

**IN THE HIGH COURT FOR ZAMBIA** 2017/HPC/0031  
**AT THE COMMERCIAL REGISTRY**  
**HOLDEN AT LUSAKA**  
*(Commercial Jurisdiction)*



**IN THE MATTER OF:** Sections 210 and 211 of the Companies Act, Chapter 388 of the Laws of Zambia

**IN THE MATTER OF:** Order 30 Rule 11(b) and (c) of the High Court Rules Chapter 27 of the Laws of Zambia

**IN THE MATTER OF:** Necor Zambia Limited and Application Solutions Zambia Limited

**BETWEEN:**

**SYLVESTER NTHENGE**

**PLAINTIFF**

**AND**

**FRIDAY S. MWAMBA**

**1<sup>st</sup> DEFENDANT**

**SOLOMON DOKOWE**

**2<sup>nd</sup> DEFENDANT**

**Before Hon. Mr. Justice B. C. Mbewe in Chambers on the 8<sup>th</sup> December 2019.**

*For Plaintiff* : *Mrs. N. Simachela of Messrs Nchito & Nchito*

For Defendants : Mrs. T. Banda of Messrs Milner & Paul  
Legal Practitioners

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## **RULING**

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### **Cases Referred to:**

1. *Gateway Service Station Ltd (T/A) Gateway Service Station v. Engen Petroleum (Zambia) Ltd Appeal No. 12 of 2003*
2. *Leopard Ridge Safaris Limited v. Zambia Wildlife Authority (2008) volume 2 Z.R. 97*
3. *Tommy Mwandalema v. Zambia Railways Boards (1978) Z.R. 65;*
4. *In Re Msika (1983) Z.R. 86*
5. *Odys Oil company v. Attorney General and Constantinos James Papoutsis SCZ Judgment No. 4 of 2012 /Z.L.R 164 Volume 1*
6. *Beza Consulting Inc Limited v. Bari Zambia Limited & Another (Appeal No. 171/2018)*
7. *Huwiler v. CPD Properties Limited and Others (Appeal No. 16/2018)*

### **Other Authorities Referred to:**

1. *Arbitration Act Number 19 of 2000*
2. *High Court Act, Chapter 27 of the Laws of Zambia*

## **INTRODUCTION**

This is an application by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by way of Notice to Raise Preliminary issue pursuant to **Order 14A** of the **Rules of**

**the Supreme Court 1965, (White Book), 1999 Edition** as read with **Order 45 rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia, section 10 of the Arbitration Act No 19 of 2000** and **Section 4 of the Arbitration (Court Proceedings) Rules – SI No 75 of 2001.**

The Preliminary issues raised being:

- 1. Whether this court has jurisdiction to hear and determine this matter in the light of the provisions of clause 16 of the Shareholder's Agreements for Application Solutions (Z) Limited and Necor Zambia Limited which require parties to resolve their disputes through Arbitration.*
- 2. Whether or not any cause of action has accrued in the absence of any Notice demanding the settlement of the matter by Arbitration as provided in clause 16.2 of the Shareholder's Agreement for Application Solution (z) Limited and Necor (z) Limited.*
- 3. Whether this action should not be stayed and the ex-parte order of injunction discharged pending reference to Arbitration.*

## **ARGUMENTS**

The Notice was filed on the 22<sup>nd</sup> of February 2017 together with an Affidavit in Support of Notice of Intention to raise preliminary issues of even date, sworn by the 1<sup>st</sup> Defendant. In his Affidavit the 1<sup>st</sup> Defendant who is managing director of Necor Zambia Limited states

that the Plaintiff commenced the action herein to assert his rights as a shareholder in both Necor Zambia Limited and Application Solutions Zambia Limited in which he holds shares. The deponent further alleges that in terms of the shareholders agreements relating to the two companies, particularly clauses 16.1.4, 16.1.5 and 16.1.7 any issue relating to the parties rights and obligations or the validity enforceability or implementation of the shareholders agreements is to be resolved through arbitration. The deponent further alleges that clause 16.2 of the said shareholders agreement accords a party to the agreement the right to demand that a dispute be resolved through arbitration.

The deponent further states that no such request for arbitration was made by the Plaintiff to the Defendant prior to the commencement of the action herein and the deponent reasonably believes that the case is one that is proper for the discharge of the order of interim injunction dated 26<sup>th</sup> January 2017 and referral to arbitration.

In their skeleton arguments the Defendants, submit that the court has no jurisdiction to determine this matter as the issues raised within the matter are subject of an arbitration agreement executed by the parties and contained in Clause 16 of the Shareholders Agreements signed for both Necor Zambia Limited and Application Solutions Zambia Limited. Their prayer among others is that the

matter be referred to arbitration and they cite the cases of **Gateway Service Station Ltd (T/A Gateway Service Station) v. Engen Petroleum (Zambia) Ltd (1) - Appeal No. 12 of 2003** and **Leopard Ridge Safaris Limited v. Zambia Wildlife Authority (2)** in support. The Defendants also cite in their skeleton arguments **Order 45 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia** which allows for parties within a suit to refer the matters in difference between them in the suit to arbitration where they desire that the matter should be so referred. The Defendants, submit that the parties through the shareholders agreement did agree beforehand how disputes between them would be resolved once they arise and therefore granted jurisdictional powers to an arbitrator to resolve their dispute.

In their skeleton arguments the Defendants, also allege that the Plaintiff obtained the ex-parte order of interim injunction of 26<sup>th</sup> January 2017 without disclosing material facts to the Court and therefore the injunction herein should be discharged. The Defendants submit the same relying on the cases of **Tommy Mwendalema v. Zambia Railways Board (3) ZR 65** and **In Re Msika (4)**. The undisclosed facts according to the Defendants are that the Plaintiff is not in fact a majority shareholder of Necor Zambia Limited as he allegedly holds 48% and 5.82% shareholding respectively and not the percentage alleged by the Plaintiff in his Affidavit in support of Originating Summons. The Defendants ultimately pray that this

Court stays the proceedings herein, refers the parties to arbitration, discharges the ex-parte order for interim injunction obtained and grants costs to the Defendants.

The Plaintiff, on the 1<sup>st</sup> of March 2017 filed into Court an Affidavit, Skeleton Arguments and List of Authorities in opposition to the Defendants' Notice to raise preliminary issue. The affidavit was sworn by the Plaintiff SYLVESTER NTHENGE who states he is a major shareholder and director in both NECOR Zambia Limited and Application Solutions Zambia Limited with a shareholding of 51.5% and 17.82% in both companies respectively. The Plaintiff, disputes having withheld material facts from the Court when obtaining the order for interim injunction as alleged by the Defendants and states that he accurately represented his shareholding structure in his affidavit in support by demonstrating that he purchased an additional 3% shares from other shareholders.

The deponent, further submits in his affidavit that in 2007 the parties herein referred certain matters to arbitration which resulted in a consent settlement order where the parties agreed that they would dispense of arbitration as a means of resolving their disputes and following the same all disputes between the parties as shareholders have been taken to and resolved by litigation. The deponent therefore deposes that by reason of the statements alleged he believes that the

Arbitration agreement in this instance was waived by the previous conduct of the parties.

In his skeleton arguments, the Plaintiff, maintains that the 1<sup>st</sup> Defendant has waived the right to refer the matter to arbitration by his conduct and the Plaintiff further contends that the 2<sup>nd</sup> Defendant is not a party to the shareholders agreement and that the dispute between the plaintiff and 2<sup>nd</sup> Defendant cannot be resolved by arbitration. He supports his submission of the Defendant having waived his right to rely on the Arbitration Clause causing the clause to be inoperative with the authorities of **Halsbury's Laws 3<sup>rd</sup> Edition Volume 2 at page 19 paragraph 47** and **Odys Oil company v Attorney General and Constantinos James Papoutsis (5)**. The Plaintiff therefore urges this Court to find that the Defendant's application is without merit and should as a result be dismissed.

Following the reallocation of this matter it was decided in November 2019 by the Honourable Judge in Charge of the Commercial Court that the pending application being the Notice of Motion to raise preliminary issue and any other applications if need be, be heard denovo. The parties were heard on the 8<sup>th</sup> of December 2019. At the hearing the Defendants placed reliance on their Affidavit, Skeleton Arguments and List of Authorities in support of the Notice and further submitted that their application is made on the premise that this Court has no jurisdiction to determine this matter based on the arbitration clause contained in the shareholders agreement signed

by the Plaintiff and the First Defendant herein. The Defendants maintain that the claims in the current action do fall within the scope of clause 16 of the shareholders agreement of the parties which agreement allows for arbitration.

In their oral arguments, the Defendants further submit that the consent order referred to by the Plaintiff is one that related/referred to non-payment of dividends and the claim in the originating summons of the current matter are different. The Defendants also did in their oral submissions contend that they still wish to rely on the Arbitration Clause despite the fact that the 2<sup>nd</sup> Defendant is not a party to the shareholders agreement because the matters in contention under the current cause, directly affect both the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. The Defendants finally reiterated their submission that the matter herein be stayed and referred to arbitration.

The Plaintiff, in response, also placed reliance on his Affidavit, Skeleton Arguments and List of authorities filed in opposition to the Defendants Notice to raise preliminary issue and augmented his arguments with oral submissions stating mainly that this Court is clothed with jurisdiction by agreement of the parties and or previous conduct of the party to resolve the matter before it. The plaintiff maintains that the Consent Order in question not only relates to the



payment of dividends as the Defendants allege but also includes a number of other disputes including board composition and ratification. The Plaintiff also states that because the 2<sup>nd</sup> Defendant is not a party to the shareholders agreement it makes arbitration an unsuitable forum to resolve the dispute with him and further makes the arbitration clause in the shareholders agreement inoperative. It is the Plaintiff's prayer that this Court dismisses the Defendants' preliminary issue with costs to the Plaintiff.

## **RULING**

I have read all the pleadings filed before Court by the Plaintiff and Defendants and have also heard all the verbal submissions made on behalf of the parties.

In addressing the first question under the preliminary issue raised by the Defendants which question seeks to establish whether or not this court has jurisdiction to hear and determine this matter in the light of the provision in the shareholders agreement that requires parties to it to resolve their dispute through arbitration, I rely on the agreement itself and the evidence before me in the cause. In perusal of the shareholders agreement, the articles of association and the submissions before Court by both parties it is established and a matter of fact that the 2<sup>nd</sup> Defendant herein is not a party to the shareholders agreement that contains the Arbitration Clause. It is

also a fact from perusal of the Originating Summons herein that the Plaintiff despite seeking other reliefs in the matter also seeks relief against the 2<sup>nd</sup> Defendant, which relief specifically concerns the said party in his disputed position as director in the named Companies, outside of Company, Director and shareholder business as instituted in this cause.

It is trite and established law as was adjudicated in the case of **Odys Oil Company v. Attorney General and Another (5)** that where a party to proceedings is not a party to an arbitration agreement the arbitration clause becomes inoperative for purposes of that cause because the party who is not a part of the arbitration agreement cannot be bound by its terms or its outcome.

This position has severally been confirmed by the Court of Appeal, including the case of **Beza Consulting Inc Limited v. Bari Zambia Limited & Another (6)** wherein the Court held at page J17 that:

*“Furthermore, in view of the fact that the 2nd Respondent is not a party to the arbitration agreement renders the arbitration agreement inoperative. This is in line with the case of **ODYS Oil Company Limited v. The Attorney General and Constantinos James Papoutsis (5)**. The decision in that case effectively renders the arbitration agreement inoperative for the*

*reason that a party to the proceedings, who is not a party to the arbitration agreement, ought to be heard and the Court is the forum at which he can be heard and not at arbitration.”*  
[Emphasis Added]

In the same vein the Appellate court also pronounced itself in the case of **Huwiler v. CPD Properties Limited and Others (7)** holding that:

*“We must state that unlike the Courts which cannot refer to arbitration non parties to the arbitration agreement or even sever the parties... the arbitrator can hear the non-parties once they consent or even sever the parties.”*

I therefore, in view of the above find that the Court does indeed have the jurisdiction to determine the matter and that the arbitration clause in the shareholders agreement to which only the Plaintiff and 1<sup>st</sup> Defendant are a party is rendered inoperative for purposes of these proceedings due to the presence or appearance of the 2<sup>nd</sup> Defendant in the proceedings.

Further, **The Arbitration Act** under **Section 10** highlights instances where a request for referral by a party to an agreement containing an Arbitration Clause in legal proceedings will not be taken up by the

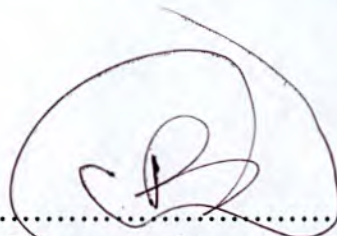
Courts. These exceptional instances include among other things where the clause is inoperative as is the case herein. I must also note herein that contrary to the manner of application of provision under **Order 45 of the High Court Rules** by the Defendants which provision concerns an order by the court for referral to arbitration. An order for referral to Arbitration under the said Order envisages a situation where all parties to a cause before Court are desirous for the matter be refereed to arbitration and make such necessary application before the Judge. The order itself does not place a mandatory instruction on the Courts to refer matters to arbitration where there is an application by one party in the cause who is bound by the Arbitration Clause to so refer the matter. It therefore goes without saying that in consideration of the substantive applicable law, any request for referral to arbitration and any other insubstantial or peripheral issues herein can neither be considered nor stand.

In addition, while the matter itself will not be stayed and referred to arbitration, the ex-parte order of injunction under the current cause will remain in place as I find that the same has not been successfully challenged by the defendants and the plaintiff has exhibited proof of the veracity of the material facts disclosed by him and on which he relied when seeking the said order of injunction which was legitimately granted by the Judge in conduct of this matter at the time.

I therefore decline the stay of these proceedings as well as the referral of the matter to Arbitration. I further decline the discharge of the order of injunction. Costs in the Cause.

I appoint 10<sup>th</sup> July, 2020 at 14:00 hours to hear the Originating Summons.

**Delivered at Lusaka this 25<sup>th</sup> day of June, 2020.**

A handwritten signature in black ink, consisting of a large, stylized 'B' followed by 'C. Mbewe' in a cursive script.

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**Bonaventure C. Mbewe**  
**HIGH COURT JUDGE**