IN THE SUPREME COURT OF ZAMBIA **APPEAL NO 31 OF 2003**
HOLDEN AT LUSAKA
BETWEEN:

GATEWAY SERVICE STATION **Appellant**

and

ENGEN PETROLEUM (Z) LIMITED **Respondent**

Coram: **Chirwa, Chibesakunda and Mushabati, JJS on 18th July 2006 and 24th May 2007**

For the Appellant: Mr J A Wright of Wright Chambers
For the Respondent: Mr N Nchito of MNB Practitioners

JUDGMENT

Chirwa, JS delivered the judgment of the Court-

Cases referred to:

1. **BEUFORT DEVELOPMENT (ND LIMITED V GILBERT – ASH (NI) LTD AND ANOTHER [1998] 2 All. E.R. 778**
2. **RONALD E BROWN V BALATON INC. M. 2001 – 02770 – COA – R3 – CV**
3. **ASHVILLE INVESTMENTS LTD V ELMER CONTRACTORS LTS [1988] 2 ALL E.R 577**
4. **KATHMER INVESTMENTS PROPRIETARY LTD v WOOLWORTHS PROPRIETARY LTD 91970 (2) S A 498**

This is an appeal against the decision of the High Court which decided that the dispute between the parties be referred to arbitration pursuant to Clause 24 of Lease Agreement between the parties.

The history of the dispute is that there is a Lease Agreement between the parties whereby the appellant, **GATEWAY SERVICE STATION** leased some premises belonging to the Respondent, **ENGEN PETROLEUM**

(Z) LIMITED, on which premises, per their agreement, the appellants were to run a service station to sell the respondent's petroleum products. A dispute arose from the execution of that agreement and this is the dispute that has yet to be decided upon.

Under this Lease Agreement, there are two provisions that outline how any dispute under the Agreement are to be resolved. Under Clause 20:1, it is provided that:-

> **"Every Party shall be entitled to institute action against the other, in respect of any matter arising out of this Lease, in any Court having territorial jurisdiction; and to the extent that the consent of the other party may be required in respect of the monetary jurisdiction of such Court, the parties hereby irrevocably grant such consent".**

Under Clause 24:1. It is provided that:-

> **"If any dispute arises as to validity, interpretation, effect or rights and obligations of either party under the Lease, either party shall have the right to require such dispute be referred to arbitration before a single arbitrator".**

A dispute arose between the parties and the appellant issued a writ of summons in the High Court on 8th November 2002 claiming a number of declarations and damages and an injunction. The issue of injunction has been dealt with by this Court under APPEAL NO 12 OF 2003 and the judgment is dated 29th October 2003.

Whilst the matter was still pending before the High Court, the respondent applied to the High Court for the stay of those proceedings and have the matter referred for arbitration. The application was made under Section 10 of the Arbitration Act, No 19 of 2000. Before we quote Section 10 of the Arbitration Act in full, it may be worthwhile to give the definition of Arbitration Agreement under Section 2 of the Arbitration Act.

Arbitration Agreement is defined as **"an agreement, whether in writing or not, by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".**

Section 10 of the Arbitration Act under which the application was made in the High Court reads as follows:-

> **"10 (1). A Court before which legal proceedings are brought in a matter which is the subject of 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.**
>
> **(2) Where proceedings referred to in Sub-Section (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court".**

After considering the affidavit evidence before him and the law the learned trial judge granted the application and stayed the High Court proceedings and referred the matter to arbitration. It is against that decision that the appellants have appealed.

There are three grounds of appeal and these are that:-

1) The learned trial judge misdirected himself when he failed to take into account that the same agreement contains a provision which entitle either party "to institute legal proceedings in respect of any matter arising out of the agreement".

2) The learned trial judge misdirected himself at law by failing to appreciate that the jurisdiction of the arbitral agreement vis-à-vis that of a Court having competent jurisdiction are not clearly defined and the dispute between the parties appears to be one of pure legal nature.

3) That ultimately and pursuant to Section 10 of the Arbitration Act No. 19 of 2000 the arb'tration Clause ought to have been null and void and inoperative.

These grounds were argued in detail in the written heads of arguments and supported by oral submissions at the hearing of the appeal.

At the hearing and in the heads of written submissions, grounds 1 and 2 were argued together. The gist of grounds 1 and 2 was that the learned trial judge erred in totality disregarding Clause 20:1 of the same agreement that gave a right to any party to the agreement to institute proceedings against the other in the Court having territorial jurisdiction and merely ordered arbitration under Clause 24:1 without attempting to reconcile the conflict between the two clauses. In failing to reconcile the conflict, it was submitted, has brought about conflict two well established principles that where the parties agree to resolve their dispute through arbitration, the Courts should be willing to give effect that the agreement. The other principle said to be in conflict is that multiplicity of proceedings are highly undesirable. To support this submission reliance was put on my ruling in SCZ/8/27/2003 involving the same parties where I stated that situations should not be allowed where two processes are allowed to proceed simultaneously as this may result in possible two different conclusions and I allowed the arbitration proceedings to be stayed. Counsel also relied on the Cases of **BEUFORT DEVELOPMENT (ND LIMITED V GILBERT – ASH (NI) LTD AND ANOTHER (1)**and **RONALD E BROWN V BALATON INC.(2)** a decision of Court of Appeal of Tennesse at Nashville.

Counsel's submission centred on whether the arbitration clause ousted the Courts jurisdiction over any dispute in the Lease.

In answer to these grounds of appeal, Counsel for the respondent submitted that the lower court did not err in staying the proceedings in the High Court and referring the matter to arbitration as the Court took

recognizance of the jurisdiction of the Arbitrator over the Lease Agreement. It was submitted that the powers of the Arbitrator are limited by Clause 24:1 itself and these are limited to dispute arising as to the validity, interpretation, effect or rights and obligations of either party under the Lease. It was submitted that there was no conflict between Clause 20:1 and Clause 24:1. It was argued that that the disputes arising as to validity, interpretation, effect or rights and obligations of either party to the lease and the Case of **ASHVILLE INVESTMENTS LTD V ELMER CONTRACTORS LTS (3)** was relied upon. It was argued that the dispute between the parties in the present case is over the validity of the notice given to the appellant to terminate the lease agreement which is a matter over which the Arbitrator has jurisdiction. It was further argued that there is nothing in the Arbitration Act that prevents any legal disputes being referred to Arbitration and Section 6(3) of the Act was referred to.

On the question of the Arbitration Clause being declared null and void, the **ASHVILLE (3)** case was also relied upon particularly at pages 504-505 where Bingham L.J in agreeing with the South African Supreme Court in the Case of **KATHMER INVESTMENTS PROPRIETARY LTD v WOOLWORTHS PROPRIETARY LTD (4)** said:

> **"The Court took the view that when the parties agreed that their contract be governed by an arbitration clause, they must have believed (whether in error or not) that the document contained their real agreement, and have intended to refer to arbitration such matters as arose out of or concerning such agreement. On that basis, a dispute about any term of the agreement was a dispute which arose out of the agreement or which**

concerned the agreement, and it was therefore referable to arbitration in terms of the arbitration clause".

We have considered the arguments advanced by both Counsel. From what we can gather from the appellant's arguments, he feels that there is a conflict between Clauses 20:1 and 24:1 of the agreement in that it appears that Clause 24:1 seems to oust the jurisdiction of the Court whereas Clause 20:1 gives the parties to the agreement the right to institute action against the other in respect of any matter arising out of the agreement. We see no conflict between the two Clause. Clause 20:1 just emphasizes, in our view, the in-born right of one to take any dispute to Court for determination. Clause 24:1 provides an alternative to dispute resolution. The two are open to the parties to the agreement. If the party or both parties wish to submit the dispute to arbitration, they may do as provided under Clause 24:1 of the Agreement. As there is an arbitration Clause in the agreement, the proceedings in Court can be stayed under Section 10 of the Arbitration Act. What was meant in the Ruling of 29th July 2004 was that there should not be concurrent proceedings in Court and Arbitration. The **BEAUFORT DEVELOPMENT (1)** case relied on by Counsel for the appellant dealt with the question of whether the powers of the Court are ousted by an arbitration clause in the agreement and it found that the powers of an arbitrator are as conferred on him by the parties. Clearly, Clause 24:1 coes not remove the powers from the Court. The agreement and the Authorities cited are to the effect that the Court's jurisdiction is not ousted by an arbitration Clause.

It follows, therefore, that in terms of Section 10 of the Arbitration Act, once any party to an agreement with an arbitration clause makes an application to have the matter stayed and refer the matter to arbitration, the Court has no choice but to refer the matter to arbitration unless it finds the agreement null and void, imperative or incapable of being performed. The validity of the agreement is not in issue here.

We are satisfied that the lower Court properly, upon application by the respondent, referred the mat-er to arbitration. We see no merit in the appeal and it is dismissed with costs. Costs to be agreed, in default to be taxed.

D K Chirwa
JUDGE OF THE SUPREME COURT

L P Chibesakunda
JUDGE OF THE SUPREME COURT

C S Mushabati
JUDGE OF THE SUPREME COURT