

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2018/HP/2138



BETWEEN:

CONSTRUCTION & INDUSTRIAL MAINTENANCE

SERVICES LIMITED T/A WACO KWIKFORM

PLAINTIFF

AND

FAIR FACE ENTERPRISES LIMITED

1ST DEFENDANT

HENRY NGULUBE

2ND DEFENDANT

BOSTON NKHOWANI

3RD DEFENDANT

Before the Hon. Justice Mr. M. D. Bowa this 10th day of August 2020.

For the Plaintiff: Ms. G. Kumwenda of Messrs. Grace & Partners.

For the Defendants: Mr. G. Pindani of Messrs. Chonta, Musaila & Pindani
Advocates.

RULING

Cases referred to:

1. Printing & Numerical Registered Company v. Simpson [1875] LR. 19. Eq. 462.
2. National Drug Company Limited & Zambia Privatization Agency v. Mary Katongo Appeal No. 79 of 2001.
3. Zambia National Holdings & United National Independence Party (UNIP) v. The Attorney General (1994) SJ No. 22.
4. Godfrey Miyanda v. The High Court (1984) ZR. 62.
5. EE Caledonian Ltd. v. Orbit Value Co. Europe [1993] 4 All ER. 165.
6. Indo Zambia Bank v. Mushaukwa Muhanga (2009) ZR. 266.
7. Larco Concrete Products Ltd. v. Transair Ltd. [1987] HCH. 40.
8. Zambia National Provident Fund Board v. A-G & Others And In the matter of Industrial Relations Courts Decision dated 29th October, 1982 and an Application for Certiorari (1983) Z.R. 140 (H.C.)
9. Dr. Ludwig Sondashi v. Attorney General SCZ Judgment No. 27 of 2000.
10. Cordoba Shipping Co. Ltd. v. National State Bank of Albaforth [1984] 2 Lloyd Rep. 91.

11. Distiller Co. (Biochemical) Ltd. v. Laura Ann Thompson [1971] AC. 458.
12. Spiliada Maritime Corporation v. Consulex Ltd. [1987] AC. 460.

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia, ss. 9(1)(2); 13 and Order 3(2).
2. The Rules of the Supreme Court, 1999 edition, Order 2(1)(2).

Other works referred to:

1. Evan McKedrick (2008), Evan McKedrick's Contract Law, 3rd Edition, at page 3.
2. Dicey & Morris (1980), The Conflict of Laws 10th Edition, at page 1168.
3. Chitty on Contracts, General Principles, Vol. 1, 28th Edition, at page 604, paragraph 12 -043.

The considerable delay in the delivery of this ruling is regretted.

By summons dated 28th February, 2019, the Defendants applied for the dismissal of this action for want of jurisdiction and/or irregularity pursuant to section 9 (1) (2) , Order 3 (2) of the High Court Act Chapter 27 of the Laws of Zambia and Order 2 (1) (2) of the Rules of the Supreme Court of England, 1999 Edition.

The application was supported by an affidavit of even date and sworn by Boston Nkhowani, the 3rd Defendant and Director in the 1st Defendant Company. He deposed that on 27th February 2017, the Plaintiff made the Defendants sign a Deposit Account Application Form when the 1st Defendant approached them to enquire on whether the Plaintiff could hire out and install various form work equipment for decking at its construction site.

It was his assertion that the Plaintiff's action is not sustainable on account of Clause 12 of the said Deposit Account Application Form exhibited as "**BN1**". That he believed based on advice from his Advocates that this action cannot be adjudicated upon by the

Zambian courts for want of jurisdiction. Further that the parties hereto agreed on the forum of choice for adjudication of any issues arising under the said contract to be the Magistrate's Courts of South Africa or the High Court of South Africa. That in the premises, this is a proper case for the court to dismiss for want of jurisdiction or set aside the writ for irregularity with costs.

In an Affidavit in Opposition filed on 25th March, 2019 and sworn by Munuma Malichi the Country Coordinator in the Plaintiff Company, it was deposed as true that there was execution of a Deposit Account Application Form by the Defendant to facilitate the hiring of various form work equipment from the Plaintiff. It was further deposed that the Plaintiff is aware of the provisions in Clause 12 of the Deposit Account Application Form but wished to draw the attention of this Court to the Deed of Suretyship signed by the 2nd and 3rd Defendants, particularly in the last paragraph. A copy of the Deed of Suretyship is exhibited "**MM1**".

That the said Deed of Suretyship and clause referred to gives the creditor, who in this case is the Plaintiff, discretion to commence proceedings in any court having jurisdiction. Further that he had been advised by his Advocates that the High Court of Zambia has unlimited jurisdiction to determine all civil and criminal proceedings arising from disputes within the boundaries of Zambia. In the premises, the Defendants' application is misconceived and void of merit and should be dismissed with costs.

In an Affidavit in Reply filed on 17th July 2019 and sworn by Boston Nkhowani, the deponent disputed the contents of paragraphs 6, 7, 8, 9 and 11 of the Affidavit in Opposition which suggest that the Deed of Suretyship gives the Plaintiff a choice of forum on where to commence an action. He deposed that the Deposit Account Application Form is prepared pursuant to South African Law and as such reference to 'any other courts having jurisdiction' refers to other courts other than the Magistrate's Courts within South Africa which may have jurisdiction to adjudicate over the dispute and not 'any Zambian courts'.

In their skeleton arguments dated 24th September 2019, the Defendants' argued that the Plaintiff's action commenced in the High Court of Zambia was irregular as it should have been instituted in the South African courts in accordance with Clause 12 of the Deposit Account Application Form which the Plaintiff is duly bound to. It was submitted further that the Zambian courts subscribe to the English Common Law doctrine of freedom of contract. Therefore where parties agree to grant exclusive jurisdiction to a particular court, that court will readily enforce such an agreement provided the claim is not illegal or contrary to public policy.

The Defendants further submitted that parties who freely enter into contracts will be bound by its terms and the court's role is to give efficacy to such agreements. In support of this proposition, the Defendants called in aid the cases of **Printing and Numerical Registered Company v. Simpson**¹ and **National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo**². I

was also referred to passages from the learned authors of *Evan McKedrick's Contract Law, 3rd Edition; Dicey & Morris, The Contract of Laws; and Chitty on Contracts: General Principles* in further aid of this argument.

The Defendants argued that the parties in this case had agreed that in the event of a dispute arising under the contract, the courts which shall have jurisdiction are the Magistrate's Courts of South Africa, the High Court of South Africa or any other court having jurisdiction within the Republic of South Africa where the parent company is incorporated and domiciled.

It was submitted that the Plaintiff's contention that the High Court of Zambia has jurisdiction is untenable. That as stated in the affidavit in reply, the Deposit Account Application Form was prepared pursuant to South African law and as such the reference to "any other courts having jurisdiction" means other courts other than the Magistrate's Courts within the Republic of South Africa which may have jurisdiction to adjudicate over the dispute and not Zambian courts.

As regards the Plaintiff's contention that the High Court of Zambia has unlimited jurisdiction to determine all civil and criminal proceedings arising from disputes within the boundaries of Zambia, the Defendants submitted that the term "unlimited jurisdiction" as defined in the case of ***Zambia National Holdings Limited & United National Independence Party (UNIP) v. The Attorney General***³ does not mean limitless but rather that the jurisdiction should be exercised within the confines of the law. It was argued that with regard to the law of

contracts therefore, the court's role is to enforce the intention of the parties as expressed in the signed agreements.

It was further argued that going by the definition of the term jurisdiction in the case of **Godfrey Miyanda v. The High Court**⁴, and clause 12 of the Deposit Account Application Form, the High Court of Zambia does not have jurisdiction to determine this matter because the contract stipulates that the dispute must be determined by courts in South Africa . Thus, it was submitted that permitting this case to be heard and determined by this Court will be exercising authority beyond the extent to which it is conferred and also be disregarding the principle of freedom to contract and agree on terms.

The Defendants further submitted that this Court should note that the Deposit Account Application Form and the Deed of Suretyship were prepared by the Plaintiff. Therefore, any ambiguity, contradictions or inconsistencies in the clauses in the signed Deed and Form should be interpreted against the Plaintiff in accordance with the contra proferentum rule. In support of this argument, reliance was placed on the case of **EE Caledonian Ltd. v. Orbit Value Co. Europe**⁵ where the Court stated:

"...that contractual provisions should prima facie be construed against the party who was responsible for the preparation of the contract."

Reference was also made to the case of ***Indo Zambia Bank v. Mushaukwa Muhanga***⁶ in which the Supreme Court said as follows:

“As between the grantor and grantee, or between the maker of an instrument and the holder, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee or holder.”

It was submitted that should this Court be of the view that the cited clause in the Deed of Suretyship is ambiguous, the ambiguity on whether it is South African Courts only or Courts outside South Africa to have jurisdiction should be interpreted against the Plaintiff as it contradicts Clause 12 in the Deposit Account Application Form. The Defendants thus prayed that the application be granted with costs.

The Plaintiff filed its submissions on 7th October, 2019. According to the Plaintiff, Clause 12 does not oust the jurisdiction of the High Court of Zambia to adjudicate on the matter. It was the Plaintiff's contention that the said Clause merely presents the fact that the Defendants consent to the jurisdiction of the Magistrate's Court of South Africa which may even be disregarded by the Plaintiff.

The Plaintiff further argued that the Clause does not expressly indicate that 'all disputes' should be determined by the

Magistrate's Court of South Africa', which would have had the effect of excluding the jurisdiction of this Court. I was referred to the case of **Larco Concrete Products Ltd. v. Transair Ltd.**⁷ wherein it was held that:

"...the law governing contracts is not a decisive factor in determining whether a particular court has or should exercise jurisdiction to entertain disputes arising out of the contract; what matters is whether the parties have unequivocally submitted to the jurisdiction of a foreign court and whether it is proper and just for the court where the proceedings are brought to entertain the action. The High Court jealously guards its jurisdiction and therefore, any instrument purporting to oust its jurisdiction must do in clear and in no uncertain terms. Even where they have conferred exclusive jurisdiction to a foreign court, the High Court has discretion whether or not to order a stay of the action."

On the basis this authority it was contended that a document seeking to oust the High Court's jurisdiction must be clear and certain. That it is for this reason that the courts have constantly stated that the presumption against ousting the jurisdiction of the court can only be rebutted by a clear language of the document or statute containing the 'ouster clause'. The Plaintiff referenced the cases of **Zambia National Provident Fund v. Attorney General**⁸ and **Dr. Ludwig Sondashi v. Attorney General**⁹ to augment its submission. To this end, it was submitted that the Deed of Surety which is part of the Deposit

Account Application Form does not expressly oust the Zambian High Court's jurisdiction in this case.

Further that Clause 12 has no binding effect on the parties to submit all disputes exclusively to the Magistrate's Court of South Africa. Therefore, the intention of the parties as contained in the said agreement is not to limit the jurisdiction of the Zambian High Court as there is no such limitation in the agreement.

Making reference to the holding in Zambia National Holdings Limited & United National Independency Party (UNIP) v. Attorney General, the Plaintiff argued that the High Court for Zambia has inherent jurisdiction to hear and determine the matter brought before it arising from events which occurred within Zambia. In line with the aforesaid, the Plaintiff called in aid the case of **Cordoba Shipping Co. Ltd. v. National State Bank of Albaforth**¹⁰ in which it was held that prima facie, the natural forum for determination of the disputes between the parties is the jurisdiction in which the wrong was committed. It was submitted that the court in the case of **Distiller Co. (Biochemical) Limited v. Laura Ann Thompson**¹¹ held that it is only reasonable that a defendant should have to answer for his wrong in the country where he did wrong.

The Plaintiff further argued that where the court is faced with the choice of jurisdictional problems, the principle to follow was that highlighted in the case of **Spiliada Maritime Corporation v. Cansulex Limited**¹² which states that:

“(1) The fundamental principle applicable to both the stay of English proceedings on the ground that some forum was the appropriate

forum and also the grant of leave to serve proceedings out of the jurisdiction was that the Court would choose that forum in which the case could be tried more suitably for the interests of all the parties and for the ends of justice.

(2) In the case of an application for a stay of English proceedings, the burden of proof lay on the defendant to show that the Court should exercise its discretion to grant a stay. Moreover, the Defendant was required to show not merely that England was not the natural or appropriate forum for the trial but that there was another available forum which was clearly or distinctly more appropriate than the English forum. In considering whether there was another forum for the trial but that there was another forum which was more appropriate the Court would look for that forum with which the action had the most real and substantial connection, eg in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties resided or carried on business. If, however, the Court considered that there was another forum which was prima facie more appropriate than the English Court it would normally grant a stay unless there were circumstances militating against a stay, e.g. if the plaintiff would not obtain justice in the foreign jurisdiction.”

Conclusively the Plaintiff argues that the balance of convenience favours that the matter can be adjudicated upon by Zambian courts where the parties are based.

I have considered the parties' affidavits and arguments for and against the application. It is not in dispute that the Plaintiff entered into an agreement with the Defendants to hire its equipment. The Deposit Account Application Form spelt out the obligations for the parties as well as dispute resolution in the event of a dispute arising from the said contract. A dispute

subsequently did arise which prompted the Plaintiff to take out an action against the Defendants in the Principal Registry in Zambia. It is this action that the Defendants seek to be dismissed on the ground that Clause 12 of the contract provided for disputes arising from the contract to be adjudicated upon by the courts in South Africa essentially ousting the jurisdiction of this Court.

In responding to the Defendants' position, the Plaintiff submitted that Clause 12 of the contract does not categorically oust this court's jurisdiction. That in any event, there is authority to support the proposition that disputes should be adjudicated in the jurisdiction where the wrong was done and where justice will be best served taking into account cost and location of witnesses and not in a jurisdiction where it would be difficult to secure the attendance of such witnesses.

I have here been called upon to interpret the import of Clause 12 which states as follows:

"The Customer consents in terms of Section 45(1) of the Magistrate's Court Act No. 32 of 1944 as amended in respect of any proceedings which may be instituted against it by Form-Scaff arising out of or in connection with this contract, to the jurisdiction of any Magistrate's Court which at the time of such proceedings has jurisdiction over it in terms of Section 28 (1) of the said Magistrate's Court Act. Notwithstanding the foregoing the Customer specifically agrees that Form-Scaff may in its discretion disregard the foregoing consent to jurisdiction and institute any

proceedings arising out of or in connection with this contract in the High Court of South Africa having jurisdiction.”

It is my considered view that Clause 12 quoted above is clear in its terms. It is to the effect that any dispute that arises out of the contract between the Plaintiff and the Defendants is to be adjudicated upon by the Magistrate’s Courts of South Africa. The clause goes further to grant the creditor the discretion to dispense with taking out an action in the Magistrate’s Courts of South Africa and instead do so in the High Court of South Africa.

The Plaintiffs however, argued that the last part of the Deed of Suretyship which refers to ‘any other court’ means that action can be taken out in any other court, which includes the High Court of Zambia. The said part reads as follows:

“...In terms of section 45 of the Magistrate’s Court Act 1944, I/we hereby consent to the jurisdiction of the Magistrates Court having jurisdiction under section 28 of the said Act in respect of any action to be instituted against me/us or any or more of us by the Creditor. It shall nevertheless be entirely within the discretion of the Creditor as to whether to proceed against me/us in such Magistrates or any Court having jurisdiction.”

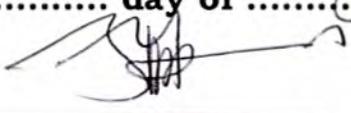
The Defendant aptly referred to the contra proferentum rule which is to the effect that any ambiguity in a document will be interpreted against the author of that document. This notwithstanding, it is my considered view that there is no ambiguity regarding the import of Clause 12 as considered together with the Deed of Suretyship. The phrase “any other court having jurisdiction” is to be read in the context of the enabling

provisions which I opine had in contemplation South African Courts as the adjudication platform.

The Plaintiff's reliance on the case of *Larco Concrete Products Ltd.* (Supra) does not aid its case. I am satisfied that the parties unequivocally submitted to the jurisdiction of the Magistrate's Courts of South Africa with an option for the Plaintiff to choose to institute legal proceedings in the High Court of South Africa or such other courts having jurisdiction within the Republic of South Africa. This was a choice freely made by the parties and the courts role is to enforce the party's agreement.

The *Zambia National Holdings Limited & United National Independency Party (UNIP) v. Attorney General (supra)* makes clear that whilst the High Court enjoys original and unlimited jurisdiction that jurisdiction is not necessarily limitless. The law may specifically limit the jurisdiction or as observed in this case, the agreement of the parties. This is no different from arbitration clauses typically included in agreements. Conclusively, I would dismiss the action on account of want of jurisdiction with costs to the Defendant to be taxed in default of agreement.

Dated at Lusaka this ^{10th} day of ^{August} 2020.



JUDGE.

