THE SUPREME COURT OF ZAMBIA **APPEAL No.121 of 2013**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

JOHN SANGWA **APPELLANT**

AND

THE LEGAL PRACTITIONERS COMMITTEE OF THE LAW ASSOCIATION OF ZAMBIA **RESPONDENT**

Coram : **Hamaundu, Kabuka and Mutuna JJS**
On 2nd August 2023 and 30th August 2023

For the Appellant : **Mr. Nkunika of Messrs Simeza Sangwa and Associates**

For the Respondent : **N/A**

JUDGMENT

Mutuna JS, delivered the judgment of the court.

Cases referred to:

1) **New Plast Industries v Commissioner of Lands and the Attorney General SCZ Judgment No. 8 of 2001**
2) **R V Epping and Harlow General Commissioners ex parte Goldstraw (1983) 3 ALL ER 257**
3) **Mungomba and others v Machungwa and others (2003) ZR 17**

Legislation referred to:

1) **Constitution of Zambia, Cap 1 of the Laws of Zambia**
2) **Law Association of Zambia (General) Rules, 1996**
3) **Legal Practitioners Act, Cap 30 of the Laws of Zambia**
4) **Legal Practitioners' (Practice) Rules, S.I. No. 51 of 2002**
5) **Law Association of Zambia Act, Cap 31 of the Laws of Zambia**
6) **The Rules of the Supreme Court, 1965**
7) **Arbitration Act, No. 19 of 2000**
8) **Arbitration (Court Proceedings) Rules, S.I. No. 75 of 2001**
9) **High Court Rules, Cap 27 of the Laws of Zambia**

1. Introduction

1.1 The Appellant, John Sangwa, enjoys the rank and dignity of State Counsel and is no stranger to our courts. This time he comes to our court challenging the decision by the Learned High Court Judge, Sichinga J. (as he then was), which dismissed his action. This followed the raising of a preliminary question by the Respondent, on the ground that the Appellant's action was misconceived as it was launched in the wrong forum. According to the Learned High Court Judge, the Appellant ought to have first sought recourse to arbitration in accordance with Rule 16 of the ***Law Association of Zambia (General) Rules, 1996*** prior to commencing the action in the High Court.

2. Background

2.1 The Appellant practices law in Zambia under the name and style of Simeza Sangwa and Associates. In 2010, during the course of his practice, Ody's Works Limited,

acting through its Managing Director, Odysseas Mandenakis, lodged a complaint against him with the Legal Practitioners Committee (the Committee), constituted in accordance with Section 13(3) of the ***Law Association of Zambia Act***.

2.2 The Committee deliberated on the complaint and found that the Appellant had breached Rules 32(3) and 37(3) of the ***Legal Practitioners (Practice) Rules***. He was, for that reason, reprimanded.

2.3 The Appellant was aggrieved by the decision of the Committee and launched an action for judicial review before the High Court in terms of Order 53 Rule 3 of ***The Rules of the Supreme Court, 1965 (White Book)***, alleging procedural impropriety. The Respondent's response was to challenge the propriety of the matter on the grounds that the Appellant's recourse to the decision of the Committee lay in arbitration in accordance with Rule 16 of the ***Law Association of Zambia (General) Rules*** and not court action.

3. Consideration by the Learned High Court Judge and decision

3.1 The Judge began by setting out the two positions taken by the parties. He said the Respondent contended that modes of commencement of actions are provided for by statute in accordance with the decision of this court in the case of ***New Plast Industries v Commissioner of Lands and the***

Attorney General[1]. Therefore, in this case, the Appellant ought to have resorted to arbitration and not judicial review in accordance with the prescription by the ***Law Association of Zambia (General) Rules***.

3.2 The Appellant, on the other hand, contended that the motion raised by the Respondent was misconceived as it did not comply with the provisions of Order 14A of the ***White Book***. That is to say, the conditions precedent contained in Order 14A/2/3 of the ***White Book*** were not fulfilled. Secondly, reference to arbitration does not necessarily bring a matter to finality as it is possible to stay proceedings pending the outcome of the arbitral proceedings. The Respondent's prayer to dismiss the action was, therefore, untenable. Further, the motion was incompetent in so far as it was raised against an action launched by way of judicial review.

3.3 The Judge agreed with the Appellant that a preliminary objection under Orders 14A and 33 of the ***White Book*** could not be brought in relation to actions for judicial review. However, he went on to hold that the action by the Respondent of wrongly invoking these two orders was not fatal because interlocutory applications could be brought in judicial review proceedings. The application, in the Judge's view, was therefore, properly before him.

3.4 Dealing with the substantive application before him, the Judge cited the provisions of Rule 16 of the ***Law***

Association of Zambia (General) Rules and Section 10 of the ***Arbitration Act***. He concluded that having been aggrieved by the decision of the Committee, the Appellant was compelled to adhere to the provisions of the relevant law. In making this finding, he endorsed our decision in the ***New Plast***[1] case that the mode of commencement of any action is generally provided for by statute.

3.5 The Judge also made an alternative finding that the matter was amenable to dismissal because the Appellant ought to have appealed to an arbitrator first. Having failed to do so, he did not exhaust all the avenues open to him, prior to resorting to judicial review. In making this finding, he cited the decision in the English case of ***R v Epping and Harlow General Commissioners ex parte Goldstraw***[2]. He upheld the objection by the Respondent and dismissed the Appellant's action for judicial review with costs.

4. Appeal to this Court and arguments by counsel

4.1 The Appellant is aggrieved by the decision of the Learned High Court Judge and has launched this appeal on two grounds. The grounds of appeal question the interpretation given to section 10 of the ***Arbitration Act*** by the Learned High Court Judge and his reliance on the ***New Plast***[1] case. They also question the dismissal of the matter by the Learned High Court Judge on the grounds that Rule 16 of the ***Law***

Association of Zambia (General) Rules, provides an alternative forum for dispute resolution.

4.2 The written arguments by the Appellant can best be summarized as follows:

4.2.1 Section 10 of the ***Arbitration Act*** does not provide for dismissal of an action but rather a stay of proceedings and referral of the matter to arbitration. The Judge was thus compelled to stay proceedings and not dismiss them;

4.2.2 The ***New Plast***[1] case dealt with modes of commencement of actions in court. It is, therefore, distinguishable from this case which dealt with the forums in which disputes can be presented. This is confirmed by the fact that the Respondent challenged the forum rather than the form in which the action was launched. The reference to *"action"* in the ***New Plast***[1] case is to matters which are before the court and not matters which are before or ought to be commenced before an alternative forum. Consequently, the Learned High Court Judge misdirected himself when he relied on the ***New Plast***[1] case;

4.2.3 A perusal of the application for leave to apply for judicial review reveals that the Appellant sought to challenge the decision-making process of the Committee and not the substantive decision. There was, as a result, no question or difference which was

amenable to referral to arbitration in accordance with Rule 16 of the ***Law Association of Zambia (General) Rules***;

4.2.4 The Learned High Court Judge failed to appreciate this fact and erroneously arrived at the conclusion that the Appellant had the alternative remedy of appealing to an arbitrator; and,

4.2.5 The dispute presented to the court by the Appellant relates to rules under the ***Legal Practitioners Act***. These provisions are not subject to the dispute resolution mechanism prescribed under the ***Law Association of Zambia (General) Rules***.

5. At the hearing, counsel for the Appellant, Mr. Nkunika, along with relying on the heads of argument submitted as follows:

5.1 The appeal calls for the determination of three issues as follows:

5.1.1 what is the effect of the existence of an arbitration clause in relation to proceedings pending before the court;

5.1.2 what is the jurisdiction of the court where a matter is brought before it in contravention of an arbitration agreement; and,

5.1.3 how can a party who seeks to have a dispute arbitrated move the court to resort to the parties' choice of dispute resolution forum.

5.2 Counsel began by addressing the third issue. He argued that this court has on countless occasions held that where a party commences an action in contravention of an arbitration agreement, the application should be one to stay proceedings and refer the matter to arbitration and not dismiss it. According to counsel, a party has no choice but to strictly follow this procedure which is laid down in section 10 of the ***Arbitration Act***. A party cannot apply by way of Orders 14A and 33 of the ***White Book***, as the Respondent did, and pray for dismissal of the action. The Learned High Court Judge, therefore, misdirected himself by dismissing and not staying the proceedings.

5.3 Regarding the second issue, counsel argued that the jurisdiction of courts is conferred by the ***Constitution*** and Acts of Parliament. In this case, the jurisdiction of the Learned High Court Judge was pursuant to section 10 of the ***Arbitration Act***. The Judge abrogated his jurisdiction by failing to follow the procedure set out in that section.

5.4 In relation to the first issue, Mr. Nkunika argued that the matter was not arbitrable, therefore, the referral order was wrong. He justified this argument by stating that the only avenue open to the Appellant in questioning the Committee's decision-making process was by way of judicial review pursuant to Order 53 of the ***White Book*** which is the only legal avenue where one seeks redress in judicial review.

5.5 Advancing his argument, Mr. Nkunika, contended that Order 53 provides that once leave to commence judicial review proceedings is granted there are only two options open to a respondent. That is, either to discharge the leave or defend the action. Parties are compelled to follow the procedure set out in Order 53 of the ***White Book*** because there is no local legislation providing for judicial review. This, he argued, is in accordance with the decision of this court in the case of ***Mungomba and others v Machungwa and others***[3] in which he contended, we said parties in judicial review are restricted only to apply the provisions of Order 53.

5.6 We were urged to allow the appeal.

6. The written arguments in response by the Respondent were as follows:

6.1 Section 10 of ***Arbitration Act*** is not applicable to this matter because it requires a party to request the court to refer a party to arbitration. In this case, none of the parties requested the Learned High Court Judge to refer the parties to arbitration but the Respondent merely raised a preliminary issue as to the propriety of the Appellant resorting to judicial review and not the preferred path of arbitration as per Rule 16;

6.2 The decision in the ***New Plast***[1] case is relevant to this appeal because it states that a party cannot seek to resolve his dispute by employing a mechanism that is not provided

for in the enabling statute. In this case, the mechanism prescribed by Rule 16 is arbitration and not judicial review which the Appellant resorted to;

6.3 The Learned High Court Judge was on firm ground when he dismissed the matter because the Appellant has not demonstrated that he attempted to resolve the dispute by arbitration. In addition, there is a dispute which is amenable to arbitration because the Appellant is in effect challenging the manner in which the Committee arrived at its decision. We were urged to dismiss the appeal.

7. Consideration and decision by this Court

7.1 At the hearing of the appeal, the Respondent was not represented by counsel and no reason was given for counsel's absence. We, nonetheless, proceeded with the hearing after we were satisfied that the notice of hearing had been served upon counsel for the Respondent.

7.2 Following our consideration of the record of appeal and arguments, we intend determining this appeal by firstly considering the effect of Rule 16 of the ***Law Association of Zambia (General) Rules*** and section 10 of the ***Arbitration Act***. Thereafter, we shall consider the arguments by the parties in light of the interpretation we will give to Rule 16 and section 10.

7.3 ***Interpretation and Effect of Rule 16 and section 10***

7.3.1 The provision of the Rule is as follows:

> *"Any question or difference between the Association and members or between members relating to professional conduct, etiquette or practice, shall be resolved in accordance with the Arbitration Act with such modifications as circumstances may permit."*

7.3.2 This provision is in effect an arbitration agreement between the members of the Law Association of Zambia and the Law Association of Zambia and as between the members themselves to refer any dispute they may have between them relating to professional conduct, etiquette or practice to arbitration.

7.3.3 The legal profession is a noble profession which thrives on good public opinion and reputation. As such, any issue pertaining to ethical or professional conduct of the members and indeed, practice, should be resolved away from the glare of the public and press to preserve, not only the integrity of the Law Association of Zambia, but also its members and the profession. Hence, the preferred choice of arbitration as the forum for dispute resolution which is confidential in nature.

7.3.4 Having established that Rule 16 is an arbitration agreement and that the choice of dispute resolution forum is arbitration, the question we have asked ourselves is what happens in a case where a member of the Law Association of Zambia commences court

proceedings in an attempt to resolve a dispute, in contravention of Rule 16. Section 10(1) of the ***Arbitration Act*** provides the answer when it enacts 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."*

7.3.5 The interpretation we have given to section 10 is that it compels a court to stay proceedings before it which are commenced in contravention of an arbitration agreement and refer the parties to arbitration. The stay and referral of the parties to arbitration marks the end of those proceedings before the court because the parties will have been referred to their preferred choice of dispute resolution forum. The court is only precluded from staying proceedings where the arbitration clause is not enforceable or cannot be invoked for being pathologically or poorly drafted.

7.3.6 In terms of the mode of applying for the stay and referral to arbitration, Rule 4 of the ***Arbitration (Court Proceedings) Rules*** stipulates that it shall be by summons and supporting affidavit.

7.4 ***Consideration of the arguments by counsel in relation to our interpretation of Rule 16 and section 10***

7.4.1 The first argument advanced by the Appellant was that section 10 of the ***Arbitration Act*** does not provide for dismissal of an action but rather a stay of proceedings and referral of the matter to arbitration. According to the Appellant, the Judge misdirected himself when he dismissed instead of staying the proceedings and thereby abrogated his jurisdiction.

7.4.2 The Respondent's response was that the application which was before the Learned High Court Judge was not a section 10 application calling for a stay of proceedings but rather an Order 14A and Order 33 application calling for dismissal.

7.4.3 We have already stated that the provisions of section 10 require a court to stay proceedings and refer the parties to arbitration. It does not call for dismissal of a matter. To this extent, there is merit in the arguments by the Appellant. However, the omission by the Learned High Court Judge cannot be likened to an abrogation of his jurisdiction but rather a procedural omission which is not fatal as we have demonstrated later in this judgment.

7.4.4 The second argument questioned the reliance on the ***New Plast***[1] case by the Judge. To recap, the Appellant argued that the case deals with mode of

commencement of actions rather than choice of dispute resolution forum by the parties.The Respondent on the other hand argued that the Judge was on firm ground because the decision in the ***New Plast***[1] case prohibits a party from deploying the wrong mechanism in resolving his dispute.

7.4.5In the ***New Plast***[1] case, we dealt with modes of commencement of actions and stated that statute provides for this and not necessarily the nature of the claim. In this case, the Respondent questioned the choice of dispute resolution forum and not the manner in which the action was commenced. To the extent that the ***New Plast***[1] case dealt with mode of commencement, it was not relevant to the action before the Learned High Court Judge.

7.4.6In the third argument, the Appellant questioned the deployment of Orders 14A and 33 of the ***White Book***. Here, counsel repeated his earlier arguments at paragraph 7.4.1 and advanced them as follows: Order 53 does not permit the procedure under section 10 of the ***Arbitration Act*** to be invoked; and, once leave to apply for judicial review has been granted, a party cannot raise a preliminary issue. The only options open to such a party are to defend the judicial review proceedings or apply to set aside the leave granted.

7.4.7 In advancing the first argument in the preceding paragraph, Mr. Nkunika emphasized that we made it clear in the ***Mungomba***[3] case that judicial review proceedings are only governed by Order 53 of the ***White Book*** because there is no local legislation which governs it. For this reason, a court cannot entertain a section 10 application because Order 53 does not provide for such intervention.

7.4.8 It is important that we revisit what we said in the ***Mungomba***[3] case to adequately address the arguments advanced by Mr. Nkunika. In that case, the Learned High Court Judge refused to grant an interlocutory application to join a party in judicial review proceedings which was launched pursuant to Orders 14 and 18 of the ***High Court Rules***. The basis upon which the Judge refused the application was that it was misconceived because the orders of the ***High Court Rules*** upon which it was anchored were not applicable to judicial review proceedings. The Judge went on to hold that Order 53 is comprehensive enough to cater for all aspects of procedure relating to the parties that can join as interested parties. We agreed with the Learned High Court Judge.

7.4.9 The facts of the ***Mungomba***[3] case should be distinguished from the facts of this case. In that case,

the applicant sought to import into the procedure of judicial review, a procedure for joinder from the ***High Court Rules***, when Order 53(9) provides for hearing of a person with an interest. There was, therefore, already a rule under Order 53 which the applicant in that case should have invoked. In the matter with which we are engaged, by invoking section 10 of the ***Arbitration Act***, the Respondent was not seeking a remedy under Order 53 or to complement proceedings under that Order. It sought to put a dispute commenced wrongly under Order 53 in the correct forum, which is arbitration.

7.4.10 Our decision in the ***Mungomba***[3] case must, therefore, be understood in its proper context to mean that Order 53 has various remedies built into it such as for hearing of interested parties, there is no need to invoke the ***High Court Rules*** on such matters. The basis of this being that, the ***High Court Rules***, which are the principal local legislation in civil procedure do not provide for judicial review. The decision was restricted to this narrow point only, not to mean that procedure such as that arising from a section 10 application seeking to direct the parties to their choice of dispute resolution forum cannot be invoked.

7.4.11 We also do not accept the argument by Mr. Nkunika that following the grant of leave to apply for judicial review, the only avenue open to the Respondent was either defend the action or apply to discharge leave granted. Mr. Nkunika was expressly stating that there can be no interlocutory application in judicial review proceedings. We hold a contrary view. In the ***Mungomba***[3] case, the application which was before the High Court was for joinder. This is an interlocutory application which followed the grant of leave to apply for judicial review. Although the Judge found the procedure used to be wrong, he did hold, and we agreed that, there is provision for joinder or hearing of a party under Order 53 which is an interlocutory application. In addition, Order 53 rule 3(10) states as follows:

> **"Where leave to apply for judicial review is granted, then .... (b) if any interim relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action began by writ."**

7.4.12 The effect of this rule is that after the grant of leave to apply for judicial review, the court can entertain any interlocutory application. It goes further to state that the reliefs that can be granted in such interlocutory applications are ones that can be granted in matters commenced by writ. It does not

restrict the interim reliefs to those only provided for by Order 53. This is reinforced by Order 53 rule 14 subrule 48 which sets out the practice and procedure for applying for interlocutory relief. We, therefore, cannot accept that after the grant of leave to apply for judicial review all the Respondent could do was apply to discharge the leave or defend the action. The Respondent was, within its right to question the forum in which the dispute was deployed as it did.

7.4.13 The fourth argument advanced by the Appellant was regarding the nature of the dispute. He contended that since it challenged the decision-making process of the Committee, it was only amenable to judicial review and was not one of the disputes contemplated under Rule 16. Further, the dispute fell in the realms of the ***Legal Practitioners Act*** and not the ***Law Association of Zambia Act***.

7.4.14 We have already explained the effect of Rule 16 to the extent that it is an arbitration clause. The Rule also provides for arbitration of disputes in relation to professional conduct, etiquette and practice, which are the primary areas of legal practice which the ***Legal Practitioners Act*** was legislated for. In addition, although the dispute the Appellant presented to the Learned High Court Judge questioned the decision-making process of the

Committee in that he alleged procedural impropriety, contending that he had not been heard, it arose from his actions while practicing at the bar and questioned his professional conduct. The dispute, therefore, fell squarely in the realms of Rule 16.

7.4.15 Further, although our law prescribes that certain decision-making processes of certain entities such as public authorities will be challenged through judicial review, this does not bar parties from resorting to arbitration if they have agreed to do so. Section 6 of the ***Arbitration Act*** states that any matter which the parties have agreed to submit to arbitration is arbitrable except a select few which do not include matters like the one which was before the Learned High Court Judge.

7.4.16 Section 6(3) of the ***Arbitration Act*** explains the fact that although a law prescribes the court as the dispute resolution forum for certain matters, it does not preclude parties from resorting to arbitration.

7.4.17 The Appellant's fate is compounded by the fact that what was in issue in the dispute between him and the Law Association of Zambia arose from private and not public law. Judicial review is concerned with protection of rights under public law and not private law. This is clearly set out in Order 53 rule 14 subrule 33 of the ***White Book*** which highlights the

inappropriateness of attempting to assert rights arising from private law through judicial review.

7.5 Conclusion

7.5.1 The Learned High Court Judge did make a number of procedural errors which did not substantially affect his sound decision to refer the parties to arbitration. One such error was his holding that the Appellant ought to have resorted to arbitration before commencing the court action. We have explained that since Rule 16 is an arbitration clause, the choice of dispute resolution forum by the parties was arbitration and not court. Arbitration is an end in itself and not a first step in the dispute resolution process because the decision of the arbitrator is final and binding on the parties in terms of section 20 of the ***Arbitration Act***.

7.5.2 The second error was his entertainment of the application made pursuant to Orders 14A and 33 of the ***White Book***. Rule 4 of the ***Arbitration (Court Proceedings) Rule*** stipulates that section 10 applications will be made by way of summons and affidavit. The omission is not fatal because the Respondent's prayer was similar to what it would have made by summons to refer the parties to arbitration, which was their preferred choice of

dispute resolution forum in accordance with section 10. This section actually compels a judge to make the referral once a party applies for such referral.

7.5.3 We have rationalized the agreement by the Law Association of Zambia and its members to resort to arbitration and not court in dealing with their differences at paragraph 7.3.3. Despite his lofty status at the Bar which essentially makes him one of the leaders at the Bar, the Appellant still chose to abrogate the agreement and seek to redress his grievance with the Law Association of Zambia in a public forum. We find this strange because at the heart of this appeal and matter before the High Court was the question of the Appellant's conduct during practice.

7.5.4 To the extent that the Learned High Court Judge erred at law by dismissing the action and not staying it and relied upon the ***New Plast***[1] case, the appeal has merit. This, however, is academic because we have held that he was on firm ground when he referred the parties to arbitration being their choice of dispute resolution forum. We, accordingly, dismiss the appeal. In doing so, we substitute the decision by the Learned High Court Judge dismissing the action with a decision to stay proceedings before him in terms of Section 10 of the ***Arbitration Act*** and refer

the parties to arbitration. The costs will follow the event and be taxed in default of agreement.

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J.K. KABUKA
SUPREME COURT JUDGE

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N.K. MUTUNA
SUPREME COURT JUDGE