

IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2020/HPC/0437



**BETWEEN:**

**INDO ZAMBIA BANK LIMITED**

**PLAINTIFF**

**AND**

**JACK SANDIE MWALE**

**1<sup>ST</sup> DEFENDANT**

**ZAMBIA NATIONAL BROADCASTING  
CORPORATION**

**2<sup>ND</sup> DEFENDANT**

**CORAM: Hon. Justice Bonaventure C. Mbewe in Chambers on  
the 1<sup>st</sup> day of July, 2020.**

*For the Plaintiff* : *Mr. G. Pindani of Messrs. Chonta  
Musaila Pindani and Advocates*

*For the 1<sup>st</sup> Defendant* : *Mr. J. S. Mwale, In Person*

*For the 2<sup>nd</sup> Defendant* : *Mr. Z. Zaza, In-house Counsel*

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**RULING EX TEMPORE**

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**CASES AND AUTHORITIES REFERRED TO:**

- 1. Ody's Oil Company Limited v. The Attorney General and  
Constantinos James Papoutsis SCZ Judgment No. 4 of 2012;*

2. *The High Court Rules, Chapter 27 of the Laws of Zambia;*
3. *The Arbitration Act No. 19 of 2000;*
4. *Rules of the Supreme Court of England, 1965 (White Book) 1999 Edition, Volume 1.*

## **INTRODUCTION**

This is an action brought by the Plaintiff Indo Zambia Bank Limited commenced on 3<sup>rd</sup> June, 2020 and claiming against the Defendants who are; 1<sup>st</sup> Defendant, Jack Sandie Mwale, an employee of the 2<sup>nd</sup> Defendant and the 2<sup>nd</sup> Defendant, Zambia National Broadcasting Corporation, a statutory body. The Plaintiff's claim is indorsed in its writ of summons as follows;

- i. *Payment of all the monies which as at 20<sup>th</sup> February, 2020 stood at a total sum of ZMW187,839.52 under a personal loan facility availed to the 1<sup>st</sup> Defendant on 13<sup>th</sup> October, 2017 and secured by an undertaking from the 2<sup>nd</sup> Defendant to continue routing the 1<sup>st</sup> Defendants salary through a bank account held with the Plaintiff and offset outstanding loan at the end of the employment contract or separation from gratuity or terminal benefits.*
- ii. *Interest thereon at the agreed rate of 27% per annum.*
- iii. *An Order that the 2<sup>nd</sup> Defendant honours an Undertaking to continue routing the 1<sup>st</sup> Defendant's salary through a bank account held with the Plaintiff Bank and offset the outstanding loan as the end of the employment contract or separation from gratuity or terminal befits (benefits).*

- iv. Legal costs of and incidental to this action; and*
- v. Any other relief the Court may deem fit.*

The writ is accompanied by a Statement of Claim setting out the Plaintiff's claim in more detail. The 2<sup>nd</sup> Defendant entered conditional appearance to the writ of summons on 11<sup>th</sup> June, 2020 and followed this up with a summons for stay of proceedings pending referral of matter to arbitration accompanied by affidavit in support and list of authorities and skeleton arguments. The 2<sup>nd</sup> Defendants has not filed a defence with its memorandum of appearance.

This Court issued a notice for a Scheduling Conference for 1<sup>st</sup> July, 2020 as well as set the hearing of the 2<sup>nd</sup> Defendant's application for stay of action to the same date. To date, the 1<sup>st</sup> Defendant has not entered appearance to the writ of summons issued against him.

### **ARGUMENTS AND EVIDENCE**

The gist of the 2<sup>nd</sup> Defendant's application for stay as set out in an affidavit in support sworn by one Reuben Kajokoto, is that the contract entered into between the Plaintiff and the 2<sup>nd</sup> Defendant for extending personal loans to the 2<sup>nd</sup> Defendant's employees has an arbitration clause as Article 17.0 by which the parties undertook to resolve any disputes arising out of the agreement through arbitration under the **Arbitration Act No. 19 of 2000**.

The 2<sup>nd</sup> Defendant therefore submits that the current action is improperly before the Court and should be stayed pending arbitral determination. The 2<sup>nd</sup> Defendant exhibited 2 copies of the contracts between the parties as “RK1” and “RK2” signed in 2015 and 2017 respectively.

The 2<sup>nd</sup> Defendant filed a list of authorities and skeleton arguments in support of its application. The skeleton arguments quote the **Arbitration Act No. 19 of 2000, Order 73 (6) (2) of the Rules of the Supreme Court of England, 1965 (White Book) 1999 Edition, Volume 1** as well as Article 17.0 of the contract between the parties as the basis for its application. The 2<sup>nd</sup> Defendant relies on the case of **Ody’s Oil Company Limited v. The Attorney General and Constantinos James Papoutsis SCZ Judgment No. 4 of 2012**, *inter alia*, to convince the Court that this is a matter that should be sent to arbitration and the proceedings herein stayed pending the said arbitration.

The Plaintiff has filed an affidavit in opposition to the 2<sup>nd</sup> Defendant’s application accompanied by list of authorities and skeleton arguments.

The Plaintiff’s arguments submit that for a dispute to be referred to arbitration, there must be an underlying arbitration agreement signed by all the parties and relies on **Section 9(1) and (2) of the Arbitration Act No. 19 of 2000** and various other authorities

which includes the **Ody's Oil Company** case cited on by the 2<sup>nd</sup> Defendant itself. The Plaintiff prays that the application be dismissed with costs.

Section 9(1) and (2) of the **Arbitration Act** reads as follows;

*“1. An arbitration agreement may be in the form of an arbitration Clause in a contract or in the form of a separate agreement.*

*2. An agreement is in writing if it is contained in a document signed by the parties.....”*

At the hearing, Counsel for the 2<sup>nd</sup> Defendant, Mr. Zaza, relied on the affidavit and skeleton arguments filed into Court and argued that the Contract for extending personal loans to employees was between the Plaintiff and the 2<sup>nd</sup> Defendant and the Court should look at “on whose behalf was the 2<sup>nd</sup> Defendant entering into the Contract, the answer to which is that it entered into the contract on behalf of its employees to facilitate personal loans being extended to the said employees.” Counsel submitted, that without the employees, the 2<sup>nd</sup> Defendant would not have entered into the contract and for that reason prayed that the matter be referred to arbitration.

Counsel for the Plaintiff, Mr. Pindani, also relied on the affidavit in opposition and skeleton arguments filed in the matter and proceeded to submit that the criterion set by **Section 9 (2) of the Arbitration Act** to stay proceedings in a case and refer the same to arbitration, is that the arbitration agreement should be in writing and signed by the parties. The exhibits in the 2<sup>nd</sup> Defendant's affidavit clearly show that the 1<sup>st</sup> Defendant did not append his signature to these documents. It was also submitted that under the doctrine of privity of contract, the 1<sup>st</sup> Defendant therefore cannot be bound by the arbitration agreement he did not sign and the clause is thus incapable of performance.

Counsel went on to posit that the Plaintiff exhibited a facility letter issued by the Plaintiff to the 1<sup>st</sup> Defendant which he accepted and pursuant to which the claimed monies were disbursed, which is different from the contracts RK1 and RK2. Counsel submitted that it would be a multiplicity of actions if the Plaintiff were to sever the claims to be decided under 2 different fora, being arbitration as between the Plaintiff and the 2<sup>nd</sup> Defendant and by way of court adjudication as between the Plaintiff and the 2<sup>nd</sup> Defendant. Such an approach is frowned upon by the Courts citing the case of **Ody's Oil Company**. Counsel prayed that the application be dismissed for lack of merit and the 2<sup>nd</sup> Defendant be condemned in costs.

In reply to the Plaintiff's arguments and submissions in opposition, Counsel for the 2<sup>nd</sup> Defendant reiterated his earlier

argument that the 2<sup>nd</sup> Defendant entered into the agreement with the Plaintiff on behalf of its employees hence the absence of the 1<sup>st</sup> Defendant's signature therein which fact satisfies the Arbitration Act. Counsel argued that the 2<sup>nd</sup> Defendant's employees were bound by the contract signed on their behalf by the 2<sup>nd</sup> Defendant as they could only access the loans as provided in the loan agreement thereby establishing privity of contract. Counsel submitted that there would be no multiplicity of actions as arbitration would ensure an amicable resolution of the matter.

## **RULING**

The application before me is one in which the 2<sup>nd</sup> Defendant has filed a conditional memorandum of appearance but has not filed its defence. **Order 11, Rule 1(1) and (2) of the High Court Rules, Chapter 27 of the Laws of Zambia** dealing with how appearance is to be entered provides as follows;

*“(1) A defendant shall enter appearance to a writ by delivering to the proper officer sufficient copies of memorandum of appearance in writing dated on the day of their delivery, and containing the name of the defendant's advocate, or stating that the defendant is defending in person. **The defendant shall at the same time deliver to the proper officer sufficient copies of the defence and counterclaim if any:***

*Provided that before delivering the memorandum and defence, the defendant shall be at liberty to apply for further and better particulars...”*

*(2) A memorandum of appearance not accompanied by a defence shall not be accepted.”*

The 2<sup>nd</sup> Defendant herein settled a conditional memorandum of appearance which it endorsed with the words *“This memorandum shall and is conditional pending an application to strike out the action for being an abuse of authority and/or for irregularity within 14 days”*. It has also not settled a defence with its memorandum of appearance as required by the above rule of court. This application is for stay of the proceedings pursuant to **The Arbitration Act and Order 73 (6) (2) of the Rules of the Supreme Court of England, 1965 (White Book) 1999 Edition, Volume 1** (Which order deals with arbitration proceedings), and is not an application to strike out the action for abuse of process or irregularity as endorsed in the conditional memorandum of appearance.

I am therefore of the firm position that the 2<sup>nd</sup> Defendants application is not properly before this Court in so far as it is made in pursuance of the conditional memorandum of appearance and owing to the very nature of the application which is not an application to strike out the writ for abuse of process or irregularity but rather one for stay of proceedings.



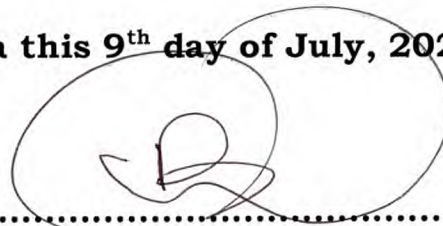
Further, the 2<sup>nd</sup> Defendant has tried hard to distinguish this case from the **Ody's Oil Company** case which held that ***"The fact that the 1<sup>st</sup> Respondent is not a party to the Arbitration Agreement and therefore not bound by its terms on the outcome also makes the arbitration inoperative in this matter."*** I have looked at the agreement exhibited by the 2<sup>nd</sup> Defendant and the submission made in paragraph 2.13 of the affidavit in support which says that *"The 2<sup>nd</sup> Defendant's argument that the 1<sup>st</sup> Defendant being an employee of the 2<sup>nd</sup> Defendant is bound by the terms of the said contract including the arbitration agreement or its outcome despite not appearing in the parties clause."* This submission is far from the facts in the exhibited agreement which clearly states that the Plaintiff would advance loans to; *"Eligible Employees" means an employee of Zambia National Broadcasting Corporation who is in employment on permanent and pensionable terms and has put in a minimum continuous service of two (2) years; OR An employee of the Zambia National Broadcasting Corporation who is in contractual employment with accrued gratuity beyond loan amount requested...."* as well as eligible employees who are also defined as; *"borrower" means an Eligible Employee of the Zambian National Broadcasting Corporation who has accessed personal loan facility from Indo Zambia Bank Limited upon terms set out herein and includes an employee who has accessed such loan prior to conclusion of this Contract and has subsequently re-financed or consolidated his indebtedness in terms of this Contract."* I find that there are two sets of contractual

relationship in place here, namely; the contract between the Plaintiff and the 2<sup>nd</sup> Defendant, which facilitated the provision of loans to the 2<sup>nd</sup> Defendant's eligible employees; and the other being the personal loan contract between the Plaintiff and the individual employees. The 2<sup>nd</sup> Defendant's arguments and submission in attempting to distinguish this case from the **Ody's Oil Company** case therefore flies in the teeth of the evidence that has been submitted. I therefore find that the arbitration agreement in the Contract between the Plaintiff and the 2<sup>nd</sup> Defendant is inoperative and incapable of being performed under Section 9 of the **Arbitration Act**.

Having found as I have, I hold that this is not a proper case for me to stay proceedings or refer this matter to arbitration, as the 2<sup>nd</sup> Defendant's application is not properly before me; and the contract involves another party, the 1<sup>st</sup> Defendant who is not party to the arbitration agreement contained in the Contract between the two parties.

I therefore hereby dismiss the 2<sup>nd</sup> Defendant's application for stay pending Arbitration and shall proceed to issue an Order for Directions to prepare the matter for trial. Costs of the application to the Plaintiff, to be taxed in default of agreement.

**Delivered at Lusaka this 9<sup>th</sup> day of July, 2020.**



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