same proceedings to the Registrar of the court or, if the proceedings are pending before a Judge, to a Judge.

In the case of **Ody's Oil Company Limited v The Attorney General Constantinos James Papoutsis (S.C.Z Judgment Number 4 of 2012.)**[1] it was held *inter alia* as follows:

1. *Section 10 of the Arbitration Act Number 19 of 2000, gives the Court discretion to determine whether a matter which has arbitration as a mode of settlement of disputes should be referred to arbitration.*
2. *In such an application, the Court must be satisfied that there is first an agreement, that the arbitration agreement is valid, and or that it is not null and void, inoperative or incapable of being performed.*

3. *If the Court finds that the arbitration agreement is null and void, inoperative or that it is not capable of being performed, then the Court will not refer the dispute to arbitration for settlement.*

4. *………….*

5. *………….*

6. *………….*

7. *………….*

8. *………….*

9. *Therefore, although the arbitration clause was valid, it was inoperative, and incapable of being performed because issues of illegality and public policy cannot be resolved at arbitration.*

10. *Further, the fact that the 1st respondent is not party to the arbitration agreement, and therefore not bound by its terms or the outcome, also makes the arbitration inoperative in this matter.*

11. *It would not be in the interest of justice to sever the dispute, so that one segment is arbitrated upon, while the other is resolved by the High Court. Splitting the dispute would result in multiplicity of actions which is frowned upon.*

12. *The possibility of conflicting decisions between the arbitrator, and the High Court was imminent.*

13. *Had the trial judge addressed his mind to the issues of illegality, public policy, multiplicity of actions, and the fact that the 1st respondent was not a party to the arbitration agreement, he could have come to the inescapable conclusion*

that even though the arbitration clause in Articles 3 is valid, the same was inoperative and not capable of being performed as the issues raised cannot be resolved by arbitration and as such, it was not proper to refer this particular dispute to arbitration.

While it is clear that the issue of reference to arbitration is couched in what appears to be mandatory terms there are conditions attached to the exercise of this jurisdiction. It is not in every case where a party presents an agreement and points to an arbitration clause that the Court ought to refer the matter to arbitration. Before exercising this power, the Court ought to consider whether the arbitration agreement is not null and avoid, inoperative or incapable of being performed. What renders an arbitration agreement null and avoid, inoperative or incapable of being performed are questions of both mixed fact and law which are too numerous to be mentioned and must be considered on a case by case basis. Suffice to say that if these circumstances exist then the Court must find that the matter is not suitable for reference to arbitration.

Careful consideration of the Agreements reveals that they do contain valid arbitration agreements. This allows the party to the Agreement to apply to the Court to have the matter stayed and referred to arbitration. However, there are still further issues to be considered.

In this case on the face of it the 2nd Defendant is not cited as a party to the two Agreements in contention. This is one of the issues that constitute part of the Defendants' defence. Without making any final determination on the issue, the prima facie view is that the 2nd Defendant would not be bound by an Agreement between the parties of the two Agreements. It would therefore be

pointless to refer a matter to arbitration knowing that one of the parties cited will not be bound by what comes out the arbitration. This would be giving rise to trying the matter piecemeal, conduct that the Courts frown upon as there is a real potential of the arbitrator and the Judge giving conflicting decisions.

In view of the foregoing I find that while the arbitration clauses in the two Agreements, subject of these proceedings, are valid I find that the same would be rendered inoperative against the 2nd Defendant in the event that it is found that the 2nd Defendant is not bound by the Arbitration Order. I, therefore find that this is not matter suitable to be referred to arbitration.

Costs in the cause.

Leave to appeal is granted.

Delivered at Lusaka this 8th day of September, 2020.

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C. LOMBE PHIRI
JUDGE