IN THE HIGH COURT FOR ZAMBIA **2017/HPC/0092**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:

ACKIM CHIRWA **1ST PLAINTIFF**

LEVY JOSEPH NGOMA **2ND PLAINTIFF**

U-FUEL ZAMBIA LIMITED **3RD PLAINTIFF**

AND

MINI MART DEVELOPMENT CORPORATION LIMITED **DEFENDANT**

CORAM: Hon. Madam Justice Dr. W.S. Mwenda in Chambers at Lusaka on the 24th day of August, 2017

For the Plaintiffs: No appearance

For the Defendants: Mr. C. Siamutwa and Mr. M. Nkulukusa of Messrs. Charles Siamutwa Legal Practitioners

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RULING

Cases referred to:

1. *Heyman and Another v. Darwins Ltd (1942) AC 356*

2. *Intermarket Banking Corporation Zambia Limited v. Nonde Munkanta 2012/HPC/0268*
3. *Ashville Investments Limited v. Elmer Constructors (1988) 2 All ER 577*
4. *Seed and Pulses Export Corporation v. Rio Del Mar Foods (1990) 1 QBD 86*
5. *OTK Limited v. Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling 2005/HPC/0199*

Legislation referred to:

1. *Section 10 and Section 12 of Arbitration Act, No. 19 of 2000 of the Laws of Zambia*
2. *Order 53 Rule 10 (8) and (9), of the High Court Rules, Chapter 27 of the Laws of Zambia*
3. *Order 35 Rule 3, of the High Court Rules, Chapter 27 of the Laws of Zambia*
4. *Rules 6, 7, 8 and 10 of the Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001*

This is an application by the Defendant for an order to stay proceedings pending arbitration.

The background leading to this application is that the Plaintiffs had made an application in March, 2017, for an order of interim injunction against the Defendant. In response to the said application the Defendant filed, into court, its Affidavit in Opposition and simultaneously filed in an application for stay of proceedings pending arbitration. It is to the latter application that this ruling relates.

When the said Defendant's Application for Stay of Proceedings Pending Arbitration (the "**Application**") came up for hearing on 11th April, 2017, Counsel for the Defendant was present while Counsel for

the Plaintiffs was not in attendance. Upon perusing the court record before me, I noticed that Counsel for the Defendant had effected service of the Summons for the Application; the Affidavit in Support thereof (the "**Affidavit in Support)**; and the Skeleton Arguments, on the Plaintiffs, as can be seen from exhibit "MN1" of the Affidavit of Service filed into Court on 7th April, 2017 and sworn by one Milao Nkulukusa.

Further, I also noticed that there was, at the time, no Affidavit in Opposition, Skeleton Arguments, or List of Authorities, filed by the Plaintiffs' Counsel in response. Therefore, considering the evidence before me and having been satisfied by the same that the Plaintiffs' Advocates were aware of this Application, I proceeded to hear the Defendant's submissions, on the strength of Order 35 Rule 3, of the High Court Rules, Chapter 27 of the Laws of Zambia, which provides as follows:

> *"If the Plaintiff appears, and the Defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the Defendant."*

This Application was made pursuant to Section 12 of the Arbitration Act, No. 19 of 2000 of the Laws of Zambia (the "**Arbitration Act**") as read together with Rule 10 of the Arbitration (Court Proceedings)

Rules, Statutory Instrument No. 75 of 2001 (the "**Arbitration Rules**"). Section 12 of the Arbitration Act (which is too lengthy to reproduce) deals with appointment of arbitrators while Rule 10 of the Arbitration Rules which elaborates Section 12 of the Arbitration Act, provides as follows:

> *"(1) An application to the court, under section twelve of the Act, for the appointment of an arbitrator shall be made by originating summons before the Registrar of the High court.*
>
> *(2) An application for the appointment of an arbitrator may be made by ordinary summons in the course of an application for stay of proceedings."*
>
> *(3) An application referred in sub-rule (1) shall be supported by an affidavit-*
> *(a) exhibiting a copy of the arbitration agreement;*
> *(b) stating facts in support of the application, including steps taken to secure the appointment of an arbitrator; and*
> *(c) stating the name, address and qualifications of any proposed arbitrator.*

The genesis of this Application lies in paragraph 31 of the Affidavit in Support filed into court on 7th March, 2017 and sworn by one Victor Makuza. The said paragraph 31 states that:

"Clause 9.1 of the Share Pledge Agreement is unequivocally clear that any disputes arising from the Share Pledge Agreement must be resolved by way of arbitration and not through litigation."

I have had occasion to peruse the said Share Pledge Agreement which has been exhibited as "VM2" in the Affidavit in Support and the paragraph in question (being clause 9.1) states as follows:

"Any dispute or difference which may arise out of, in connection with or in relation to this Pledge or its interpretation, performance or non-performance or any breach thereof which shall not have been settled by mutual agreement of the parties shall be referred to an Arbitration Tribunal constituted in accordance with the rules of the Arbitration Act No. 20 of the Laws of Zambia by three (3) arbitrators appointed in accordance with the said Rules. The venue for the arbitration shall be at Lusaka."

The Application is clearly stated as one for stay of proceedings pending arbitration. However, the law pursuant to which it is purported to have been made seems to relate to a completely different subject, being, "appointment of an arbitrator." It appears to me that the law cited by Counsel, in favour of this Application, would have been more relevant if the application before the court was one for appointment of an arbitrator. In view of the foregoing, I am of the view that Counsel misconceived the proper law applicable to this Application, which should be Section 10 of the Arbitration Act and which provides as follows:

"(1) A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so request 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 subsection (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."

It follows, therefore, that the relevant Arbitration Rules that would properly supplement the said Section 10, above, (as opposed to the Rule 10 cited in the Summons) would be Rules 6, 7 and 8 of the Arbitration Rules; and which Rules provide as follows:

"6. After service of process, an application for the stay of proceedings in pending legal proceedings shall be disposed of by the court in accordance with the Rules of each particular court.

7. The form of summons, notice of motion, affidavits and other processes to be used in applications for stay of pending legal proceedings shall be in accordance with the forms prescribed for use in each particular court.

8. The court or a Judge may determine the costs of an application under this Part or reserve them to the discretion of the arbitrator and may make any other appropriate order relating to such costs."

The Application to Stay Proceedings Pending Arbitration is supported by an Affidavit sworn by one Victor Makuza and filed into court on 7th March, 2017. It is the deponent's testimony in paragraph 44 of the Affidavit in Support that the 1st and 2nd Plaintiffs should be ordered to nominate an Arbitrator in accordance with Clause 9.1 of the Share Pledge Agreement. Clearly paragraph 44 is a prayer and not statement of fact. It is trite that the rules relating to affidavits do not condone the inclusion of prayers or statements of law in affidavits. These are better placed in summonses, skeleton arguments and submissions. For this reason, I shall disregard the said paragraph.

The Affidavit in Support exhibited several documents, most relevant to this Application being the Share Pledge Agreement, said to evidence the 1st and 2nd Plaintiffs' security for what has been termed as "the Loan". However, no Loan Agreement has been exhibited in the said Affidavit although reference has been made to it in paragraph 5 of the Affidavit in Support. I have, therefore, taken the liberty to examine the two Loan Agreements (exhibited as "AC2" and "AC3" in the Plaintiffs' Affidavit in Support of Ex-parte Summons for an Order of Interim Injunction filed on 27th February, 2017), as well as the said Share Pledge Agreement.

My attention is drawn to two clauses in the said Agreements, namely Clause 15 of the Loan Agreements and Clause 9.1 of the Share Pledge Agreement; the interpretation of which is cardinal to determining the outcome of this Application. I will discuss the said clauses in greater detail later in this ruling. Upon perusing the said clauses, it is evident that the question to be considered in this Application is whether these proceedings were commenced on the basis of the Loan Agreements or the Share Pledge Agreement.

Counsel for the Defendant further augmented the application with Skeleton Arguments, also filed into Court on 7th March, 2017. The gist of the Skeleton Arguments, as can be deduced from reading Section 6 of the Arbitration Act; the case of ***Heyman and Another v. Darwins Ltd (1);*** and the case of ***Intermarket Banking Corporation Zambia Limited v. Nonde Munkanta (2),*** (which authorities have both been cited in the said Skeleton Arguments), is that where parties agree, through an arbitration clause, to submit to arbitration, such jurisdiction over disputes cannot be usurped by the court and parties are bound to take their disputes to arbitration.

Counsel acting for the Defendant further reiterated at the hearing of the Application, on 11th April, 2017, the foregoing. Counsel also submitted that the tendency of the courts has been to support arbitration proceedings where parties have elected to resolve their disputes by way of arbitration.

I have noted that the citation of the Zambian law governing arbitration as per clause 9.1 is incorrect. In this regard, Counsel for the Defendant submitted that the error was curable and that if any question was to arise for the determination of whether the parties referred to the Arbitration Act, No. 19 of 2000 of the Laws of Zambia, such question would be resolved by the arbitral tribunal. To buttress this submission, Counsel referred the court to an English case of ***Ashville Investments Limited v. Elmer Constructors (3)*** which was referred to in the case of ***Ethiopian Oil Seed and Pulses Export Corporation v. Rio Del Mar Foods (4)*** which demonstrates that an arbitral tribunal is empowered to determine its own jurisdiction.

In closing his submissions, Counsel for the Defendant stated, as a penultimate submission, that the Application was not for proceedings to be dismissed, but that the Application was intended merely to stay the proceedings in order to give arbitral proceedings a chance.

As a final prayer, Counsel applied for costs for the Application and further requested the court to duly note the conduct of Counsel for the Plaintiffs in deliberately missing court and failing to abide by an earlier order made by the court, for payment of a hearing fee.

As alluded to above, Counsel for the Plaintiffs neither turned up at the hearing of the Application, nor filed into court (at the time of the hearing) any Affidavit in Opposition to the Affidavit in Support,

despite having been served with the Application and the Affidavit in Support, as evidenced by the Affidavit of Service filed into court by the Defendant on 7th April, 2017. However, it is on record that Counsel for the Plaintiffs did, on 20th April, 2017, cause to be filed into Court the Plaintiffs' Affidavit in Opposition to the Application (the "**Affidavit in Opposition**"), Skeleton Arguments and a List of Authorities augmenting the Affidavit in Opposition. As can be noted, this was eleven (11) days after this Application was heard and no leave of court was sought by the Plaintiffs to file in the said documents, subsequent to the hearing.

Order 53 Rule 10 (8) and (9) is very clear as regards procedure to be followed by parties in filing documents in an interlocutory application. The said Rule provides as follows:

> *"(8) An applicant in an interlocutory application shall file, together with the interlocutory application, skeleton arguments of the applicant's case, stating the facts, law and authorities relied upon with copies of such authorities, wherever possible.*
>
> *(9) Sub-rule (8) shall apply to a respondent filing an affidavit in opposition and to applications for assessment of damages."*

While the provisions above do not specify a period of time within which opposing documents are to be filed into Court, I am of the view that the return date on the Summons issued provided sufficient guidance for the Plaintiff as to when the documents relating to this

Application should have been filed into court, that is to say, at least two (2) clear days before the return date of hearing.

As my brother Mutuna, J. (as he then was) correctly stated in the case of ***OTK Limited v. Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited, Amanita Milling Limited (5)***, the Commercial List was introduced as a fast track section of the High Court to assist in the speedy disposal of commercial matters. Therefore, parties that commence matters in the Commercial Registry of the High Court for Zambia should be forefront in assisting the court achieve that goal.

In light of the foregoing, I find the Plaintiffs' Counsel's conduct of filing the documents in opposition to this Application eleven (11) days after the hearing and without leave of court, out of order. The same were filed after the fact, that is, after the court had already heard the Application on 11th April, 2017. For this reason, I have disregarded the documents filed into court on 20th April, 2017. I consider this Application as being unopposed.

I have carefully considered the Defendant's Affidavit filed in support of this Application; the List of Authorities and the Skeleton Arguments augmenting the Application.

As earlier stated, the determination of this question is hinged on the interpretation of two vital clauses, namely, Clause 15 under both Loan Agreements and Clause 9.1 under the Share Pledge.

Clause 15 of said Loan Agreements provides as follows:

> *"This agreement and the contract arising out of the Borrower's acceptance of the loan facility on the terms and conditions set out in this Agreement shall be governed by and construed in all respects in accordance with the laws of Zambia. The Parties submit themselves to the exclusive jurisdiction of the Zambian Courts."*

Clause 9.1 of the Share Pledge, on the other hand, provides as follows:

> *"Any dispute or difference which may arise out of, in connection with or in relation to this Pledge or its interpretation, performance or non-performance or any breach thereof which shall not have been settled by mutual agreement of the parties shall be referred to an Arbitration Tribunal constituted in accordance with the rules of the Arbitration Act No. 20 of the Laws of Zambia by three (3) arbitrators appointed in accordance with the said Rules. The venue for the arbitration shall be at Lusaka."*

Counsel for the Defendant has cited, among other authorities, the case of Heyman v. Darwins in order to demonstrate that the agreement evidenced by both Loan Agreements and the Share Pledge, should be construed so broadly that the arbitration clause under 9.1 of the Share Pledge, is extended to apply to disputes arising under both Loan Agreements. However, it appears to me that there is nothing in the said arbitration clause signifying an intention, on the part of the parties, that the said arbitration clause should supersede the jurisdiction clauses (being Clause 15) in the Loan Agreements, so

that all disputes under the Loan Agreements and the Share Pledge are subjected to arbitration without exception.

Further, a perusal of the Statement of Claim does reveal that the Plaintiffs' claims arise from the Loan Agreements rather than the Share Pledge. It goes without saying, therefore, that the correct dispute resolution clause to be applied in these proceedings is Clause 15 of the Loan Agreements, which states that said Agreements are subject to the courts' jurisdiction.

This view I hold is fortified by the sentiments of my brother Mutuna, J. (as he then was) in the case of ***Intermarket Banking Corporation Zambia Limited ("IBCZL") v. Nonde Munkanta ("NM"),*** which case had a similar question to be determined. The facts of the case were that IBCZL agreed to extend a loan facility to NM in the sum of USD100,000.00. Pursuant to the said agreement, IBCZL wrote to NM, setting out the terms and conditions of the loan. Upon NM confirming the terms and conditions, the parties executed a mortgage deed which was registered in the Lands and Deeds Registry. By the said mortgage deed, NM charged his property to IBCZL as security for the loan. NM also executed a deed of guarantee and indemnity, in favour of IBCZL. It was a condition of said deed of guarantee and indemnity that if a dispute arose as to the validity, interpretation, effect or rights and obligations of either party under the deed, which dispute could not be resolved amicably, either party could refer such dispute to arbitration. As fate would have it, a dispute arose between the parties and an action was commenced by way of Originating

Summons and the relief sought therein, were predicated on the mortgage deed. NM thus made an application to stay proceedings pending referral to arbitration.

The following was the reasoning of Mutuna J. in arriving at his decision:

> *"A reading of the two documents, namely, the personal guarantee and mortgage deed, reveals that the two documents do not indicate that they are dependent on each other or that they must be read as one. The facility letter does not also indicate that the documents must be taken as one, but merely indicates that the two shall be the two securities provided by the respondent.... Further, whilst it is not disputed that the documents arise out of the same transaction, they must be understood in their proper context which is that, the mortgage deed is the primary security securing the funds and offers the applicant the luxury of possession of the property charged. On the other hand, the personal guarantee is a secondary or additional security which permits the applicant to pursue the respondent personally and beyond the security offered. This is clear from the wording of the personal guarantee which states in part that the respondent binds himself to pay and satisfy and gives to the bank a guarantee and indemnity.... Arising from what I have stated in the preceding paragraph it is therefore clear that the applicant has an option to pursue two remedies, namely under the mortgage or the personal guarantee. The applicant may also choose to invoke both remedies. If it invokes the remedy via the personal guarantee or both, then, the arbitration clause comes into play. If it invokes the remedy via the mortgage, the arbitration clause does not come into play. I have*

stated in the earlier part of this ruling that the endorsement in the originating summons clearly indicates that the applicant has invoked its rights under the mortgage deed only, as such the arbitration clause is of no effect...."

While a judgment of a court of equal jurisdiction is not binding on this court, I find Mutuna J's decision, in this regard, highly persuasive and I adopt the same.

In view of the foregoing, I am persuaded that these proceedings are based on the two Loan Agreements, which both provide that the parties submit themselves to the exclusive jurisdiction of the Zambian Courts. Therefore, to the extent that these proceedings have not been brought before this court for determination of a question arising under the Share Pledge, the said proceedings are properly before this court.

Consequently, I am inclined to dismiss this Application to stay proceedings pending arbitration and I dismiss it accordingly.

With regard to the final prayer advanced by Counsel for the Defendant, namely that this court takes note of the conduct of Counsel for the Plaintiffs in deliberately missing court and failing to abide by the earlier order made by the court for payment of a hearing fee for causing an adjournment, this court is constrained from censuring the Plaintiff's Counsel in the absence of proof that he deliberately missed court. However, it is correct that the Plaintiffs disobeyed the order of this court to pay a hearing fee and for that reason, no further proceedings in this case shall be entertained by

this court until the Plaintiffs pay the hearing fee of K500.00 (Five Hundred Kwacha).

Costs follow the event.

Dated at Lusaka the 24th day of August, 2017.

W.S. MWENDA (Dr)
HIGH COURT JUDGE