IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 66/2022**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MOBA HOTEL & CONVENTION CENTRE LTD **APPELLANT**

AND

LYCO BUSINESS SOLUTIONS LIMITED **RESPONDENT**

CORAM: Siavwapa, JP, Chashi and Sichinga, JJA
On 21st March, 2023 and 6th April, 2023

For the Appellant: *Ms. M. Mulenga of Messrs Steven Osborne Advocates*

For the Respondent: *Mr. W. Muhanga of Messrs Willis Clement and Partners*

JUDGMENT

Sichinga JA delivered the Judgment of the Court.

Cases referred to:

1. *Cash Crusaders Franchising Pty Ltd v Shakers and Movers (Z) Limited (2012) 3 ZR, 174*
2. *ZCCM Investments Holdings PLC v Vedanta Resources Holdings and Konkola Copper Mines PLC - SCZ Appeal No. No.14 of 2021*
3. *Heyman and Another v Darwins Limited (1942) 1 All ER 337*
4. *Printing and Numerical Registering Company v Simpson L.R 19 EQ 462*

5. *Audrey Nyambe v Total Zambia Limited - SCZ Appeal No. 29 of 2011- SCZ Appeal No. 29 of 2011*
6. *Indo Zambia bank Limited v Mushaukwa Muhanga - SCZ No. 26 of 2009*
7. *Konkola Copper Mines PLC v NFC Africa Mining PLC - SCZ Appeal No. 118 of 2006*
8. *Ody's Oil Company v. Attorney General and Constantinos James Papoutsis- SCZ Judgment No. 4 of 2012, (2012) Z.L.R 164*
9. *Kenny Ilunga T/A La Fiesta VIP Lounge v Hotel and Tourism Training Institute Trust T/A Fairview Hotel 2019 - CAZ Appeal No. 142 of 2017*
10. *Zambia National Holdings limited and Another v The Attorney-General (1993-1994) ZR 115*
11. *Leonard Ridge Safaris Limited v Zambia Wildlife Authority (2008) 2 ZR 97*
12. *Beza Consulting Inc Limited v. Bari Zambia Limited & Another (CAZ Appeal No. 171/2018)*
13. *Group Five Zambia Limited v Nuco Industries Services Limited - CAZ Appeal No. 217 of 2021*

Legislation referred to:

1. *The Arbitration Act, No. 19 of 2000, Laws of Zambia*
2. *Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNICITRAL) UN Document No. a/40/17, Annex 1*

Other works referred to:

1. *Commercial Arbitration- Essays in Memorian Eugenio Minoli 1974*
2. *Black's Law Dictionary, Bryan B. Garner, 10th Edition, A Thomson Reuters*

1.0 Introduction

1.1 The appellant appeals against the Ruling of Zeko Mbewe J of the High Court Commercial Division at Lusaka delivered on 24th January, 2022. Judge Mbewe declined to stay the appellant's application, made pursuant to ***section 10 of the Arbitration Act No. 19 of 2000*** pending arbitral proceedings.

2.0 Background and claim

2.1 In the introductory part of this judgment we shall refer to the parties by their designations in the court below.

2.2 The plaintiff, Lyco Business Solutions Limited, is the respondent in this appeal.

2.3 The defendant, Moba Hotel & Convention Centre Limited, is the appellant.

2.4 On 18th May, 2021, the plaintiff commenced an action by way of writ of summons on the basis of an agreement entered into between the parties on or about 5th October, 2017, referred to as ***"the Engagement Agreement"*** for a period of twelve (12) months. The parties agreed that the plaintiff would be the

defendant's Financial Advisor and would render services such as: provide the defendant with a list of potential financiers, negotiate terms with investors, restructure the defendant's financial structure and draft the necessary documents for and on behalf of the defendant in financial transactions.

2.5 Pursuant to a term of the agreement, the defendant was to pay the plaintiff a sum of ZMW 17,500.00 upon execution of the said agreement, and a further ZMW 17,500.00 upon execution of what was referred to as a Term Sheet (to mean any document setting out the parties' agreed terms) for each transaction.

2.6 Upon execution of the agreement, the plaintiff issued an invoice to the defendant for the initial payment to which the defendant did not settle.

2.7 Further, upon execution of a term sheet between Cavmont Bank Limited and the defendant, which the plaintiff facilitated, the defendant failed to settle the invoice presented.

2.8 Furthermore, the plaintiff performed other duties and incurred costs and expenses incidental to the performance of its obligations under the agreement to which the defendant had not settled.

2.9 The plaintiff then commenced the said action claiming:

i. *Payment of the sum of K364,898.12 being the principal amount plus contractual interest outstanding and payable to the plaintiff;*

ii. *Contractual and other Interest on the said sum due and payable at the rate in the Agreement and as prescribed by Order 36 of the High Court Act Cap 27 of the Laws of Zambia from the date of issue of the Writ to the date of full and final settlement;*

iii. *Damages for breach of contract, loss of money usage and or loss of revenue/opportunity cost and reinvestment for profit making;*

iv. *Costs; and*

v. *Any other relief the court may consider fit to award in the circumstances.*

3.0 The defence

3.1 The defendant denied the plaintiff's claims and counter claimed for an order for payment of the sum of ZMW95,574.85 due from the plaintiff to the defendant being monies owing in respect of hotel charges. The defendant also claims costs.

4.0 Decision of High Court

4.1 Upon analysing the issues before her, in particular, the arbitration clause in the Engagement Agreement, the learned judge resorted to a textbook titled ***Commercial Arbitration-***

Essays in Memorian Eugenio Minoli 1974[1] wherein the author came up with four elements of an arbitration clause.

4.2 The learned judge found that the arbitration clause was missing the four elements and came to the conclusion that it lacks clarity, is imprecise and that its validity and effectiveness is hampered and it is therefore null and void. She proceeded to conclude that there being no dispute amenable to arbitration, she could not stay the proceedings and refer the parties to arbitration.

5.0 The appeal

5.1 Dissatisfied with the ruling of the High Court, the defendant appealed to this Court raising two grounds of appeal as follows:

i. The Court below erred in law and in fact when it held that the Arbitration Clause contained in the engagement agreement is null and void and of no effect.

ii. The Court below erred in law and in fact when it held that the Arbitration Clause contained in the engagement agreement has no mandatory consequences for the parties in that the Arbitration Clause is silent and that the wording of the Arbitration Clause has not given powers to the

Arbitrators to resolve the disputes likely to arise between the parties as it merely states the seat of arbitration.

6.0 Appellant's submissions

6.1 On 29th March, 2022, the appellant filed its heads of argument in which the two grounds are argued as one.

6.2 The gist of its argument is that the Arbitration clause between the appellant and respondent falls within the definitions of an arbitration agreement as provided in ***section 2 of the Arbitration Act,*** and the definition provided by the learned authors of ***Black's Law Dictionary[2], 10th Edition*** which defines *arbitration agreement* as an ***"agreement by which the parties consent to resolve one or more disputes by arbitration."***

6.3 In support of the submission that the arbitration agreement between the parties is valid, we were referred to the case of ***Cash Crusaders Franchising Pty Ltd v Shakers and Movers (Z) Limited[1]*** a decision of Mutuna J (as he then was) where he held that:

"...the starting point is to recognise 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."

6.4 It was submitted that in the present case the parties showed the intention to arbitrate and went as far as having their intention expressed in their engagement agreement. It was contended that it is trite that where parties freely and independently agree to an arbitration agreement, the effect is that the jurisdiction of the court is ousted. In support of this submission, we were referred to the case of ***ZCCM Investments Holdings PLC v Vedanta Resources Holdings and Konkola Copper Mines PLC[2],*** where the Supreme Court held as follows:

"...where parties have chosen that they would refer any of their dispute to arbitration instead of resorting to regular courts, a prima facie duty is cast upon the court to act on their agreement."

6.5 To buttress its argument, the appellant referred us to the English case of ***Heyman and Another v Darwins Limited***[3], a House of Lords decision in which Lord MacMillan at page 347 stated as follows:

> ***"...the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the other party has undertaken to the other such dispute shall be settled by a tribunal with their own Constitution...the arbitration clause survives for determining the mode of their settlement."***

6.6 On the basis of these cases, it was submitted that, where there is an arbitration clause in an agreement, the same infers that the parties' intention is to have disputes settled by way of arbitration. That there was no need for an arbitration clause to state the nature of the dispute unless the parties wished to state the nature of the disputes to refer to arbitration.

6.7 Reliance was also placed on the old English Court of Appeal case of ***Printing and Numerical Registering Company v Sampson***[4] where Sir George Jessel stated the following:

"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by the courts of justice."

6.8 It was submitted that the parties freely and voluntarily entered into an agreement and the court is duty bound to enforce what the parties' agreed to. It was advanced that the clause *in casu* is neither illegal nor repugnant to natural justice so as to prompt the court to disregard it as against the wishes of the parties.

6.9 We were also referred to the case of ***Audrey Nyambe v Total Zambia Limited***[5] where the Supreme Court held that:

"...in determining whether a matter is amenable to arbitration or not, it is imperative that the wording used in the arbitration clause itself are closely studied."

6.10 It was submitted that a close examination of the arbitration clause between the appellant and the respondent shows it is operative and capable of being performed. That it is not in any way null and void.

6.11 We were urged to allow the appeal.

7.0 The respondent's submissions

7.1 In response to the grounds of appeal, it was submitted that the learned judge heed the Supreme Court's guidance in the case of ***Aubrey Nyambe*** when she stated at page R4 (Page 11 of the record of appeal) as follows:

> ***"I heed the guidance of the Supreme Court in the case of Aubrey Nyambe v Total Zambia Limited, where it was said that:***
>
> > ***'However, in determining whether a matter is amenable to arbitration or not, it is imperative that the wording used in the arbitration clause itself are closely studied."***
>
> ***In so doing, I have to undertake an inquiry in relation to the issues to be covered and whether they are amenable to arbitration as agreed by the parties. This entails that the application must specify the dispute and nature of the dispute."***

7.2 The respondent has argued that the arbitration clause *in casu* is incoherent, vague and ambiguous as to whether a dispute is

to be referred to arbitration or not. That what is evident upon reading the arbitration clause in the present case is that it is incoherent, vague and ambiguous. As a result, the learned judge found it difficult to uphold the clause and failed to infer a viable meaning from it. It was argued the case of ***Audrey Nyambe*** gives an impression on the need for a judge to understand the wording of the arbitration clause and not merely refer the matter to arbitration. Reliance was placed on the Supreme Court's following statement:

> ***"The only question that arises for the determination from the sole ground of appeal is whether or not, in the view of the wording of the arbitration clause in the Agreement, the proceedings were properly stayed and referred to arbitration."***

7.3 It was argued that the Supreme Court was aware of the need for a judge to appreciate the wording in an arbitration clause before him, and not merely refer the matter to arbitration on the basis of there being a supposed arbitration clause.

7.4 It was contended that the wording in the present case was unclear which made the learned judge to state at page R6 (page 13 of the record of appeal) as follows:

> ***"...the Defendant did not specify the dispute and nature of the dispute but merely made reference to the arbitration clause. The application, so to speak, was brought in dead and cannot be judicially resuscitated."***

7.5 It was submitted that when the lower court found the arbitration clause to be *null* and *void* it did not do so to dictate what terms were to form part of the clause, but rather, that the clause was imprecise and difficult to uphold. We were referred to the learned judge's finding at page 12 of the record of appeal where she stated the following:

> ***"I find the present arbitration clause to be pathological meaning a defective clause as coined by Fredric Eisenmann. It clearly lacks clarity...so imprecise that its validity and effectiveness is hampered."***

7.6 It is submitted that the learned judge merely referred to the essay by ***Fredric Eisemann, Commercial Arbitration Essays in Memorian Eugenio Minoli*** for its persuasive value

and did not intend it as a binding authority against the *Arbitration Act.*

7.7 It was argued that ***section 10 of the Arbitration Act*** requires a court to interpret an arbitration clause/agreement before referring parties to arbitration. That the learned judge did not dispute that there was an arbitration clause. Counsel submitted that the validity of the clause or the capacity of the clause to be used to refer the matter to arbitration was or is not dependent on the definition of an arbitration agreement, but that the *Arbitration Act* at *section 10* requires the clause to be interpreted by the court.

7.8 The respondent defended the learned judge's position in that the wording of the clause needed to be studied. That upon her interpretation of the clause, she found it was ambiguous and therefore could not be construed in favour of the parties. We were referred to the *contra preferentum doctrine* as defined by ***Black's Law Dictionary*** that:

> ***"...in interpreting documents, ambiguities are to be construed unfavourably to the drafter..."***

7.9 We were also referred to the learned author, ***Mark Alder, Clarity for Lawyers*** where he states that:

> ***"...it's a commendable principle that ambiguity will be construed against the interests of the party responsible for it. We call it 'the careless drafting rule.'"***

7.10 The case of ***Indo Zambia bank Limited v Mushaukwa Muhanga***[6] was referred to as one upholding the *contra preferentum principle.*

7.11 It was submitted that the lower court was on firm ground to adjudge the arbitration clause *null* and *void* in light of its ambiguity. That the mere existence of an arbitration clause does not create an obligation to transfer the matter to arbitration without any conditions. Reliance was placed on the case of ***ZCCM Investment Holdings PLC v Vedanta Resources Holding and Konkola Copper Mines PLC*** *supra* where the Supreme Court reaffirmed what it had earlier stated in the case of ***Konkola Copper Mines PLC v NFC Africa Mining PLC***[7] as follows:

"However, as we observed in the case of Konkola Copper Mines PLC v NFC Africa Mining PLC a court has no obligation to stay proceedings and refer the parties to arbitration where it is demonstrated that the arbitration agreement is null and void, inoperative or incapable of being performed."

7.12 The case of ***Ody's Oil Company Limited v The Attorney-General and Constantinos James Papoutis***[8] was referred to where the Supreme Court held:

"The court must be satisfied that there is first an agreement, that the arbitration agreement is valid, and or that it is not null and void, inoperative or incapable of being performed."

7.13 Next, the respondent reverted to the lower court's use of the essay of *Frederic Eisenmann.* It was argued that the learned judge was not precluded from referring to the essay for its persuasive value. Reliance was placed on the case of ***Kenny Ilunga T/A La Fiesta VIP Lounge v Hotel and Tourism Training Institute Trust T/A Fairview Hotel 2019***[9] in which case we stated the following:

"We turn to ground six in which the learned trial judge is faulted for relying on legal works in assisting her in the

interpretation of section 28 of the Act. It was argued that such reliance on other works by learned authors is a misdirection, as such works cannot take precedence over express and mandatory provisions.

We are alive to the fact that it is common knowledge that reference to works of eminent jurists in arriving at judicial decisions is a common and well accepted practice, not only in Zambia, but in most common law jurisdictions, as such words are of persuasive value. Therefore, the Appellant's view comes to us with a sense of shock.

We accordingly, find that it lacks merit and we dismiss it."

7.14 We were urged to uphold the lower court and dismiss the appeal.

8.0 Our consideration and decision

8.1 We have carefully considered the record of appeal together with the parties' respective heads of argument. The issue for consideration is whether the agreement by the parties is amenable to arbitration. We will address both grounds of appeal together as one.

8.2 It is trite that arbitration is a conflict resolution method that has been applied in our jurisdiction for a couple of decades now. Our current *Arbitration Act* is framed in accordance with the ***Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL)*** on 21st June, 1985.

8.3 If the seat of arbitration is not Zambia, *Articles, 8, 9, and 10 of the UNCITRAL Rules* will not apply. The said Articles relate to an arbitration and substantive claim before the court, applications for interim measures by the court, and the numbers of arbitrators respectively. The other required element in an arbitration agreement is a statement on the applicable national law.

8.4 From the plethora of authorities cited by counsel for the parties, the position of Zambian jurisprudence and law are settled as far as the jurisdiction of the High Court is concerned in matters where a contract embodies an arbitration clause. ***Section 10 of the Arbitration Act*** provides as follows:

> ***"A court before which legal proceedings are brought in a matter which is subject to 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."***

8.5 The Supreme Court has given guidance in a number of cases on the effect of ***section 10 of the Arbitration Act*** as it applies with reference to arbitration and the court's jurisdiction. In the case of ***Zambia National Holdings Limited and another v The Attorney-General***[10] the Supreme Court held that where parties have agreed to settle any dispute between them by way of arbitration, the court's jurisdiction is ousted unless the agreement is *null* and *void,* inoperable, or incapable of being performed. This principle of law reinforces the freedom that the parties have to arbitrate as opposed to being forced to litigate whenever there is a dispute, as was held in the case of ***Leonard Ridge Safaris Limited v Zambia Wildlife Authority***[11].

8.6 In the present case, the arbitration clause is contained in the agreement termed the *Engagement Agreement* by which the appellant engaged the respondent for a period of twelve (12) months to provide it with financial advisory services and matters incidental thereto. Under clause IV (f), the agreement states as follows:

> ***"Governing law; Arbitration. This Agreement shall be construed and enforced in accordance with the laws of Zambia. The parties agree to submit themselves to the binding arbitration of the International Commerce Arbitration Association in London, England which will be the sole tribunal to initiate an arbitration proceeding."***

8.7 The Supreme Court held in the case of ***Ody's Oil Company v Attorney-General and Constantinos James Papoutis*** *supra* held that in interpreting ***section 10(1) of the Arbitration Act***, the court must first be satisfied that there is an agreement, that the agreement is valid and that it is not null and void, inoperative and incapable of being performed.

8.8 In the present case, the approach taken by the learned judge was to study the wording of the arbitration clause in adherence to the guidance give in the ***Audrey Nyambe*** case. She found that the clause did not contain four elements: mandatory consequences for the parties; the exclusion of the state court's jurisdiction; the naming of arbitrators; and putting in place the procedure for arbitration. Ultimately, she held the clause to be pathological which she defined as a defective clause as conceived by the learned author, *Frederic Eisemann.*

8.9 In the case of ***Audrey Nyambe v Total Zambia Limited*** *supra* on which the lower court placed reliance as regards the court's obligation to study the wording used in the arbitration clause, the Supreme Court evaluated the arbitration clause as follows:

> ***"In this case the arbitration clause which was embodied in Article IX (iv) of the Agreement reads as follows:***
>
> > ***"If at any time during the continuance of this agreement, any dispute, differences or questions***

relating to the construction, meaning or effect of this agreement or any clause herein shall arise between the parties, then the aggrieved party shall give written notice or the affected party shall give written notice of not less than 21 days to the other party herein. Each party shall within 14 days of the date of expiry of the written notice aforementioned appoint an arbitrator. The matter shall therefore be referred to the two arbitrators."

Using the literal rule or plain meaning rule of interpretation, which says that ordinary words must be given their ordinary meaning, we agree with counsel for the appellant that the words "At any time during the continuance of this agreement..." in Article IX (iv) means that the parties had limited the disputes to be referred to arbitration to disputes arising between them during the continuance or subsistence of the agreement."

8.10 As observed by the Supreme Court, the arbitration clause in that case was worded in such a way that a dispute arising ***'during the continuance of the agreement'*** was to be referred to arbitration. However, in that case, the dispute related to the manner in which the agreement was terminated. Therefore, the dispute between the parties occurred after the termination of the agreement and not during its continuance. As such, the Supreme Court held that at the time the dispute between the parties arose, the arbitration clause had become *inoperative and incapable of being performed* and that the

learned Judge erred when she stayed the proceedings before her and referred the matter to arbitration.

8.11 The Supreme Court has further given guidance on circumstances that would render an arbitration clause inoperative, such as where a party to proceedings is not a party to an arbitration agreement. The Supreme Court held in the case of ***Ody's Oil Company v Attorney General and Constantinos James Papoutsis*** that in such an instance, the arbitration clause becomes inoperative because the party who is not part of the arbitration agreement cannot be bound by its terms or its outcome. We equally followed this guidance in ***Beza Consulting Inc Limited v. Bari Zambia Limited & Another***[12].

8.12 This Court had occasion to consider the wording of an arbitration agreement. That is, whether there was an arbitrable issue in the case of ***Group Five Zambia Limited v Nuco Industries Services Limited***[13], where parties had agreed to first refer disputes to the senior representatives of the companies which, if reached, would be final and binding. Arbitration proceedings were only to be commenced if parties failed to reach a settlement. We found that the dispute would only have been amenable to arbitration if a resolution had not been reached. However, since a resolution was reached, there was no dispute referable to arbitration and therefore no need to stay court proceedings.

8.13 What was meant by the Supreme Court in the ***Audrey Nyambe*** case by reference to studying the words used in an arbitration clause was that the courts must determine whether the agreement or clause is worded in such a way that there are pre-existing conditions essential to the subjection of the matter to arbitration, such as a time limit within which arbitration proceedings are to be commenced or only after an amicable settlement fails.

8.14 Reference to the court's obligation to study the wording of the arbitration clause does not entail that the court is to search for elements that ought to have been included in the arbitration clause. It is sufficient that the parties agreed to subject themselves to arbitration and where such a clause is not inoperative, null and void or incapable of being performed, the jurisdiction of the court where a dispute arises is ousted and arbitration proceedings take precedence. Therefore the courts have no jurisdiction over disputes which are covered by an arbitration agreement save for the exceptions found in ***section 6 of the Act.*** It provides as follows:

> ***"6. (1) Subject to subsections (2) and (3), any dispute which the parties have agreed to submit to arbitration may be determined by arbitration. (2) Disputes in respect of the following matters shall not be capable of determination by arbitration:***
>
> ***(a) an agreement that is contrary to public policy;***

(b) a dispute which, in terms of any law, may not be determined by arbitration;

(c) a criminal matter or proceeding except insofar as permitted by written law or unless the court grants leave for the matter or proceeding to be determined by arbitration;

(d) a matrimonial cause;

(e) a matter incidental to a matrimonial cause, unless the court grants leave for the matter to be determined by arbitration;

(f) the determination of paternity, maternity or parentage of a person; or

(g) a matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.

(3) The fact that a law confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration."

8.15 In the circumstances of this case, as we have earlier alluded to, the *Engagement Agreement* is one not meeting the exceptions in *section 6 of the Act,* as it was a financial advisory agreement.

8.16 The respondent urged us to invoke the *contra preferentum rule.* The *contra preferentum rule* is a legal doctrine in contract law

which states that any clause considered to be ambiguous should be interpreted against the interests of the party that created, introduced, or requested that a clause be included. That the arbitration clause should be interpreted against the appellant. Applying the literal rule or plain meaning rule of interpretation, which says that ordinary words must be given their ordinary meaning, we agree with counsel for the appellant that the wording in the arbitration clause before us is clear that the parties intended to oust the jurisdiction of the court.

8.17 We take the view that the *contra preferentum rule* is applicable where the evidence does not dispel the ambiguous nature of the contract language, then the court will rule against the party that created or introduced the clause to be included and in favour of the unknowing party. We see no ambiguity in the construction of the arbitration clause regarding the mutual intentions of the parties to refer the matter to arbitration. The *contra preferentum rule* and the case of ***Indo Zambia Bank Limited v Mushaukwa Muhanga*** *supra* are inapplicable to the circumstances *in casu.*

8.18 The learned judge misconceived the application of the law on what would warrant a refusal to stay proceedings pending arbitration. This appeal is therefore allowed and the lower court's decision is set aside.

9.0 Conclusion

9.1 In view of the forestated, having set aside the lower court's ruling, we stay the proceedings before the lower court and refer the parties to arbitration.

9.2 We award costs to the appellant, to be taxed in default of agreement.

M.J. Siavwapa
JUDGE PRESIDENT

J. Chashi
COURT OF APPEAL JUDGE

D.L.Y. Sichinga,SC
COURT OF APPEAL JUDGE