IN THE COURT OF APPEAL OF ZAMBIA **CAZ Appeal No. 217/2021**
HOLDEN AT LUSAKA **CAZ/08/377/2021**
(Civil Jurisdiction)

BETWEEN:

GROUP FIVE ZAMBIA LIMITED **APPELLANT**

AND

NUCO INDUSTRIAL SERVICES LIMITED **RESPONDENT**

CORAM : Chishimba, Siavwapa and Sharpe-Phiri JJA
On the 17th February, 2022 and 28th July, 2022

For the Appellant: Mr. C. Sianoondo – Messrs Malambo & Co
For the Respondent: Mr. H. Pasi – Messrs Mando & Pasi Advocates

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J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

1) Pouwels Construction Zambia Limited & Another v Inyatsi Construction Limited (2016) 2 ZR 1
2) Audrey Nyambe v. Toyota Zambia Limited Appeal 29/2011
3) Intermarket Banking Corporation Zambia Limited v Munkanta 2012/HPC/0268
4) Ody's Oil Company Limited v The Attorney General & Constantinos James Papoutsis, S.C.Z Judgment No 4 of 2012
5) China Henan International Corporation Group Company Limited v G and G Nationwide (Z) Limited, SJ No. 8 of 2017
6) Chita Chibesakunda and Abode Properties Limited v J.Z Morrison (Export) Limited Appeal No. 105 of 2018
7) Beza Consulting Inc Limited v Bari Zambia Limited and Gidey Genremariam Egziabher

LEGISLATION CITED:

1) The Arbitration Act No. 19 of 2000 of the Laws of Zambia.
2) The United Nations Commission on International Trade Law (UNCITRAL) Model Law
3) A Practical Approach to Arbitration Law by Andrew Tweeddale and Karen Tweeddele (1999)

1.0 INTRODUCTION

1.1 This is an appeal against the ruling of the Hon. Lady Justice A. Patel dated 3rd June, 2021, refusing to stay the proceedings and to refer the matter to arbitration on the basis that the arbitration clause in the subcontract agreement is inoperative because the condition precedent for its' trigger did not exist, the dispute between the parties having been settled.

2.0 BACKGROUND

2.1 On 24th January, 2019, the appellant and respondent entered into a subcontract agreement in respect of certain works. Clause 27 of the said agreement provided for a mechanism of resolving disputes between the parties. The parties were to do their best to reach an amicable agreement to resolve disputes arising from the subcontract. Any dispute not resolved by mutual amicable agreement would be submitted for resolution by notice to the Managing Director or Senior Representatives of

each of the parties. If settled, the resolution would be final and binding on all parties. In the event of failure by the representatives to resolve the dispute, the parties were entitled to refer the dispute to arbitration within 21 days or such longer period as agreed by the parties in writing.

2.2 Clause 27.3 provided for arbitration in the event of the parties failing to resolve the dispute as highlighted above.

2.3 On the 11th of August 2020, pursuant to clauses 27.1 and 27.2(a), (b) and (c) of the agreement, the parties entered into a Final Payment Agreement (FPA) for the services rendered. The said agreement was executed by Jacques Reyneke and Vivian Espach, the Managing Director and Projects' Manager of the respondent company on the one hand. Mr. Zander Van Lingen, the Projects Director on behalf of the appellant executed the FPA. In the FPA, the appellant agreed to pay the respondent the discounted sum of $529,994.93 by 25th September, 2020. It is not in issue that the appellant failed to pay the alleged agreed sum under the FPA Agreement.

2.4 On 25th February, 2021, the respondent commenced an action against the appellant by writ of summons and statement of

claim seeking the payment of the sum of $529,994.93, interest and costs. Subsequently on 5th May, 2021, the appellant issued summons to stay proceedings and to refer the dispute to arbitration pursuant to **section 10(1) of the Arbitration Act No. 19 of 2000**. The basis being clause 27.2(d) of the Sub-Contract Agreement between the parties providing for alternative dispute resolution, namely arbitration in the event where the parties fail to amicably settle a dispute.

3.0 **EVIDENCE AND ARGUMENTS IN THE COURT BELOW**

3.1 The affidavit in support of the application was deposed to by one Zander Van Lingen. The deponent stated that in terms of clause 27.2 of the Subcontract Agreement, disputes between the parties, were to be settled amicably, failing which the dispute may be referred to the Managing Directors or equivalent senior representatives for amicable resolution.

3.2 According to the deponent, the agreement reached by the senior representatives of either party ought to have been signed by more than one representative of each party. The agreement of 11th August 2020 having been signed by only one representative of the respondent, did not meet the requirements of clause 27.2.

3.3 The respondent opposed the application and filed an affidavit deposed to by one Doreen Nketani who stated that there was no dispute under the contract, except that the final sum payable under the subcontract was queried by the appellant who had invoiced and received payment from Mopani Copper Mines. Due to the failure by the appellant to pay for the services rendered, the parties resolved the dispute by way of negotiations pursuant to clause 27.2 of the contract.

3.4 The deponent further stated that the issue between the parties is not a dispute on the breach of the terms of the agreement, but a suit to enforce the payment of a debt as agreed by the parties in the FPA. Therefore, there was no dispute under the agreement for the court to refer to arbitration. The only dispute that arose thereunder, was on the reconciliation of the final amount payable. This was resolved culminating in final payment agreement in accordance with clause 27.2.

3.5 The respondent stated that the FPA had been signed by a senior representative of the appellant. That there was no requirement under clause 27.2 of the subcontract agreement that any

settlement agreement between the parties should be signed by at least two representatives from each party.

3.6 The respondent contended that the summons and affidavit by the appellant to stay proceedings and refer the matter to arbitration did not state or identify the dispute which the appellant sought to refer to arbitration. The dispute between the parties under the subcontract agreement had been settled amicably by negotiations between the senior representatives of the parties pursuant to clauses 27.1 and 27.2(a) of the sub-contract agreement. The settlement reduced in writing was signed by the parties' senior representatives, therefore the FPA was final and binding. Consequently, the arbitration clause is inoperative and that the matter could not be referred to arbitration because there is no reasonable dispute to be determined at arbitration.

4.0 **DECISION OF THE LOWER COURT**

4.1 In her ruling, Judge Patel considered whether there was a dispute between the parties to be referred to arbitration, and whether in the circumstances, the arbitration agreement had been triggered.

4.2 The learned Judge considered the provision of clause 27.1 of the subcontract agreement and found that it provides a two pronged approach to settling disputes between the parties. The first required the parties to settle their dispute amicably, while the second under clause 27.2(d), triggers the arbitration under clause 27.3.

4.3 Having considered clause 27.2(a) to (c) of the agreement, the court below reasoned that the subcontract agreement does not provide an automatic reference and submission to arbitration. As regards the manner the FPA was executed, the learned Judge scrutinized clause 27.2(c) of the subcontract agreement and was of the view that it required no 'exotic interpretation'. She held that the reference to the word "representatives" is a generic reference to the representatives of the respective parties. The learned Judge found that if the subcontract had intended for execution by two representatives of each party in order for the document to be valid, it would have stated so expressly.

4.4 The learned Judge stated that she was alive to the fact that the actual subcontract giving birth to clause 27 was only in fact executed by one representative of each party. Further, that the

appellant was only challenging the proper execution of the FPA as opposed to the content of the agreement which led her to hold that the issue of the debt outstanding had been resolved by the parties. The court also noted the fact that Zander Van Lingen on behalf of the appellant had sworn the affidavit in his capacity as Project Manager and was also the instructing client in *casu*. This signified his senior standing in the company, which the defendant attempted to impugn.

4.5 In addition, the judge noted that the appellant had not demonstrated to the court whether it had served the respondent with the "Arbitration Notice" within the mandatory 21 days following its perception that the parties had failed to resolve the dispute in accordance with clause 27.2(a) to (c). The court below found the approach by the appellant of in one breath challenging the validity of the Final Payment Agreement and in the other, comfortably resting on its laurels whilst arguing that the amicable approach had failed triggering arbitration, as fundamentally flawed and untenable.

4.6 The lower court accepted the contention by the respondent that the amicable settlement of the dispute that culminated in the

FPA, is independent of arbitration, and if successful is exclusive of arbitration. Arbitration is triggered and dependent on the failure of the amicable settlement which in turn requires an Arbitration Notice to be submitted within 21 days.

4.7 The lower court concluded that in the circumstances, the arbitration clause in the subcontract agreement is inoperative as the condition precedent for its trigger did not exist. She found that there was no dispute between the parties which can be referred to arbitration at this stage. Consequently, the court below dismissed the application to stay the proceedings and refer the matter to arbitration with costs to the respondent.

5.0 **GROUNDS OF APPEAL**

5.1 The appellant, dissatisfied with the decision of the lower court, appealed advancing five grounds as follows that:

1) ***The court below erred both in law and in fact by not staying the proceedings and to refer the matter to arbitration;***
2) ***The court below erred in law and fact in interpreting the settlement of dispute clause and thereby arriving at an incorrect decision;***
3) ***The court below erred when it found that the arbitration clause was inoperative and more so that the final payment agreement is independent of the arbitration clause;***
4) ***The court below erred when it stated that the arbitration notice should have been served with(in) the mandatory 21 days (sic);***

5) ***The court below misapprehended the appellant's position when it stated the position of the appellant as that the agreement should have been signed by two senior managers and thereby arriving at a wrong conclusion.***

6.0 APPELLANT'S ARGUMENTS

6.1 The appellant filed heads of argument dated 16th September, 2021 and argued the grounds of appeal together. The appellant submits that the theme of the whole appeal lies in clause 27.2 of the subcontract agreement between the parties, particularly with respect to clause 27.2(c). In issue is the FPA at page 71 of the record of appeal where only one party on behalf of the appellant signed while on the part of the respondent, two representatives signed. The appellant contends that for the agreement to be binding pursuant of clause 27.2, it ought to have been signed by two representatives of each of the parties.

6.2 The appellant contended that when the word *"representatives"* in clause 27.2(c) of the subcontract agreement is replaced with the singular *"representative"*, to read as follows;

> ***Any resolution of a Dispute so referred, shall (unless expressly otherwise stated therein) be final and binding on the Parties when reduced to writing and signed by the Senior Representative of each of the Parties. To this end, the Parties***

respectively agree and warrant to each other that the Senior Representatives have full authority to so bind them.

It becomes abundantly clear that where the word "representatives" is in plural, it means that more than one person from each party ought to sign. Further that where there is singular use of the word "representative" of each party, it means that only one person for each party should sign.

6.3 It was submitted that contrary to the holding of the lower court, in respect of the word *'representatives'*; that the agreement was to be signed by two senior managers, the court failed to apprehend the argument advanced by the appellant. According to the appellant, the FPA could only be executed by two signatories and above. Thus, the FPA in issue shows that two signatories from each party ought to have signed, and not only one as envisioned by clause 27.3 of the subcontract agreement.

6.4 It was further argued that this position is re-enforced by clause 27.2(d) which stipulates that failure to resolve any issues will result in the senior representatives of the parties referring the matter to arbitration. This, according to the appellant, entails that at least two officers of the entity should refer the matter to arbitration, and not one representative.

6.5 As regards the issue whether the matter can be the subject of arbitral proceedings, we were referred to the case of **Pouwels Construction Zambia Limited & Another v Inyatsi Construction Limited** [1] where the Supreme Court guided that whether or not some of the issues in contention are arbitral, is a question to be determined by the arbitral tribunal once it is constituted, and not the court. The Supreme Court further reasoned that the fact that there is no dispute between the parties is not a ground, envisaged by **section 10 of the Arbitration Act, 2000,** upon which a court can refuse to refer the parties to arbitration. As long as all the claims traced their origin from the subcontract agreement which contains the arbitration clause, it followed that all the claims fall under the arbitration clause and should be referred to arbitration.

6.6 With respect to clause 27.2(d), the appellant submitted that the 21 days within which to refer a matter to arbitration comes in when the parties have failed to resolve the matter within the said days. The parties can then give notice to arbitrate. However there is no time limit to the giving of notice to arbitrate after the failure within 21 days to resolve the matter.

6.7 We were urged to allow the appeal and refer the matter to arbitration as per decision of the Supreme Court in the **Pouwels** case.

7.0 **ARGUMENTS BY THE RESPONDENT**

7.1 The respondent filed heads of argument dated 10th February 2022, in which it contends that though four grounds of appeal have been raised, they are splinters of one ground. Namely whether the court below erred in law and in fact by refusing to stay proceedings and refer the matter to arbitration. Further, that the issues for determination are whether the final payment agreement is valid and binding on the parties, whether there is a dispute to be referred to arbitration and whether the arbitration agreement in the contract is operative.

7.2 In response to the contention that the FPA should have been signed by at least two representatives of each of the parties, the appellant submits that there is no such requirement under clause 27.2 of the subcontract. The FPA is final and binding because it was reduced into writing and signed by senior representatives of the parties with full authority to bind them. Further, that Mr. Zander Van Lingen the deponent of the

affidavit in court below, is a senior person with authority to bind the appellant and signed the said FPA. The fact that the appellant does not deny owing the respondent the sum stated, means that the FPA is valid and binding on the parties.

7.3 The respondent submits that there is no dispute in existence that is capable of resolution by way of arbitration because the parties had resolved the dispute in accordance with Clause 27.2 which procedure qualifies as a dispute resolution mechanism in its own right. Further, that the said FPA is an admission of a debt in the sum of USD524,994.93, a fact the court found was not disputed by the appellant. In fact, the court below on 18th January 2022 entered judgment on admission in favour of the respondent, a clear indication that there is no dispute between the parties to be referred to arbitration.

7.4 In respect of whether the arbitration agreement is inoperative, the respondent submits that the amicable settlement of disputes is independent of arbitration. Arbitration is only triggered by and dependent on the failure to resolve the dispute. Therefore, where a dispute is resolved, there is no requirement that the enforcement of such should be through arbitration.

The dispute having been settled, the arbitration clause is inoperative as the condition precedent for its trigger does not exist. The case of **Audrey Nyambe v. Toyota Zambia Limited** [2] was cited as authority in which the Supreme Court held that at the time the dispute between the parties arose and the time the matter was referred to arbitration, the arbitration clause had become inoperative and incapable of being performed.

7.5 The gist of the argument being that the parties in *casu* had limited arbitration to disputes which the parties failed to resolve by amicable settlement through negotiations. The parties having settled the dispute, the arbitration clause was rendered inoperative. Hence, the court action sought to enforce the Final Payment Agreement. Reference was made to the High Court case of **Intermarket Banking Corporation Zambia Limited v Munkanta** [3] where Judge Mutuna held that a mortgage deed was a separate agreement from personal guarantee/indemnity deed subject of an arbitration clause. Therefore, the arbitration clause did not come into play in the mortgage deed.

7.6 As regards the cited case of **Pouwels Construction Zambia Limited (supra)**, the respondent submits that it is

distinguishable from the facts of this case, because there was no subsequent agreement by the parties in **Pouwels** and other reliefs were being sought. Further, that the arbitration clause was not inoperative.

7.7 As to the issue whether the matter should be referred to arbitration, the respondent reiterated that there is no reasonable dispute to be determined at arbitration, the parties having resolved the dispute under another mechanism. It was prayed that the appeal be dismissed.

8.0 **ARGUMENTS IN REPLY**

8.1 The appellant filed arguments in reply dated 16th February 2022. In assailing the respondent's contention that the final payment agreement was valid and binding, the appellant reiterated its main arguments and made reference to clause 27.2 (c) as well as the interpretation by the court below on the word *"representatives"* in the agreement and the meaning ascribed to it.

8.2 The appellant contends that though it does not dispute one representative of the entity having signed the agreement, in

order for it to be valid, two of its representatives ought to have signed. Therefore, the FPA agreement is invalid.

8.3 As regards the argument that there is no dispute to be referred to arbitration, the appellant submits that by virtue of the agreement being invalid, the alleged enforcement of it through court process is equally invalid.

8.4 In respect of the judgment on admission entered for the sum in issue, it was argued that the said judgment has been appealed against to this court and in any event was not an issue at the time of applying to refer the matter to arbitration. Further that even if judgment on admission was entered, it does not prevent this court from nullifying the same. The **Pouwel's** case was cited as authority for the above proposition.

8.5 On the issue of whether the arbitration clause was inoperative, the appellant contends that it was not inoperative because Clause 27 does not provide a mechanism of dispute resolution but a staged process of dispute resolution. One being the amicable settlement of dispute before the parties could go to arbitration. That the said amicable settlement is not independent of arbitration.

8.6 In reaction to the cited cases of **Audrey Nyambe** and **Intermarket Banking Corporation Zambia Ltd v Mukanta**, (supra) the appellant contends that they are of no application to this case. The appellant went on further to contend that the respondent had failed to distinguish the **Pouwels'** case and maintained that the dispute herein ought to have been referred to arbitration because the agreement did not meet the settlement mechanism and consequently a dispute still remained which must go to arbitration.

9.0 **DECISION OF THIS COURT**

9.1 We have considered the record of appeal, the judgment appealed against, the competing arguments advanced and authorities cited by the learned Counsel for both parties.

9.2 It is not in dispute that the subcontract agreement provided for a mechanism of resolving disputes between the parties. For ease of reference the pertinent clause is reproduced hereinunder.

27. SETTLEMENT OF DISPUTES

Amicable Agreement

27.1 The parties will do their best to reach an amicable agreement in order to solve all disputes which could arise from the Subcontract.

Settlement of Disputes

27.2 Any dispute, which is not disposed of by mutual amicable agreement of the Contractor and the Subcontractor, shall be submitted for resolution and determined in accordance with, and pursuant to, the following procedures:

a) A party, may by written notice to the other Party, (hereinafter the "Notice of Dispute") refer a dispute to the Managing Directors or equivalent senior representatives of each of the Parties (hereinafter the "Senior Representatives"), for amicable resolution.

b) The Notice of Dispute shall identify the dispute and the result sought.

c) Any resolution of a Dispute so referred, shall (unless expressly otherwise stated therein) be final and binding on the Parties when reduced to writing and signed by the Senior Representatives of each of the Parties. To this end, the Parties respectively agree and warrant to each other that the Senior Representatives have full authority to so bind them.

d) If the Senior Representatives fail to resolve the Dispute within 21 (twenty one) days of such Dispute having been referred to them, or such longer period as the Parties may agree in writing, a Party (hereinafter "the Referring Party") shall be entitled via its Senior Representatives, to refer that Dispute to arbitration in terms of clause 27.3 by notifying the other Party/Parties in writing of its intention to so refer the Dispute (hereinafter "the Arbitration Notice"). The Arbitration Notice shall state that it is given in terms of this sub-clause.

9.3 The parties executed a final payment agreement (FPA) for the payment of the sum of US$ 529,994.93, this was not honored

resulting in the commencement of this suit and the subsequent application to refer the dispute to arbitration.

9.4 The main issue for determination is whether the court below ought to have stayed proceedings and referred the matter to arbitration. In determining the above, we shall address the other issues raised in the appeal regarding the alleged incorrect interpretation of the settlement dispute, and the holding that the arbitration clause is inoperative on the basis that the FPA is independent of the arbitration clause.

9.5 We shall start by addressing ground five, in which the appellant contends that for the FPA to be binding, it ought to have been signed by two representatives of each of the parties. That the word *"representatives"* being plural means that more than one person from each party must sign.

9.6 Clause 27.2 (c) earlier cited provided that the resolution of a dispute shall be final and binding on the parties when reduced in writing and signed by senior representatives of each of the parties. The fact that the FPA was signed by one representative on behalf of the appellant and two representatives on the part of the respondent is not disputed. The issue is whether clause

27.2 (c) required two representatives from each party to execute for it to be enforceable.

9.7 Our reading and general interpretation of the clause is that, the use of the word senior representatives of each of the parties though in plural, refers to a representative from each of the parties. We cannot fault the learned judge for holding that reference to the word *"representatives"* is a generic reference to the representatives of the respective parties. Indeed as stated by the court below, had the said clause in the subcontract agreement intended for execution by two representatives from each party in order for the document to be valid, it would have expressly stated as such. The word *"representatives"* being in plural may refer to representatives from both parties. Therefore the appellant cannot be heard to argue that this refers to two representatives from each party. We do not find merit in this ground. It goes without stating the obvious, that the agreement having been executed by representatives of the parties, was validly entered into.

9.8 We now revert to the substantive issue of whether the court erred by refusing to stay proceedings and refer the dispute to arbitration.

9.9 The law with respect to arbitration is found in the **Arbitration Act No. 19 of 2000. Section 10 of the said Act** provides for reference to arbitration and reads as follows:

> ***10 (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 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.***
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> ***(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.***

9.10 The court below found that the amicable settlement of the dispute by FPA is independent of arbitration, that arbitration is triggered on the failure of the settlement of the dispute. Therefore, the arbitration clause is inoperative as the condition for its trigger did not exist. Further that there was no dispute to be referred to arbitration, the parties having reached an agreement.

9.11 The appellant contends that the question of whether the issues in contention are arbitral is a question to be resolved by the arbitral tribunal and not the court. Emphasis being placed on the **Pouwels Construction Zambia Limited case (supra)**. Therefore, the dispute ought to have been referred to arbitration.

9.12 On the other hand, the respondent's gist of argument is that there is no dispute between the parties to be resolved by way of arbitration, the dispute having been resolved pursuant to clause 27.2 culminating in the FPA. In a nutshell, that the dispute having been resolved, the arbitration clause is inoperative as the condition for its' trigger does not exist.

9.13 In determining the substantive issue, we have considered the provisions of section 10 of the **Arbitration Act**, on stay of proceedings and reference of parties to arbitration. The court will not stay proceedings and refer the parties to arbitration where the arbitration agreement is null and void, inoperative or incapable of being performed. In interpreting **section 10 of the Arbitration Act** the Supreme Court, in **Ody's Oil Company Limited v The Attorney General & Constantinos James**

Papoutsis [4], held that the court must be satisfied first, that there is an agreement, that the agreement is valid, and that it is not null and void, inoperative or incapable of being performed. The court's jurisdiction to stay proceedings and refer the matter to arbitration is undisputable. There are a plethora of Supreme Court decisions to the effect that where an action before the court is subject of an arbitration agreement, the court upon being requested must refer the matter to arbitration, subject to the exceptions earlier stated. We are alive to the purpose of arbitration and the effect of a request by a party to refer the matter subject of arbitration clause to arbitration and the subsequent ousting of the court's jurisdiction.

9.14 The court has to satisfy itself that there is in fact a dispute between the parties with regard to the matter agreed to be referred to arbitration and that the arbitration agreement is not null, and void, inoperative or incapable of being performed. The word inoperative covers circumstances where the arbitration agreement has ceased to have effect. This may occur for a number of reasons i.e where the parties have revoked the

agreement to arbitrate, or where the dispute has already been decided in court/arbitration and even where a settlement was reached before the commencement of proceedings. These may have the effect of rendering the arbitration agreement inoperative.

9.15 It is, in our view, not in dispute that the parties were at liberty to refer for resolution any dispute to the senior representatives of each of the parties which if reached would be final and binding.

9.16 We have inquired into the question whether there is a dispute for reference to arbitration and whether this question is within the province of the court or the arbitral tribunal.

9.17 We are of the view that it is within the court's power or jurisdiction to evaluate this issue. Should courts stay proceedings and refer matters to arbitration where there is not in fact any dispute between the parties, merely because there is an arbitration clause? We opine that we need not stay proceeding in such cases. In *casu,* the parties entered into the FPA for the appellant to pay the agreed discounted sum due for services rendered. The appellant does not dispute the liability

but argued that the FPA was not binding on the basis that it was not signed by two representatives from each party. We earlier stated that the FPA was valid having been executed by representatives of each party. The respondent then went to court to seek enforcement of the FPA.

9.18 The appellant cannot insist on proceeding to arbitration by simply raising the issue of the validity of the FPA settlement agreement. It is clear to us that the sum payable was agreed upon. There is no issue referable to arbitration in respect of that settlement amount. There was a judgement on admission entered by the lower court in 18th January 2022 in favour of the respondent in respect of the amount due. This judgment has been appealed against.

9.19 In our view, there is no genuine dispute to warrant the stay of proceedings and reference to arbitration. Having come to the conclusion that the suit before the court below was for enforcement of the settlement agreement under the FPA which the respondent sought payment, we cannot fault the lower court for holding that there was no dispute between the parties capable of reference to arbitration.

9.20 We can further ask the question, whether this claim arising out of a settlement agreement fell within the ambit of the arbitration agreement in the underlying contract? Recourse to arbitration in *casu* clause 27.2 (d) was stipulated to come into effect where the senior representatives failed to resolve the dispute within 21 days of such dispute having been referred to them or such longer period agreed by the parties in writing, by notifying the other party of the intention to refer the dispute to arbitration.

9.21 The parties settled a FPA for the agreed sum to be paid. As regards the nature of claim, the appellant did not dispute its liability to pay the stated sum for services rendered. Therefore, there is no dispute the parties having reached a settlement, which we agree was valid, binding and enforceable.

9.22 Reverting back to the question of whether the alleged dispute settlement agreement falls within the ambit of arbitration, we are of the view that it does not fall within the said ambit, for the reason that the agreement made it clear that the resolution of any dispute presented to the representatives shall be final and binding on the parties when reduced in writing and signed by the senior said representatives. The said FPA settlement was

and is independent of arbitration. We therefore come to the inescapable conclusion that the conditions for granting a stay of proceeding in favour of arbitration were not satisfied. Namely that there is no dispute between the parties in view of the settlement agreement (FPA) which was final and binding on the parties. Had there been no resolution of the dispute, then the dispute would fall within the ambit of arbitration.

9.23 We emphasise that **section 10 of the Act** grants power to the court to exercise jurisdiction to refuse to stay and refer parties to arbitration on the basis earlier stated of the agreement being inoperative etc.

9.24 The learned authors of **A Practical Approach to Arbitration Law** at page 21 states that:

> ***"For there to be a reference to arbitration there needs to be a dispute. Where there was no dispute that was capable of compromise by accord or satisfaction there could be no reference to arbitration..... If a party admits a claim then there is something which is incapable of being compromised by accord and there is no dispute to found the jurisdiction of the arbitral tribunal"***

9.25 The dispute have being resolved by the FPA agreement, there was therefore no dispute to refer to arbitration, the FPA being

an independent agreed mechanism of settlement of disputes, from the arbitration clause.

9.26 We have had regard to the Supreme Court decision in the case of **Pouwels Construction Zambia Limited** cited by the appellant, in which the Supreme Court stated that the argument that the parties could not be referred to arbitration because there is no dispute is a question to be determined by the arbitral tribunal. We are of the view that the facts in the **Pouwel's** case are distinguishable from the facts in *casu* and does not apply to the circumstances of this case. One of the main issues dealt with in the **Pouwel's** case was the refusal by the High Court to refer the parties to arbitration on the basis that there was no request or application made by the 1st appellant to refer the parties to arbitration, despite the court below acknowledging the existence of a valid arbitration clause in the contract between them. The Supreme Court held that the court below fell into error when it held that no request or application had been made to refer the 1st appellant and the respondent to arbitration because the learned trial judge had inherent jurisdiction to treat the request as an application to

stay proceedings and should have referred them to arbitration because there was a valid arbitration clause. The Supreme Court in considering the contention by the respondent that some issues are not arbitrable emphasized that this was a question to be determined by the arbitral tribunal and not the court. The Supreme Court further stated that the same could be said of Counsel's argument that the parties could not be referred to arbitration because there is no dispute. This was in reference to the averment in the affidavit in opposition by the respondent that the amount owed to the plaintiff was admitted and therefore there was no dispute to be referred to arbitration.

9.27 The distinguishing factor is that in *casu*, the parties had resolved the dispute culminating into the FPA which upon signing by the senior representatives was agreed to be final and binding. This was independent of the arbitration clause. Arbitration in the circumstances of this case would have only kicked in upon failure by the parties to resolve the dispute.

9.28 Having distinguished the Supreme Court decision from the facts of this case, we cannot fault the lower court for refusing to stay proceedings and to refer the matter to arbitration on the basis

that the arbitration clause was inoperative and that the FPA agreement is independent of the arbitration clause. We find no merit in grounds one, two and three.

9.29 As regards ground four in which the appellant assails the holding by the court below, that the arbitration notice should have been served within the mandatory 21 days upon failure to settle the present dispute, we find no merit in the ground. Clause 27.2 (d) clearly provided that if the parties failed to resolve the dispute within 21 days from date it is referred to them, then a party shall be entitled via its representatives to refer the dispute to arbitration. The clause further provided for a longer period than 21 days as the parties may agree in writing to refer the dispute to arbitration. The appellant cannot be heard to argue that there was no time limit to the giving of notice to arbitration after the failure within 21 days to resolve. There having been no period in writing agreed by the parties for extension for a longer period.

10.0 **CONCLUSION**

10.1 Having held that the amicable settlement of the dispute culminating in the FPA agreement fell out of the ambit of

arbitration, by virtue of being independent of arbitration, the arbitration clause in the subcontract agreement is inoperative as the condition for its trigger did not exist. We find no merit in the appeal and uphold the decision of the lower court. Costs to the respondent to be taxed in default of agreement.

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F. M. Chishimba

COURT OF APPEAL JUDGE

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M. J. Siavwapa

COURT OF APPEAL JUDGE

Dissenting Judgment/OPINION

Sharpe-Phiri, JA delivered this dissenting judgment.

I hold a different view from the majority decision and my dissenting opinion will be read separately as below.

The presentation of the facts and issues in contention outlined by this Court are adopted as outlined in the judgment of the majority of

the Court. My respectful point of departure from that decision lies in my view that the issues in contention brought before the Court ought not to be adjudicated upon by the High Court. As I see it, following the request for arbitration made by the Appellant, pursuant to the provisions of **Section 10 of the Arbitration Act,** those issues ought to have been referred to arbitration, in line with the arbitration agreement of the parties.

I am fortified in my viewpoint by the sentiments of the late Hon. Justice Mambilima, CJ in the case of **China Henan International Corporation Group Company Limited v G and G Nationwide (Z) Limited** [5], where she stated that: *'the starting point is to recognize the fact that 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.*

Correspondingly, **Section 10 of the Arbitration Act** compels *a Court before which an action is brought which contains an arbitration agreement, to stay the proceedings and refer the matter to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being enforced.'*

The foregoing provision illustrates that a Court is obligated to refer a matter to arbitration, unless it concludes that the arbitration agreement is inoperative and incapable of being performed.

Similarly, this Court held in **Chita Chibesakunda and Abode Properties Limited v J.Z. Morrison (Export) Limited** [6] that *where an action before a court is subject of an arbitration agreement, a court must, if a party requests, refer it to arbitration unless the arbitration agreement is null and void.*

Additionally, we said in **Beza Consulting Inc Limited v Bari Zambia Limited and Gidey Genremariam Egziabher** [7] in relation to the stay of proceedings under the Arbitration Act that *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. It is upon such request that, in case of China Henan 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.*

The ouster of the Court's jurisdiction where an arbitration clause exists in the agreement between parties is not debatable, unless the Court finds that the arbitration agreement is inoperative. The issue is whether the arbitration agreement between the parties is inoperative, null and void or incapable of being performed.

A perusal of the record reveals that the agreement of the parties contained an arbitration provision for resolution of disputes between them. It provided that the parties were to endeavour to reach an amicable agreement to resolve disputes arising from the subcontract. Any such dispute not resolved amicably would be submitted to their Managing Directors or Senior Representatives. If settled, this would be final and binding on them, failing which, the matter would be referred to arbitration.

A dispute arose between the parties which they attempted to resolve amicably by way of a settlement agreement (FPA). The issues not being finally resolved, the Respondent subsequently instituted a claim in the High Court against the Appellant for a sum of $529,994.93, purportedly due under the said FPA. The validity of

that settlement agreement being in question, the Appellant issued summons to stay proceedings and refer the matter to arbitration. The High Court declined the application finding that the amicable settlement of the dispute that culminated in the FPA, is independent of arbitration, and if successful is exclusive of arbitration. The purported agreement (FPA) was the basis of claim for enforcement proceedings instituted by the Respondent in the High Court. The lower Court further found that the arbitration clause in the subcontract agreement is inoperative as the condition precedent for its trigger did not exist. This was notwithstanding the fact that the said settlement agreement was called into question by the Appellant.

One of the contentions of the Appellant in the lower Court was that the said FPA agreement was not executed in accordance with the subcontract agreement between the parties which according to the Appellant required that the document be executed by two representatives of each party.

The lower Court proceeded to interpret the settlement agreement based on the affidavits filed in support of the application under Section 10 and noted that although it was only executed by one

representative of the Appellant, the Appellant was only challenging the proper execution of the agreement and not the content of the agreement. This led her to conclude that the debt sought to be recovered in the proceedings before her was not in dispute and that there was no dispute between the parties.

My view, which forms the basis of my dissent is that I am of the view the lower Court ought not to have delved into determining and adjudicating upon the validity or otherwise of the settlement agreement at the time of hearing the application brought by the Appellant under Section 10 requesting to refer the dispute to arbitration. At the time of hearing the application for stay of proceedings and request for referral to arbitration under **Section 10 of the Arbitration Act**, the issue for the lower Court's consideration was as regards the functioning and validity of the arbitration clause in the subcontract and not the settlement agreement.

On the face of it, the parties had a valid arbitration clause contained in their subcontract agreement, if a party was alleging impropriety in the manner the subsequent agreement emanating from the subcontract agreement was executed, it reverted the parties to

default position before the purported agreement in the eyes of the Court, which is the pre arbitration dispute resolution procedure outlined in the subcontract agreement and in default, arbitration. The trial Court ought to have referred the matter to arbitration for the parties to resolve the propriety of the FPA or its enforceability altogether. This is in line with the authority of the **Pouwels Construction Zambia Limited and Another v Inyatsi Constructions Limited**, where the Supreme Court of Zambia laid out a fundamental principle regarding the instances when a Court should stay proceedings and refer matters to arbitration. In that case, the Supreme Court stated that the question of whether the parties could not be referred to arbitration because there is no dispute is a question to be determined by the arbitral tribunal itself. My view therefore is that the lower Court ought not to have delved into considering the validity of the FPA agreement on an application for a stay of proceedings under **Section 10 of the Arbitration Act**.

Based on the foregoing, and on what in my view constitutes an arbitration agreement to become inoperative, such as the arbitration agreement being revoked or repudiated or the dispute being incapable of being determined by arbitration, I do not believe that a

purported settlement reached before commencement of the action invalidates an arbitration agreement and has the effect of rendering such agreement between the parties inoperative. This is specifically where the validity of such settlement agreement is in contention, and there is a dispute which was brought before the High Court, determination of which ought to be pronounced having heard the parties.

For the reasons aforesaid, I am of the view that the learned Judge erred in declining the application and proceeding to make pronouncements on the issues in contention namely the validity of the settlement agreement. My considered opinion is that those issues ought to have been determined by an arbitral tribunal and that therefore this was a proper case to stay the proceedings in the High Court and refer the matter to arbitration. This concludes my dissenting opinion.

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE