

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

2021/HP/0999



BETWEEN:

ALICK TEMBO & 21 OTHERS

PLAINTIFF

AND

KWACHA PENSION TRUST FUND

1ST DEFENDANT

BANK OF ZAMBIA

2ND DEFENDANT

BEFORE THE HONOURABLE MRS. JUSTICE M.C. KOMBE

For the Plaintiff:

Mr. K. Kaunda – Messrs. Kaunda & Kaunda & Mwila Legal Practitioners.

For the 1st Defendant:

Mr. B.J. Abwino – Messrs. Ranchod Chungu Advocates.

For the 2nd Defendant:

Ms. S Kaingu - Senior Legal Counsel-Bank of Zambia.

R U L I N G

Cases referred to:

1. Leonard Ridge Safaris Limited v. Zambia Wildlife Authority (SCZ No. 43 of 2008).
2. Upeo (Zambia) Limited v. ZCON Construction Limited (2016/HPC/0362).
3. Audrey Nyambe v. Total Zambia Limited (SCZ Judgment No.1/2015).
4. BP Zambia Plc v. Expendito Chipasha and 235 Others (Judgment No.57 of 2018).

5. **Richard Chama & 213 others v. NAPSA & 8 Others (Appeal No. 1 of 2018).**
6. **Konkola Copper Mines Plc v. NFC Africa Mining Plc. (Appeal No.118/2006).**
7. **Mitsui Construction Co Ltd v. A-G of Hong Kong (1986) 33 BLR1.**
8. **Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98**

Legislation and other material referred to:

1. **The Arbitration Act No. 19 of 2000.**
2. **The Arbitration (Court Proceedings) Rules, S.I No. 75 of 2001.**
3. **The Pension Scheme Regulation Act [as amended by Act No.27 of 2005].**
4. **Halsbury's Laws of England, Vol 2, Fifth edition (2008).**
5. **Osborne's Concise Law Dictionary**

This is a ruling on the 1st Defendant's application to stay proceedings and refer the matter to arbitration pursuant to Section 10 of the Arbitration Act No.19 of 2000 as read with Rule 4 of the Arbitration (Court Proceedings) Rules S.I No. 75 of 2001.

The application is supported by an affidavit deposed to by **PAULMAN CHUNGU**, counsel seized with conduct of the matter on behalf of the 1st Defendant.

He deposed that as rightly indicated by the Plaintiffs in their statement of claim, they were former members of the 1st Defendant Fund which

relationship was regulated by the Kwacha Pension Trust Fund Rules of January, 2008 (Third Edition) ('the Rules').

It was deposed that clause 26 of the Rules provided that any dispute, difference or question that shall arise between the Trustees, the Employer, the Members or any other interested persons or the representatives of any of them touching the construction, meaning or effect of the rules or any of them then every such dispute or question shall be referred to Arbitration. A copy of the Rules was exhibited and marked "**PC1**".

Further, that a dispute between the Plaintiffs who were members of the 1st Defendant Fund and the 1st Defendant had arisen which touched on the effect of the Rules, specifically regarding calculation or computation and payment of Pension benefits as shown in the statement of claim.

That the Arbitration Clause in the Rules was the basis on which the Defendant had indicated its intention of having the cause herein stayed and referred to arbitration.

The affidavit in opposition was deposed to by **ALICK TEMBO**, the 1st Plaintiff herein.

He deposed that the relief endorsed on the writ of summons showed that the same did not touch or relate to the construction, meaning or effect of the rules of the Kwacha Pension Trust Fund. However, the relief in the statement of claim and the action herein were related or anchored on the Pension Scheme Regulation Act (as amended by Act No.27 of 2005), and the interpretation of its relevant provisions.

Further that in any event, an arbitrator had no jurisdiction to interpret the law, as this was what the action was premised on. He added that they were former members and employees of the 1st and 2nd Defendants.

At the hearing of the application, learned counsel for the 1st Defendant, Mr. A.J. Abwino relied on the affidavit and the skeleton arguments filed in support of the application.

In the skeleton arguments, the Court was referred to Section 10 (1) of the Arbitration Act and Rule 4 (1) and (2) of the Arbitration (Court Proceedings) Rules. It was submitted that the provisions of section 10(1) of the Act mandated the Court to halt or stay and refer to arbitration a matter that was before it and that the rules provided the procedure to be employed if he wished to exercise the option presented.

Further reference was made to the case of **Leonard Ridge Safaris Limited v. Zambia Wildlife Authority** ⁽¹⁾ where the Supreme Court considered an appeal in which the trial court had an application for leave to apply for judicial review before it and subsequently, an application to stay proceedings under section 10(1) was made.

The 1st Defendant argued that the Plaintiffs' claims were made in their capacity as former members of the 1st Defendant's Trust Fund and that the relationship between the Plaintiffs and the 1st Defendant at the time of their departure from the employ of the Bank of Zambia was governed by the Kwacha Pension Trust Fund Rules which provides as follows:

“Except whereby the decision of the Trustees or Employer is made conclusive if at any time hereafter any dispute, difference or question shall arise between the trustees, the employer, the members or any other interested person or persons or the representative of any of them respectively touching the construction meaning or effect of the rules or any of them hereunder then every such dispute or question shall be referred to arbitration by one Arbitrator agreed upon by both parties thereto, the result of which shall be regulated by the provisions of the Arbitration Act in force in Zambia or any law or instrument taking the place of such Act in force at the time of such Arbitration.”

It was submitted that the wording of the Arbitration clause above was all encompassing and must be interpreted broadly. It was argued that the clause referred to arbitration of any dispute or difference between the parties that arose as a result of the construction or effect of the Kwacha Pension Trust Fund Rules. The case of **Upeo (Zambia) Limited v ZCON Construction Limited** ⁽²⁾, by the Honorable Justice B.G. Lungu was also referred to.

It was further submitted that the dispute pertained to *inter alia*, payment of the alleged outstanding pension benefits which were calculated or determined to be payable in accordance with the Rules. It was thus submitted that the Plaintiff's dispute with the 1st Defendant fell squarely within the purview of the Arbitration Agreement or clause in the Rules. Counsel urged this Court to stay these proceedings and refer the matter to arbitration as envisaged in Clause 26 of the Rules.

In his oral submissions, counsel reiterated what is contained in the skeleton arguments.

In opposing the application, learned counsel for the Plaintiffs, Mr. Kaunda argued that the 1st Defendant's application was misconceived as the cause of action had nothing to with the meaning, construction

or interpretation of the Rules of the Kwacha Pensions Trust, to which Rule 26 of the Rules referred.

It was submitted that the writ of summons and statement of claim were anchored on the Plaintiffs' claim that their portable pension benefits were not computed in line with section 18(3) (b) of the Pension Scheme Regulation Act [as amended by Act No.27 of 2005.]

It was argued further that the Plaintiffs sought re-computation of their portable pension benefits as per the statutory formula under the said Section 18(3)(b).

Counsel submitted that Rule 26 of the Rules did not apply and was inoperative or incapable of application herein. Reliance was placed on the case of **Audrey Nyambe v. Total Zambia Limited** ⁽³⁾ in this regard.

It was argued that the authorities relied on by the 1st Defendant were irrelevant.

Mr. Kaunda in his oral submissions also reiterated what was in the skeleton arguments and added that the Plaintiffs were not seeking payment under Rule 13 of the KPTF Rules or any of its rules. He argued

the reason they commenced this action was because they were paid under Rule 13 instead of Section 18(3)(5) of the Act.

It was further argued that under paragraph 1 of the statement of claim and paragraph 8 of the opposing affidavit, the Plaintiffs stated that they were former employees of the 2nd Defendant and former members of the 1st Defendant. That these facts were confirmed by exhibit AT4 on record and that the Arbitrations rule 26 did not apply to the Plaintiffs. It was submitted that the Plaintiffs were not in full time employment as they were retired and thus not covered by Rule 26. He argued that there was use of the words “any other interested persons”. These words were general and according to **Osborne’s Concise Law Dictionary** on *Juris Generis rule*, interpretation of contracts and statutes, if general words follow specific words, the general words were limited to the specific words expressly listed. He argued further that the reliefs on the writ of summons had nothing to do with construction of the Rules.

Mr. Kaunda submitted that the 1st Defendant submitted extensively on the need for the computation to be done by the actuarial valuation but forgot that Order 23 of the High Court Rules empowered the Court to appoint experts or referees especially in complex issues like

computation as was the position in the case of **BP Zambia Plc v. Expendito Chipasha and 235 Others** ⁽⁴⁾.

In their arguments in reply, counsel for the 1st Defendant reiterated their earlier arguments. It was argued that the **Aubrey Nyambe** case relied on by the Plaintiffs was distinct from the facts prevailing herein as in the **Aubrey Nyambe** case, the respondent invoked an arbitration clause in an agreement with the Appellant after determination of the said agreement.

He argued that Clause 14(2) of the Trust Deed of the Bank of Zambia Pension Trust Fund (“the Trust Deed”) and Rules 26 of the Kwacha Pensions Trust Fund Rules did not limit arbitral proceedings to the continuation of any agreement or subsistence of the members’ employment. It was argued that the case was therefore inapplicable in this matter.

Counsel argued that the Plaintiffs claimed *inter alia* payment of portable pension benefits as computed in line with section 18(3)(b) of the Pension Scheme Regulation Act (as amended by Act No.27 of 2005) less the sums fraudulently or mistakenly paid to each Plaintiff on the basis of Rule 13 of the Defendant’s fund Rules.

Reference was made to section 18(3) of the Pension Scheme Regulation Act (as amended by Act No.27 of 2005) which provides that:

“Where a member leaves a scheme under paragraph (f) of subsection (1), in the case of-

- a) A defined contributory scheme, the portable benefits shall be the total of the retirement contributions paid by the member and the member’s employer on the leaving member’s account, plus interest during his participation under the plan; and**
- b) A defined benefit scheme, the portable benefits shall amount to the present value of the accrued retirement plan.”**

It was submitted that section 18(3) (b) unfortunately was silent on the formula or computation method to employ in determining the present value of the accrued retirement plan. Reliance was placed on the case of **Richard Chama & 213 Others v. NAPSA & 8 Others⁽⁵⁾** where the Court addressed the apparent omission in the law as follows:

“The present value of accrued benefits under a defined benefit plan is computed with reference to the interest rate and the salary profile of the contributing member. It thus requires actuarial involvement.”

It was submitted that the determination of portable pension benefits in line with section 18(3) of the Pension Scheme Regulation Act (as amended by Act No.27 of 2005) was done through an actuarial evaluation, i.e an actuary who is appointed in accordance with the relevant pension scheme rules or trust deed. In this regard, Clause 15 of the Trust Deed states as follows:

“ The interim trustees shall from time to time appoint on such terms as they think fit an Actuary or Actuaries and an Auditor or Auditors each such Actuary to be fellow of the institute of Actuaries or the equivalent and such Auditor to be a person qualified for appointment as an auditor of a company under the Zambian Law and such other officers as they consider necessary for the proper management of the fund and the interim Trustees shall also have the power to vary or revoke such appointment.”

Further reference was made to Rule 20 of the Rules which provides as follows:

“The Trustees shall submit the fund actuarial investigation once every three years and for this purpose the Trustees shall furnish all necessary accounts and information to the Actuary. If the Report of the Actuary

shall show a deficiency in the fund, the employer will pay the Trustees such sum or sums as shall be certified by the Actuary to make good such deficiency. If the report of the Actuary shows as surplus in the fund, such surplus shall be credited to the Fund for the purpose of reducing the Employer's cost of funding, or to increase the benefits to Members or Pensions."

It was submitted that in accordance with the *Richard Chama* case, the Rules, and Trust Deed, the current value of the accrued retirement plan of the Plaintiffs should be determined by an Actuarial evaluation embodied in Rule 20 of the Rules.

It was also submitted that a dispute had arisen touching on the effect of Rules 13 and 20 of the Rules; the Plaintiff's position being that the payment of pension benefits, made to them pursuant to Rule 13 were fraudulently or mistakenly made and that said payments should have been made in accordance with section 18(3) (b) of the Pension Scheme Regulation Act.

Counsel submitted that succinctly put, in Rule 26 of the Rules, any dispute, difference or question that arose between the Trustees, the Employer, the Members or any other interested persons or representative of any of them touching the construction meaning or

effect of the rules or any of them then every such dispute or question shall be referred to Arbitration. Counsel submitted that the Plaintiffs dispute with the 1st Defendant fell squarely within the purview of the Arbitration Agreement and applied that this Court stayed these proceedings and refer the matter to arbitrations as envisaged in Rule 26 of the Rules and the Clause 14(2) of the Trust Deed.

I have carefully read and considered the affidavit evidence, the arguments and authorities cited by the respective parties.

The issue that falls for determination is whether this Court should stay proceedings and refer this matter to arbitration as envisaged by the arbitration clause in Clause 26 of the Kwacha Pension Trust Fund (KPTF) (the 'Rules').

The application is made pursuant to **Section 10(1) of the Arbitration Act** which provides that:

“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.”

Section 10 above is clear that in a matter which is subject of an arbitration agreement, the Court shall stay the proceedings at any stage and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. This provision applies where the Court finds that the agreement between the parties is subject to an arbitration agreement or contains an arbitration clause.

The Supreme Court has in a plethora of cases canvassed on the need for the Court to stay proceedings and refer a matter to arbitration as in the case of **Leonard Ridge Safaris case** already referred to by the 1st Defendant where the Court stated that in considering an application for stay of proceedings under section 10 of the Act, the court has no choice but refer the dispute to arbitration as provided for in the agreement between the parties.

In the case of **Konkola Copper Mines Plc v. NFC Africa Mining Plc**⁽⁶⁾, the Court emphasized that a court has discretion not to stay proceedings and refer the parties to arbitration, where the Plaintiff

accrued benefits under a defined benefit plan. And the Supreme Court in the case of *Richard Chama* clarified that:

“The present value of accrued benefits under a defined benefit plan is computed with reference to the interest rate and the salary profile of the contributing member. It thus requires actuarial involvement.”

This is why the 1st Defendant contends that the computation of the portable benefits in line with section 18(3) of the Pension Scheme Regulation Act is done through an actuarial valuation necessitated by Rule 20 of the Rules. The actuary is therefore appointed in accordance with the relevant pension scheme rules or trust deed pursuant to Clause 15 of the Trust Deed.

Given the positions taken by the parties regarding which provision is applicable in computing the benefits, it is patent and I find that there is a dispute that has arisen between the parties regarding the construction or effect of the Rules.

Then again, it does not end there. It still falls to be determined whether in light of the foregoing, Rule 26 of the Rules and Clause 14 (2) of the Trust Deed are applicable to the Plaintiffs who are now former members

of the Trust Fund. In order to ascertain whether the relevant clauses referred to apply to the Plaintiffs, regard must be had to the construction of the said clauses.

The learned authors of the Halsbury's Laws of England, Vol 2, Fifth Edition (2008) state regarding construction of an arbitration agreement at paragraph 1215 that:

“Thus it has now been said that arbitration is consensual, and depends upon the intention of the parties as expressed in their agreement...A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause.”

It would therefore appear that what is paramount in construing an arbitration agreement is the intention of the parties as further illustrated in the case of Mitsui Construction Co Ltd v. A-G of Hong Kong ⁽⁷⁾ that to the extent that the drafting of a term gives rise to a lacuna or lacks clarity, the considerations of the court should not be driven by the semantic niceties, but should be guided by the intentions of the parties.

cannot therefore be argued that because they are former members of the 1st Defendant then the Rules no longer apply to them.

In light of the foregoing and given the fact that there is a dispute that has arisen between the parties regarding the construction or effect of the Rules, I find that the dispute between the Plaintiffs and the 1st Defendant falls within the purview of the arbitration clauses relied on by the 1st Defendant.

In the result, I find merit in the 1st Defendant's application as the arbitration clauses are valid, operative and capable of being performed. I accordingly stay these proceedings and refer this matter to arbitration. Considering the circumstances of the case, I make no orders as to costs.

Leave to appeal granted.

DELIVERED AT LUSAKA THIS 29TH DAY OF DECEMBER, 2023

