

**IN THE HIGH COURT OF ZAMBIA**

**2019/HP/1550**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**NDAMBO NDAMBO**

**PLAINTIFF**

**AND**

**ZAMBIA NATIONAL FARMERS' UNION  
REGISTERED TRUSTEES**

**DEFENDANT**

***BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN  
CHAMBERS, ON 7<sup>TH</sup> FEBRUARY, 2020.***

*For the Plaintiff: Mr. B. Kaluba - Messrs. Mwenye & Mwitwa  
Advocates*

*For the Defendant: Ms. D. Kapitolo - Messrs. Makebi Zulu  
Advocates*

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## **RULING**

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**CASES REFERRED TO:**

1. *Heyman & another vs. Darmins Limited (1942) 1 ALL ER 337;*
2. *Zurich Australian Insurance Limited T/A Zurich New Zealand vs. Cogntion Education (2014) NZSC 188;*
3. *Intermarket Banking Corporation Zambia Limited vs. Nonde Munkata - 2012/HPC/0268;*
4. *Audrey Nyambe vs. Total Zambia Limited - SCZ Judgment No. 1 of 2015;*
5. *Leopard Ridge Safaris Limited vs. Zambia Wildlife Authority (2008) Z.R. 97;*
6. *Anderson Mazoka & Others vs. Levy Mwanawasa & Others (2005) Z.R. 138; and*
7. *Ashville Investments vs. Elmer Constructors Limited (1988) 2 ALL ER 577.*

**LEGISLATION REFERRED TO:**

1. *The Arbitration Act No. 19 of 2000.*

**1 BACKGROUND**

1.1 The Plaintiff commenced this action on 27<sup>th</sup> September, 2019, by way of Writ of Summons and Statement of Claim, claiming the following: -

- i. *ZMW 2,329,164.40 being outstanding leave days and gratuity accrued under the first contract;*
- ii. *ZMW 2,872,999.90 and US\$802,880.24 respectively, being accrued benefits under the second contract;*
- iii. *Refund of ZMW 21,000.00 and US\$10,000.00 left in the office by the Plaintiff at the time the Plaintiff's suspension was effected;*
- iv. *A declaration that the Plaintiff is entitled to continue receiving his salary until the Defendant settles the Plaintiff's gratuity and terminal benefits;*
- v. *Payment of salaries to the Plaintiff until and up to the settlement of his gratuity and other terminal benefits in full by the Defendant;*
- vi. *Damages for loss of use of funds;*
- vii. *Interest at the current commercial bank lending rate on the sums found to be due;*
- viii. *Any other relief the Court may deem fit; and*
- ix. *Costs of and incidental to this action.*

1.2 On 2<sup>nd</sup> October, 2019, the Defendant entered conditional appearance, following of which an application was made



to set aside originating process pursuant to **Section 10** of **The Arbitration Act**<sup>1</sup>. The application was premised on the basis that there is an arbitral clause in the contracts which are subject of the matter herein.

- 1.3 The application was heard by the Honourable Deputy Registrar, who in her Ruling of 22<sup>nd</sup> November, 2019, found as "*a fact that the two contracts in dispute contain an Arbitration Clause for which the parties have not attempted to explore*". Thus, she referred to this Court the issues of whether or not the Arbitration Clause is inoperative; and whether or not this matter should be referred to Arbitration.

## **2 SUBMISSIONS**

- 2.1 The Defendant filed an Affidavit in Support of the application together with a List of Authorities and Skeleton Arguments dated 11<sup>th</sup> October, 2019.
- 2.2 In the said Affidavit in Support and Skeleton Arguments, it has been stated *inter alia*, that the two contracts which are a subject matter in this case include an Arbitration Clause, particularly Clause 11, thus the matter must be settled at Arbitration and not through Court as has been done by the Plaintiff.
- 2.3 To fortify their contention, the Defendant called in aid the cases of **Heyman & Another vs. Darmins Limited**<sup>1</sup> and

***Zurich Australian Insurance Limited T/A Zurich New Zealand vs. Cogntion Education***<sup>2</sup>.

- 2.4 In response, the Plaintiff filed an Affidavit in Opposition on 31<sup>st</sup> October, 2019, together with Skeleton Arguments, where it is conceded that indeed there are two contracts containing an Arbitral Clause. However, it was argued that the same Arbitral Clause cannot be invoked by the Defendant at this stage because it is inoperative and incapable of being performed.
- 2.5 It was further argued that the Plaintiff made requests to the Defendant to settle his terminal benefits, before the contract came to an end, but the Defendant did not respond and failed to give the Plaintiff his terminal benefits even when the contract came to an end.
- 2.6 It was contended by the Plaintiff that if the Defendant had a dispute, it was at liberty to invoke the Arbitral Clause before the contract came to an end or soon after the contract came to an end. That the Defendant cannot invoke the Arbitral Clause at this stage for the claim which they did not dispute before the contract came to an end.
- 2.7 To fortify their arguments, Learned Counsel for the Plaintiff placed reliance on the cases of ***Intermarket Banking Corporation Zambia Limited vs. Nonde***



***Munkata***<sup>3</sup> and ***Audrey Nyambe vs. Total Zambia Limited***<sup>4</sup>.

2.8 In reply, the Defendant stated that the Plaintiff is drawing his strength from the case of ***Audrey Nyambe vs. Total Zambia Limited***<sup>4</sup>, which is distinct from the case in *casu* as in that case the Supreme Court held that the Arbitral Clauses in question were inoperative because by the wording of the claim, the Arbitral Clauses were only to be opted to, if the dispute arose during the continuation of the agreement. Therefore, it limited the time period within which the Arbitration should be commenced. However, in *casu*, no such time limit was stipulated in the Arbitral Clause and therefore the same could operate at any time a dispute arose.

### **3 APPLICABLE LAW**

3.1 The law is settled as far as the jurisdiction of the High Court is concerned in matters where a contract embodies an arbitration clause. **Section 10 (1) of *The Arbitration Act***<sup>1</sup>, which governs arbitration proceedings provides as follows: -

***"A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests 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." (Court's emphasis)

- 3.2 In their quest to set aside this action, the Defendant has moved this Court pursuant to the above cited provision of the law.
- 3.3 According to the above cited provision of the law, the Court shall, at any stage of the proceedings, stay those proceedings and refer the matter to Arbitration, where a party so requests, unless the Court finds that the agreement is null and void, inoperative, or incapable of being performed. The effect of such is that the action will remain pending before the Court while the arbitral proceedings are commenced and continued leading to an award being made. If the parties are happy with the arbitral award, the pending action can then be discontinued and if they are unhappy with the award, they can apply to set it aside under **Section 17** of **The Arbitration Act**<sup>1</sup>, by resurrecting the pending action. (See the case of **Leopard Ridge Safaris Limited vs. Zambia Wildlife Authority**<sup>5</sup>).

#### **4 ANALYSIS AND FINDINGS**



- 4.1 I have considered the application to set aside the proceedings, the Affidavit evidence, Skeleton Arguments and List of Authorities, for which I am indebted to Counsel and which has made my task easy.
- 4.2 In the Ruling of the Deputy Registrar, it was found as a fact that the two contracts in dispute contain an Arbitration Clause for which the parties have not attempted to explore. Therefore, the issues that I have to resolve are whether or not the Arbitration Clause is inoperative; and if operative, whether or not this matter should be referred to Arbitration.
- 4.3 In the cited case of ***Audrey Nyambe vs. Total Zambia Limited***<sup>4</sup>, the Supreme Court guided that in determining whether a matter is amenable to arbitration or not, it is imperative that the wording used in the Arbitration Clause itself are closely studied.
- 4.4 Being guided by the above cited authority, I have closely studied the Arbitration Clause in *casu*. The Affidavit in Support of the application filed by the Defendant on 11<sup>th</sup> October, 2019, contains the subject contracts exhibited collectively as "JZ1". Both these contracts include an Arbitration Clause which was embodied in clause 11 of the contracts and read as follows: -

*"DISPUTES*

*Should there be dispute between the Union and the Employee, it shall be resolved within the Laws of Zambia. The first course of action will be an arbitration panel consisting of three lawyers, cost of which shall be equally shared by ZNFU management and the Employee."*

- 4.5 In the case of **Anderson Mazoka & Others vs. Levy Mwanawasa & Others**<sup>6</sup>, the Supreme court guided as follows in terms of interpretation of words: -

**"It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning..."** (Court's emphasis)

- 4.6 Applying the said guidance on interpretation, it is clear from the Arbitration Clause embodied in the subject contracts that it was not limited to the continuation or subsistence of the contracts and did not limit itself to a time frame within which arbitration could be invoked.

- 4.7 It is my considered view that the wording of Clause 11 is clear, precise and unambiguous. The wording should thus be taken in their natural and plain meaning. I am further fortified in the view that I have taken by the words of May, LJ. in the case of **Ashville Investments vs. Elmer Constructors Limited**<sup>7</sup>, at **page 58**, which are as follows: -

***"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." (Court's emphasis)*

- 4.8 The Plaintiff has raised an issue, that prior to the expiry of the first contract, he had indicated his intention not to renew the second contract and requested for his terminal benefits, but the Defendant did not respond. That by the said request, the Plaintiff put the Defendant in a position to invoke the arbitral clause long before the contract came to an end but it did not. It is contended that by not responding to the Plaintiff's request before the contracts expired, the Defendant acquiesced that the claims by the Plaintiff were not in dispute and were also not a dispute envisaged by the arbitral clause given that the Plaintiff was claiming what he was lawfully entitled to by virtue of his employment. It is argued that the arbitral clause became inoperative and incapable of being performed due to effluxion of time given that it was intended to bind the parties during the subsistence of the contract.
- 4.9 The Plaintiff placed reliance on the cited case of ***Audrey Nyambe vs. Total Zambia Limited***<sup>4</sup>. The facts in the said cited case, were that the Agreement that was in dispute contained an arbitration clause in Article IX (iv) as follows: -

***"If at any time during the continuance of this agreement, any dispute, differences or questions relating to the construction, meaning or effect of this agreement or any clause herein shall arise between the parties, then the aggrieved party shall give written notice or the affected party shall give written notice of not less than 21 days to the other party herein. Each party shall within 14 days of the date of expiry of the written notice aforementioned appoint an arbitrator. The matter shall therefore be referred to the two arbitrators."***

4.10As can be seen from above, the arbitral clause in the cited case provided that disputes arising during the continuance of the contract would be resolved by arbitration within a specified time frame. The arbitration clause in that matter limited itself to the time during the continuance or subsistence of the agreement and therefore it was not applicable after the termination of the agreement. Further, there was a time limit within which arbitration could take place or an arbitrator appointed and there was no reference to arbitration after termination. The application in that case was made way after the time limits. Since it was specifically limited to the time during the continuance or subsistence of the agreement, it was therefore held to be inoperative or incapable of being performed.



4.11 In my considered view, the above cited case is distinguishable from the case in *casu*, where there are no such restrictions in the Arbitration clause as were in the cited case. I agree with Learned Counsel for the Defendant that an arbitration clause is separate and independent, and survives the agreement embodying it, and the words of Lord MacMillan in ***Heyman & another vs. Darmins Limited***<sup>1</sup> are pertinent, as Learned Counsel for the Defendant rightly submitted.

## **5 CONCLUSION**

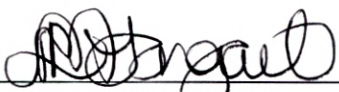
5.1 In conclusion, I find and hold that the expiry of the contract did not render the Arbitration Clause inoperative as it is trite law that an arbitration clause is separate and independent, and survives the agreement embodying it. The Arbitration Clause in the subject contracts is still operative and capable of being performed. In fortifying my finding, I refer to the cited case of ***Heyman & another vs. Darmins Limited***<sup>1</sup>, in which Lord MacMillan put the matter as follows at page 347: -

***"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other... but the arbitration clause does not impose on***

one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the other party has undertaken to the other such dispute shall be settled by a tribunal with their own constitution... the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract." (Court's emphasis)

- 5.2 It is trite that where parties have agreed to settle any dispute between them by arbitration, the Court's jurisdiction is ousted unless the agreement is null and void, inoperative or incapable of being performed.
- 5.3 In the premise, the application is meritorious and I accordingly, stay the proceedings and refer the matter to arbitration. Costs are for the Defendant, to be taxed in default of agreement.
- 5.4 Leave to Appeal is granted.

**Delivered at Lusaka this 7<sup>th</sup> day of February, 2020.**

  
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**P. K. YANGAILO**  
**HIGH COURT JUDGE**