

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)

2022/HP/0050

CHARLES MUSHITU



PLAINTIFF

AND

SWIFT CAPITAL LIMITED

DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 18<sup>th</sup> day of March, 2025

For the Plaintiff:

In Person

For the Defendant:

Ms. R. Nyirenda, Messrs Ferd Jere & Company

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## RULING

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### Cases referred to:

1. *Heyman and Another Vs Darwins Limited* (1942) AC 356
2. *Gateway Service Station Vs Engen Petroleum (Z) Limited* (Appeal No. 31 of 2003) [2007] ZMSC 164
3. *Moba Hotel and Convention Center Vs Lyco Business Solutions* Appeal No. 66 of 2022
4. *Audrey Nyambe Vs Total Zambia Limited*, SCZ Appeal No. 29 of 2011
5. *Indo Zambia Bank Limited Vs Mushaukwa Muhanga* SCZ No. 26 of 2009

### Legislation referred to:

*The Arbitration Act No. 19 of 2000*

## **1.0 Introduction**

The defendant filed an application on the 10<sup>th</sup> March, 2023 to stay proceedings and refer the matter to Arbitration. The application was made pursuant to *Section 10 of the Arbitration Act, Chapter 40 of the Laws of Zambia.*

## **2.0 The defendant's affidavit evidence**

The gist of the defendant's affidavit filed on an even date and sworn to by Erimas Kifle, a director of the defendant company is as follows:

The root of this dispute emanates from a contract of sale which was executed by the parties in relation to Stand No. LUS/144/24. The said contract of sale contains a Dispute Resolution clause referring any disputes arising from the said contract of sale to Arbitration pursuant to clause 17.8 and 17.9 of the special conditions of sale.

## **2.1 The defendant's skeleton arguments**

In their skeleton arguments, counsel referred to *Section 10 (i) of the Arbitration Act No. 19 of 2000* which provides that:

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

Reference was also made to the Dispute Resolution clauses 17.8 and 17.9 in the contract of sale signed between the plaintiff and the defendant which state as follows:

*"17.8.....the parties agree that any dispute claim, dispute or difference arising under or in connection with this contract of sale, any non-contractual obligation connected with it or in connection with*

*the negotiation, existence, legal validity enforceability or termination of this contract of sale, which cannot be amicably settled between the parties within twenty (20) working days, shall be referred to arbitration to be conducted pursuant to the Arbitration Act No. 19 of 2000 and in accordance with the rules published by the Chartered Institute of Arbitrators, Zambia branch from time to time.”*

*“17.9.....The arbitration shall be chaired by one arbitrator who shall be appointed by written agreement of both parties, and in default of such agreement, the Arbitrator shall be appointed by the President of the Chartered Institute of Arbitrators, Zambia Branch. The decision of the Arbitrator shall be final and binding on the parties. The seat of arbitration shall be Lusaka, Zambia. Notwithstanding any reference to arbitration herein, the parties shall continue to perform their respective obligations under this agreement unless otherwise agreed in writing....”*

Counsel argued that the defendant desires to stay these proceedings and have the matter referred to Arbitration in accordance with the aforementioned clauses and the *Arbitration Act No. 19 of 2000*.

The court was also referred to the case of **Heyman and Another Vs Darwins Limited**<sup>1</sup> which provides that:

*“An Arbitration clause in a contract is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation that affects the other. It embodies the agreement of both parties that if any dispute arises with regard to obligations, which the one party has undertaken, to the other, such dispute shall be settled by a tribunal of their own constitution. The purpose of the contract has failed, but the arbitration clause is not one of the purposes of the contract.*

Reference was also made to the case of **Gateway Service Station Vs Engen Petroleum (Z) Limited**<sup>2</sup> where the court held that:

*“It follows, therefore that in terms of section 20 of the Arbitration Act, once any party to an agreement with an arbitration clause makes an application to have the matter stayed and refer the matter to arbitration, the court has no choice but to refer the matter to arbitration, unless it finds the agreement null and void, inoperative or incapable of being performed.”*

In referring to the above cases, counsel argued that in *casu*, there has been no finding by the court to the effect that the arbitration agreement is null, void, inoperative or incapable of being performed. That as per clauses 17.8 and 17.9 of the contract of sale, any dispute must be referred to arbitration. On this basis counsel prayed that this matter be referred to arbitration.

#### **4.0 The plaintiff's affidavit evidence**

**4.1** In opposing the application the plaintiff filed an affidavit in opposition on the 12<sup>th</sup> February, 2024, where he avers as follows: The defendant has stated reliefs that are no longer on the record as the same were amended following an order of this court for the plaintiff to amend pleadings. The claim before this court is for rescission of the contract for fraudulent misrepresentation and other attendant reliefs. The defendant has not disputed his claim by way of filing a defence despite having served the defendant with the amended pleadings.

#### **5.0 The plaintiff's skeleton arguments**

**5.1** In the supporting arguments filed on even date the plaintiff argued that he commenced this matter on the 10<sup>th</sup> January, 2022 by writ of summons and pleaded for the following reliefs:

- (a) Order for rescission of contract of sale in respect of Stand No. LUS/144/24.

- (b) Damages for breach of contract
- (c) Order to declare the change of title of Stand No. LUS/144/24 from the plaintiff to the defendant illegal.
- (d) Costs
- (e) Any other court order

**5.2** The plaintiff argued further that upon his application on the 22<sup>nd</sup> May, 2024, this court granted him leave to amend his pleadings and, on the 19th June, 2023, he did file amended pleadings which now read as follows:

- (a) An order for rescission of contract of sale in respect of 144 Block 24, Lusaka for fraudulent misrepresentation.
- (b) An order that what existed between the plaintiffs and the defendant from the outset is a loan agreement.
- (c) A declaration that the 25% interest per month charged on the loans by the defendant is excessive, unconscionable and therefore illegal.
- (d) An order for re-opening of the loan transaction and that the plaintiff pays the defendant the loaned amount plus interest chargeable in accordance with the Money Lenders Act.
- (e) Order declaring all transactions relating to the change of title of stand No. LUS/144/24 by the defendant from the plaintiff's name to the defendant's name illegal and null and void.
- (f) An order ordering the Lusaka City Council Registrar to cancel and reverse the title in respect of property at 144/Block 24, Lusaka from the defendant's name to the plaintiff's name.
- (g) Costs.
- (h) Any other court order.

**5.3** The plaintiff contended that although *section 6 of the Arbitration Act No. 19 of 2000* provides for arbitration of matters that may be arbitrable, the law also provides exceptions as to matters that may not be amenable to arbitration and

these exceptions include a dispute which in terms of any law, may not be determined by arbitration. That the issue for determination before this court is to ascertain whether or not the purported contract of sale is a product of fraudulent misrepresentation. It was the plaintiff's argument that where fraud is alleged, the standard of proof required is higher than the usual balance of probabilities attached to a civil case. It was the plaintiff's considered view that in order for a matter involving fraudulent misrepresentation to be determined on merit and with certainty, only a competent court of law and not an arbitrator ought to determine the matter. That in this regard, an arbitrator has no jurisdiction to arbitrate over a matter involving fraudulent misrepresentation.

**5.4** In making reference to the case of **Heyman and another Vs Darwins Limited**, the plaintiff argued that this case can be distinguished from the case in *casu*, as in that case the issue was about the parties not performing certain obligations which they willingly agreed to perform. Whereas in the case before this court, the contract itself is being assailed in its totality for reasons of inducement, arising from fraudulent misrepresentation. Consequently, that the principle of severability of the arbitration clause does not arise and is a 'brought in dead' clause, as it is sitting in a *void ab initio* purported agreement.

The plaintiff argued further that the Supreme Court in the case of **Moba Hotel and Convention Center Vs Lyco Business Solutions**<sup>3</sup> in quoting the case of **Audrey Nyambe Vs Total Zambia Limited**<sup>4</sup> 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."*

**5.5** It was the plaintiff's view that a close examination of the arbitration clause shows that the words are ambiguous as they do not expressly state that if there is any dispute involving fraud, that dispute has to be referred to arbitration. That in interpreting the arbitration clause in *casu*, this court should adopt the *contra pre ferentum* doctrine, which states that any clause considered to be ambiguous

should be interpreted against the interest of the party that created or introduced that clause for its benefit. For this argument, reference was made to the case of **Indo Zambia Bank Limited Vs Mushaukwa Muhanga**<sup>5</sup>. On this basis the plaintiff submitted that the ambiguity in the wording of the arbitration clause be interpreted against the defendant.

**5.6** The plaintiff prayed that the application to stay proceedings and refer the matter to arbitration be declined.

## **6.0 The hearing**

**6.1** At the hearing it was brought to the attention of the court that the defendant had not yet served the plaintiff with the affidavit in support of the application. The defendant was directed to serve the plaintiff with the said documentation and leave was given to the plaintiff to file his affidavit in opposition which he subsequently did.

## **7.0 The decision of the court**

**7.1** The main bone of contention by the defendant is that this matter be referred to arbitration as the contract of sale contains an arbitration clause. The plaintiff on the other hand claims that this cause of action is not amenable to arbitration as the said arbitration clause is ambiguous as it does not make reference to disputes emanating from a claim of fraud or fraudulent misrepresentation. At this point it would be apt to refer to the said arbitration clause in the contract of sale being clause 17.8 which states as follows:

*“The parties agree that any dispute, claim or difference arising under or in connection with this contract of sale, any non-contractual obligations connected with it, or in connection with the negotiation, existence, legal validity, enforceability or termination of this contract of sale, which cannot be amicably settled between the parties within twenty (20) working days, shall be referred to arbitration to be conducted pursuant to Arbitration Act No. 19 of 2000 and in*

*accordance with the rules published by the Chartered Institute of Arbitrators, Zambia branch from time to time.”*

A perusal of the said arbitration clause, does not in my considered view contain any ambiguous provisions, as it is clear that any dispute arising from the contract of sale or any non-contractual obligations connected to the said contract of sale will be referred to arbitration. What the said clause does not provide for is any dispute in relation to fraud or fraudulent misrepresentation arising out of the said contract being referred to arbitration. The Court of Appeal in the case of **Moba Hotel and Convention Center Vs Lyco Business Solutions** in citing the case of **Audrey Nyambe Vs Total Zambia Limited** guided that:

*“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. 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 agree 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.”*

From the foregoing excerpt of the Court of Appeal’s judgment, in the **Moba** case it is apparent that it is not the duty of this court to start searching for elements that ought to have been included in the arbitration clause between the parties

in *casu* as the plaintiff has suggested. As such, even though the plaintiff by his amended pleadings has claimed that the contract that he entered into was as a result of a fraudulent misrepresentation this and of itself does not invalidate the arbitration clause. This is more so that this court already pronounced itself on the aspect of fraudulent misrepresentation not being present in the contract that was signed by the parties by its Ruling of 31<sup>st</sup> January, 2022. The reason that was given in its Ruling, was that this court had an occasion to examine a Memorandum of Understanding that the plaintiff signed, exhibited as "EK3" in an affidavit in opposition to an application for an injunction dated 19<sup>th</sup> January, 2022, where the plaintiff clearly affirmed that he understood all the terms and conditions of the contract that he had signed. Subsequently, the plaintiff cannot now turn around and claim to have been made to sign the said contract as a result of fraud and or fraudulent misrepresentation.

The net result is that the plaintiff's arguments are rejected and the cause of action is hereby stayed and referred to arbitration in accordance with the arbitration clause in the contract of sale entered into by the parties.

Each party will bear their own costs.

Dated the 18<sup>th</sup> day of March 2025

REPUBLIC OF ZAMBIA  
HIGH COURT OF ZAMBIA  
~~18 MAR 2025~~  
R. CHIBBABBUKA  
P.O. BOX 1007, LUSAKA  
**Ruth Chibbabbuka**  
**HIGH COURT JUDGE**