IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 171/2018**
HOLDEN AT NDOLA
(Civil Jurisdiction)

COURT OF APPEAL
30 AUG 2019
REGISTRY
P.O. BOX 50067, LUSAKA

BETWEEN:

BEZA CONSULTING INC LIMITED **APPELLANT**

AND

BARI ZAMBIA LIMITED **1ST RESPONDENT**
GIDEY GENREMARIAM EGZIABHER **2ND RESPONDENT**

CORAM: MCHENGA DJP, SICHINGA AND SIAVWAPA, JJA

On 22nd and 30th August, 2019

FOR THE APPELLANT: Mr. L. Mwamba of Messrs Simeza Sangwa and Associates

FOR THE RESPONDENTS: Mr. C. Nhari of Nhari Advocates

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *ODYS Oil Company Limited v The Attorney General and Constatinos James Papoutsis SCZ Judgment No. 4 of 2012 at Page 164.*

2. *China Henan International Corporation Group Company Limited v G and D Nation Wide (Z) Limited SJ No. 8 of 2017.*

3. *Chita Chibesakunda and Abode Properties Limited v J. Z. Morrison (Export) Limited Appeal No. 105 of 2018.*

Legislation referred to:

1. *The Arbitration Act No 19 of 2000*

1.0. INTRODUCTION

1.1. This is an appeal from the Judgment of the High Court under the hand of the Hon. Mr. Justice M. Chitabo, SC. The Appellant is a Company registered in the State of Maryland, United States of America, on 21st May 2012 as BEZA CONSULTING INCORPORATED. The 1st Respondent is a Company incorporated in Zambia under the Companies Act in 2005. The 2nd Respondent is the Managing Director of BEZA CONSULTING ENGINEERS INCORPORATED which was incorporated in the State of Virginia United States of America in 2009.

1.2. Between 3rd September 2012 and 8th August 2013, the Appellant and the 1st Respondent signed four Joint-Venture Agreements. The Joint-Venture Agreements were for the purposes of providing consultancy, design, review, construction and supervision for road projects in Zambia.

1.3. Based on the said Joint-Venture Agreements, bids were submitted to the Road Development Agency for the projects involving the Mbala-Nakonde Road, Mpika-Nabwalya-Mfuwe Road, Nyimba-Sinda Road and Safwa-Chinsali Road.

1.4. The Joint-Ventures were each awarded contracts accordingly in the order as set out above for the first, second, third and fourth Joint-Ventures.

1.5. The four Joint-Venture Agreements, while similar in many respects, differed on two material points. The first difference is on the sharing of earnings between the two partners. Whereas the first Joint-Venture Agreement contains a clause for the sharing of earnings; the other three do not contain any specific sharing percentages. They just provide for each partner to operate a separate Bank account into which fees shall be paid in proportions to be advised upon making a claim. The second difference is that whereas the first Joint-Venture Agreement does not have an Arbitration clause, the other three have.

2.0. **THE DISPUTE**

2.1. In 2014, the Appellant complained to the client, Road Development Agency, that the 1st Respondent had not remitted to it the 3% fees as per the first Joint-Venture Agreement in respect of the Mbala-Nakonde Road Project.

2.2. This was the genesis of the dispute which gave rise to the action in the Court below.

3.0. THE ACTION

3.1. By writ of summons and statement of claim dated 26th January 2016, the Appellant claimed as follows;

(i) A declaration that the Mbala-Nakonde, Mpika-Nabwalya-Mfuwe, Nyimba-Sinda and Safwa-Chinsali-Mulilansolo contracts are binding on the 1st Defendant.

(ii) A declaration that the Plaintiff is entitled to receive 40% of the income generated from the Mpika-Nabwalya-Mfuwe, Nyimba-Sinda and Safwa-Chinsali-Mulilansolo contracts.

(iii) Specific performance of the Joint Venture Agreements for the Mbala-Nakonde, Mpika-Nabwalya-Mfuwe, Nyimba-Sinda and Safwa-Chinsali-Malilansolo Joint-Venture Agreements with all consequential accounts, directions and inquires.

(iv) Damages for breach of the said Joint-Venture Agreements as against the 1st Defendant.

(v) Damages for inducing breach of contract as against the 2nd Defendant.

(vi) An order of injunction restraining the 1st Defendant from issuing further fee notes and receiving further payments from the Road Development Agency under the Mbala-Nakonde, Mpika-Nabwalya-Mfuwe, Nyimba-Sinda and Safwa-Chinsali-Mulilansolo contracts until determination of this matter or further order.

(vii) Interest and

(viii) Costs.

3.2. In a nutshell, the statement of claim alleges that the 1st Defendant failed to honour its obligations under the four Joint-Venture Agreements in respect of all the contracts awarded to the Joint-Ventures.

3.3. With respect to the 2nd Defendant, the claims are that the 2nd Defendant made representations to the 1st Defendant that he owned the Plaintiff and told the 1st Defendant's Managing Director that he would deal directly with the Road Development Agency. That if the Company for which the 2nd Defendant was the Managing Director got involved with the projects, the 1st Defendant would be in breach of the Joint-Venture Agreements.

3.4. The 1st and 2nd Defendants filed a Joint defence and counter claim in which the 1st Defendant claims that it went into the four Joint-Venture Agreements with the Plaintiff believing that it was the Arlington Virginia entity for which the 2nd Defendant is the Chairman and General Manager.

3.5. The 2nd Defendant avers that until 2014, Mr. Yadeta, the Plaintiff's Managing Director was the representative of BEZA CONSULTING INC. ARLINGTON VIRGINIA in Zambia until it withdrew Mr. Yadeta's services in Zambia in May 2014.

4. **COUNTERCLAIM**

4.1. The Defendants claim that the Plaintiff was fraudulently incorporated by Mr. Yadeta to deceive the public, the 1st Defendant and the Road Development Agency and that monies paid into the Plaintiff's account were paid under a mistaken belief that it was the Arlington Virginia entity.

4.2. The 1st Defendant therefore sought the following reliefs;

(a) A declaration that any and all agreements entered into between the Plaintiff and the 1st Defendant were carried out by the Plaintiff as an agent of the 2nd Defendant and his company namely; BEZA Consulting Inc. of Arlington, Virginia.

(b) Damages for deceit and/or fraudulent misrepresentation.

(c) A declaration that the Plaintiff's conduct amounted to Deceit.

(d) General damages.

(e) Exemplary damages.

(f) Interest on all amounts found due.

(g) Costs.

4.3. The 2nd Defendant claims as follows:

(a) A declaration that all payments made to the Plaintiff pursuant to the Joint-Venture Agreements were made to the Plaintiff as the 2nd Defendant's agent.

(b) A declaration that the said payments were made to the Plaintiff as the agent of BEZA CONSULTING INC. of Arlington Virginia USA and that the same monies were now payable to the said company.

(c) A declaration that the 1st Defendant's decision to deal directly with the 2nd Defendant through BEZA CONSULTING INC. (Arlington USA) and BEZA CONSULTING ENGINEERS (Ethiopia) is lawful.

(d) A declaration that the Plaintiff's incorporation was fraudulent.

5.0. **PROCEEDINGS IN THE COURT BELOW**

5.1. On the return date there was no attendance by the Defendants and their counsel. The learned Judge accepted the Plaintiff's application to proceed for the reason that counsel for the Defendants was present at the previous hearing and received the order for directions setting the hearing date.

5.2. After hearing the evidence for the Plaintiff adduced by its Managing Director, Mr. Yadeta, the learned Judge adjourned the matter to receive written submissions before delivering the Judgement.

5.3. In the intervening period, he heard some interlocutory applications among them, an application for the striking out of the counter claim for want of prosecution. The learned Judge

allowed the application. He however, made an order to restore the counter claim upon application by the Defendant after he had delivered the Judgment.

6.0. THE DECISION OF THE COURT BELOW

6.1. The learned Judge delivered his Judgment on 14th August, 2018 in which he addressed his mind to the claims by the Plaintiff that the sharing of the proceeds of the various contracts was agreed at 40% and 60% between the Plaintiff and the 1st Defendant.

6.2. The learned Judge found that there was no evidence of such an agreement as the same was a mere proposal by the Plaintiff which did not receive any response from the 1st Defendant. The learned Judge further found that even if that were the case, the same would only apply to the contract under the first Joint-Venture Agreement relating to the Mbala-Nakonde Road Project.

6.3. With regard to the validity of the first Joint-Venture Agreement, he found it binding as between the Plaintiff and the 1st Defendant and that the therein stipulated 3% fee collectable by the Plaintiff was legitimate.

6.4. The learned Judge however, refused to order payment of the same to the Plaintiff on account that there was no evidence that the same had not been fully paid to the Plaintiff.

6.5. With regard to the rest of the Joint-Venture Agreements, the learned Judge declined jurisdiction to pronounce himself on them for the reason that they each contained an arbitration clause.

6.6. He went on to dismiss the action in its entirety with cost to the Defendants.

7.0. **THE APPEAL**

7.1. By Notice of Appeal and Memorandum of Appeal filed into Court on 11th September 2018, the Appellant herein has advanced 7 grounds of appeal as set out herein below;

(1) That the lower Court erred in law and in fact when it failed to conclusively adjudicate on all claims raised by the Plaintiff.

(2) That the lower Court erred in law and in fact when it held that the 40% to 60% applied to claims under the Mbala-Nakonde Joint-Venture Agreement.

(3) The lower Court erred in law and in fact when it failed to differentiate between the claim under Mbala-Nakonde

Joint-Venture Agreement and the claims under the subsequent Joint-Venture Agreements.

(4) The learned trial Judge erred in law and in fact when he relied on minutes of a meeting as an agreement.

(5) The lower Court erred in law and in fact when it held that it was not established that the Plaintiff was entitled to a ratio sharing of 40% to 60% of the earnings.

(6) The lower Court erred in law and in fact when it held that it had no jurisdiction to determine the claims under the Mpika-Nabwalya-Mfuwe, Nyimba-Sinda and Safwa-Chinsali-Mulilansolo contracts; and

(7) That the lower Court erred in law and in fact when it held that there was no evidence that the second Defendant was working with the first Defendant on the RDA contracts and consequently that there was no proved case against the second Defendant.

7.2. At the hearing of the appeal, counsel for the Respondent, Mr. Nhari, was the first to address the Court and started by saying that the Respondent's heads of arguments were not settled by him but by his colleague.

7.3. His main submission was that by consent of the parties, the matter be sent back to the High Court for re-trial before another Judge. He premised his submission on the point that in the light of the counterclaim which was still pending before

the Judge who heard and dismissed the main matter; it was desirable that the two be heard together. He placed reliance on the case of ***ODYS Oil Company Limited v The Attorney General and Constatinos James Papoutsis.***[1]

7.4. We have considered the relevant portion of this Judgment which is basically to the effect that where one of the parties to a matter is not a party to an arbitration clause the same is not bound by the arbitration clause.

7.5. The effect of such a scenario is that the arbitration clause becomes inoperative and the Court must assume jurisdiction so that the party who is not a party to the arbitration clause can participate in the proceedings.

7.6. This position of the law only comes alive when at the hearing of the matter one of the parties to the arbitration clause informs the Court that they wish to invoke it so that the dispute between them is subjected to arbitration.

7.7. In reply, counsel for the Appellant confirmed that the parties had agreed as stated by counsel for the Respondent. He however asked for costs.

7.8. Counsel for the Respondent however, objected to yielding costs to the Appellant as a result of which the parties agreed that they proceed with the appeal.

7.9. Having agreed that the appeal be heard, both parties informed us that they would rely on their Heads of Argument and their earlier viva voce submissions.

8.0. **OUR VIEW**

8.1. We have noted that the learned trial Judge dealt with the dispute surrounding the Joint-Venture Agreement which gave rise to the Mbala-Nakonde Road Project. After considering the claims raised, he found that there was a valid contract between the Appellant and the 1st Respondent.

8.2. The learned Judge however, rejected the claim that there was an agreement to share the contract sums at 40% to 60% between the Appellant and the 1st Respondent. He also rejected the 3% contractual share appropriated to the Appellant on the basis that there was no evidence that the 1st Respondent had not paid it.

8.3. The learned Judge went on to reject the rest of the claims and dismissed it accordingly.

8.4. In our considered view, the learned trial Judge misdirected himself in law by finding that there was no evidence that the Appellant had not been paid the contractual 3% for the Mbala-Nakonde Road Project when it was the 1st Respondent's duty to rebut that claim by providing evidence that it had actually paid the full amount.

8.5. It is also very clear from the Judgment that the learned Judge mixed up the facts relating to the first Joint-Venture Agreement with regard to the sharing of the proceeds namely; that there was a claim by the Appellant for a 40%:60% sharing when in fact the only claim in that respect was for the 3% as per the Joint-Venture Agreement.

8.6. We therefore find that the learned Judge grossly misapprehended the facts leading to his making wrong findings of fact.

8.7. We accordingly find that grounds 1 to 5 are all centred on the learned trial Judge's misapprehension of facts in relation to the Mbala-Nakonde Road Project resulting from the 1st Joint-Venture Agreement. We would therefore allow the appeal on grounds 1 to 5.

9.0. **JURISDICTION**

9.1. With regard to the sixth ground, the argument is that the learned Judge erred in law and in fact when he declined jurisdiction on account of the arbitration clauses in the three Joint-Venture Agreements. The Appellant has relied on section 10 of the Arbitration Act which 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 not withstanding 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 enforced."***

9.2. The Respondents on their part relied on the case of ***China Henan International Corporation Group Company Limited v G and D Nation Wide (Z) Limited.***[2]

In that case, the Hon. Mrs. Justice Irene C. Mambilima, CJ, made the following statement;

> ***"In this regard, we agree with the pronouncements by Mutuna J (as he then was) in the case of Cash Crusaders Franchising Pty Ltd v Shakers and Movers (Z) Limited (2012) 3ZR 174. The starting point is to recognize the fact that the parties have decided to***

have their dispute adjudicated upon by way of arbitration, they are in fact saying that they do not wish to avail themselves of the Courts save in the limited circumstances provided for by the law. Further, once an award is rendered it is binding and enforceable upon the parties pursuant to section 20 of the Arbitration Act..."

9.3. First and foremost, we find no contradiction between the provisions of section 10 of the Arbitration Act No 19 of 2000 and the pronouncement by the Supreme Court on the effect of a contractual Arbitration Clause on the parties. The ouster of the Court's jurisdiction by an arbitration agreement is not in dispute.

9.4. What section 10 does, however, is to require the ouster of the Court's jurisdiction to be triggered by a request by a party to the arbitration agreement, which party must also be a party to the proceedings.

9.5. It is, upon such request that, the case of ***China Henan*** (Supra) provides the guidance which is to the effect that the Court's jurisdiction is ousted. It is further a clear instruction to trial Courts that once the request is made, the Court cannot refuse to refer the matter to arbitration unless it finds that the

arbitration agreement is null and void, inoperative or incapable of being performed.

9.6. In this case, there is no evidence on the record that one of the parties to the arbitration agreements in the three Joint-Venture Agreements made a request to the Court to refer the matter to arbitration. The learned Judge declined jurisdiction of his own violation contrary to the express provision of section 10 of the Act.

9.7. We are further fortified in our view by the case of ***Chita Chibesakunda and Abode Properties Limited v J. Z. Morrison (Export) Limited.***[3] In that case, we re-echoed section 10 of the Arbitration Act (supra) when we stated as follows;

> ***"A Court before which an action is brought which is subject of an arbitration agreement must, if a party so requests, refer the parties to arbitration unless the agreement is null and void."***

9.8. From the foregoing authorities, it is clear that the Court below erred when it divested itself of jurisdiction without any of the parties requesting a referral of the matter to arbitration in accordance with section 10 of the Act.

9.9. Furthermore, in view of the fact that the 2nd Respondent is not a party to the arbitration agreement renders the arbitration agreement inoperative. This is in line with the case of ***ODYS Oil Company Limited v The Attorney General and Constantinos James Papoutsis.*** The decision in that case effectively renders the arbitration agreement inoperative for the reason that a party to the proceedings, who is not a party to the arbitration agreement, ought to be heard and the Court is the forum at which he can be heard and not at arbitration.

10. **CONCLUSION**

10.1. For the above stated reasons, ground 6 succeeds. Having so found, we are inclined to make an order that the whole Judgment be, and it is hereby set aside.

10.2. We order that the record be remitted back to the High Court for a re-trial before a different Judge.

10.3. It is further our considered view that the issues raised in the counter claim are intertwined with those in the main matter and the two are best dealt with together and by the same Judge.

10.4. We were informed at the hearing by counsel that the counter claim had not been heard. We therefore order that the counterclaim pending before the Hon. Mr. Justice M. Chitabo,

SC be surrendered to the Judge-in-Charge for the purposes of it being consolidated to the main matter and re-allocation to another Judge as one cause.

10.5. Costs in this Court will be for the Appellant.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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D. L. Y. SICHINGA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE