

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 262/2024
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN

COSMAS MULENGA

AND

BRIGHT JANGAZYA

CORAM: Siavwapa JP, Chishimba and Patel, JJA



APPELLANT

RESPONDENT

On 17th February and 4th March 2026

For the Appellant: Mr. J. Zimba of Messrs Makebi Zulu
Advocates

For the Respondent: Mr. C.P. Chilangwe of Messrs Chipoma
Chilambwe Legal Practitioners

JUDGMENT

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

- 1. Sangwa v The Legal Practitioners Committee of the Law Association of Zambia SCZ Appeal No. 121 of 2013**
- 2. Konkola Copper Mines Plc v NFC Africa Mining Plc SCZ Appeal No. 118 of 2006**
- 3. Audrey Nyambe v Total Zambia Limited SCZ Appeal No. 29 of 2011**
- 4. Godfrey Miyanda v The High Court (1984) Z.R.**
- 5. JCN Holdings Limited v Development Bank of Zambia SCZ Appeal No. 54 of 2016**
- 6. Aristogerasimos Vangelatos and Another v Metro Investments Limited and Others SCZ Judgment No. 35 of 2016**



7. Beza Consulting Inc Limited v Bari Zambia Limited and Another CAZ Appeal No. 171 of 2018

8. Gass Transport and Construction Limited v Impala Terminals Zambia Limited CAZ Appeal No. 187 of 2020

LEGISLATION REFERRED TO:

- 1. The Arbitration Act No. 19 of 2000**
- 2. The Court of Appeal Rules Statutory Instrument No, 65 of 2016**
- 3. The Rules of the Supreme Court of England 1965 (Whitebook) 1999 Edition.**

1.0 INTRODUCTION

1.1 This appeal is against the Ruling of Hon. Mrs. Justice. P. Yangailo delivered on 10th July, 2024, in which the learned Judge dismissed the matter for want of jurisdiction on ground that the Appellant had not demonstrated compliance with the dispute resolution procedure.

1.2 The appeal deals with the issue of whether the Court has the power to dismiss a matter where the contract in issue provides for arbitration as opposed to staying proceedings and referring parties to arbitration.

2.0 BACKGROUND

2.1 The Appellant commenced proceedings in the lower Court against the Respondent alleging that the parties had entered

into a series of agreements which were, in essence, loan arrangements. The Appellant averred that he borrowed sums of money from the Respondent on different occasions. In the course of the said transactions, he was persuaded to sign documents which were represented to him as loan agreements but were, in fact, contracts of sale relating to Stand No. 1274, Chelston, Lusaka. The Appellant stated that the Respondent misrepresented the nature of the documents, discouraged him from obtaining independent legal advice, and subsequently sought to assert ownership of the property by registering a caveat and demanding payment of the full purchase price.

- 2.2 The Respondent denied any misrepresentation and maintained that the parties freely and voluntarily entered into three contracts of sale, pursuant to which the Appellant agreed to sell the property to him for an agreed consideration. The Respondent paid the full purchase price in the sum of K230,000 and registered a caveat to protect his interest as purchaser. He counterclaimed for specific performance, vacant possession, and damages for breach of contract.

2.3 The learned High Court Judge upon review of the record, observed that the matter had been reallocated a number of times and there was an application for an interim injunction. The parties were given orders on the filing of the relevant affidavits in opposition and reply, if any, which were not complied with. The trial Judge proceeded to render her ruling on the unopposed application.

3.0 DECISION OF THE COURT BELOW

3.1 In her ruling, the learned trial Judge considered the effect of Condition 27 of the Law Association of Zambia Conditions of Sale 2018 and concluded that the dispute fell squarely within its ambit. The Court held that the Appellant had not demonstrated compliance with the dispute-resolution procedure prescribed therein and that, in the absence of such compliance, the High Court lacked jurisdiction to entertain the matter. On that basis, the learned Judge dismissed the action in its entirety, discharged the interim injunctive relief that had earlier been granted, ordered each party to bear its own costs, and granted leave to appeal.

4.0 GROUNDS OF APPEAL

4.1 Aggrieved by the decision, the Appellant appealed raising the following grounds:

1. **The learned High Court Judge erred in law and fact when she dismissed the matter for want of jurisdiction by holding that the matter could only be resolved through arbitration and relied on Condition No. 27 of the Law Association of Zambia General Conditions of Sale, 2018.**
2. **The learned High Court Judge erred in both law and fact when she did not consider that Condition No.27 of the Law Association of Zambia General Conditions of Sale, 2018 does not bar a party from instituting court proceedings.**

5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 The Appellant argued both grounds of appeal together. He contends that the learned trial Judge misdirected herself in fact and law when she held that the existence of an arbitration clause under **Condition 27 of the Law Association of Zambia Conditions of sale 2018** deprived the High Court of jurisdiction

and warranted outright dismissal of the matter. It was submitted that Condition 27 does not bar the commencement of court proceedings, nor does it mandate dismissal of an action once proceedings have been instituted.

5.2 The Appellant contends that a proper construction of Condition 27 is that while it encourages dispute resolution prior to instituting court proceedings and provides for arbitration, it is not expressed in absolute or mandatory terms so as to prohibit access to the courts. In particular, that Condition 27(a) introduces compliance with the clause as a condition precedent, but expressly preserves the right to approach the court in circumstances such as the pursuit of urgent interlocutory relief or where proceedings have already been commenced outside the clause.

5.3 The Appellant submits that the law governing the effect of an arbitration clause on court proceedings is settled by **Section 10 of the Arbitration Act No. 19 of 2000 (Arbitration Act)**. Under that provision, where proceedings are commenced in a matter subject to an arbitration agreement, the court is required, upon request by a party, to stay the proceedings and

refer the parties to arbitration, unless the arbitration agreement is shown to be null, void, inoperative, or incapable of being performed. The Appellant's position is that the cited provision does not empower a court to dismiss an action merely because an arbitration agreement exists.

5.4 Reliance was placed on the decision of the Supreme Court in the case of **Sangwa v The Legal Practitioners Committee of the Law Association of Zambia**⁽¹⁾, where it was held that **Section 10 of the Arbitration Act** compels a court to stay proceedings and refer the parties to arbitration, and that dismissal of an action in such circumstances is erroneous. The Appellant further referred to the case of **Konkola Copper Mines Plc v NFC Africa Mining Plc**⁽²⁾, for the proposition that a court may only decline to stay proceedings where the arbitration agreement is null, void, inoperative, or incapable of performance.

5.5 It was further argued that there was no evidence before the High Court that the arbitration clause contained in the Law Association of Zambia General Conditions of Sale, 2018 was invalid or unenforceable. Accordingly, the learned trial Judge

erred in exercising discretion to dismiss the action instead of staying the proceedings and referring the dispute to arbitration.

5.6 Reference was made to the case of **Audrey Nyambe v Total Zambia Limited**⁽³⁾ for the principle that the wording of an arbitration clause must be carefully examined before determining its effect. In *casu* the clause in issue expressly contemplated arbitration as the dispute resolution mechanism, not dismissal of court proceedings.

5.7 In conclusion, the Appellant submits that the lower Court gravely erred at law by dismissing the action for want of jurisdiction. The proper course, in accordance with **Section 10 of the Arbitration Act** and settled Supreme Court authority, was to stay the proceedings and refer the parties to arbitration. The Appellant prays that the appeal be allowed and that the matter be referred to arbitration.

6.0 RESPONDENT'S HEADS OF ARGUMENT

6.1 The filed heads of arguments on record and contends that the contract of sale were expressly executed subject to the Law Association of Zambia General Conditions of Sale, 2018, and that none of the special conditions varied or excluded Clause

27. Therefore, all disputes arising from the contracts were subject to the dispute-resolution framework set out in that clause.

6.2 It was submitted that Condition 27 establishes mandatory conditions precedent to the commencement of court proceedings or arbitration, namely:

- (i) the issuance of a notice of dispute;
- (ii) an attempt to resolve the dispute by negotiation; and
- (iii) referral of the dispute to arbitration where negotiation fails.

6.3 The Respondent argues that, until these steps are exhausted, the High Court is deprived of jurisdiction to hear and determine the matter. In this regard, reliance was placed on the Supreme Court's definition of jurisdiction in the case of **Godfrey Miyanda v The High Court**⁽⁴⁾, and on the principle that courts may raise and determine issues of jurisdiction at any stage, even on their own motion.

6.4 The Respondent contends that the lower Court was entitled to consider the issue of jurisdiction notwithstanding that the

parties did not expressly raise it, as jurisdiction goes to the root of the court's authority. Reliance was placed on the cases of **JCN Holdings Limited v Development Bank of Zambia⁽⁵⁾** and **Aristogerasimos Vangelatos and Another v Metro Investments Limited and Others⁽⁶⁾**, where it was held that proceedings conducted without jurisdiction are a nullity.

6.5 In response to the contention by the Appellant that Condition 27 does not bar access to the courts, the Respondent submits that the clause expressly prohibits the commencement of court proceedings or arbitration unless the conditions precedent have been complied with, save for narrowly defined exceptions relating to urgent interlocutory relief or where proceedings have already been commenced outside the clause. The Respondent argues that the Appellant's claim did not fall within any of those exceptions.

6.6 It was further submitted that the dispute between the parties is governed by ordinary principles of contract law, and that parties of full capacity who freely and voluntarily enter into contractual terms are bound by them. In support of this proposition, reliance is placed on the cases of **Tijem Enterprises Limited v**

Children International Zambia Limited⁽⁷⁾, Printing and Numerical Registering Company v Simpson⁽⁸⁾, and National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo⁽⁹⁾.

6.7 The Respondent contends that the Appellant failed to comply with the dispute-resolution procedure set out under Condition 27 and instead commenced court proceedings contrary to the terms of the contract of sale. As such, the High Court was correct to decline jurisdiction and dismiss the matter.

6.8 The Respondent submits that the appeal is devoid of merit and urges the Court to uphold the decision of the lower Court and dismiss the appeal with costs.

7.0 HEADS OF ARGUMENTS IN REPLY

7.1 The Appellant reiterated the legal issues raised in its Heads of Argument.

8.0 AT THE HEARING

8.1 The Appellant at the hearing contended that the issue for determination is what root or course of action should the lower Court have taken in view of the arbitral Clause. Its position

being that the Court below ought to have stayed proceedings and referred the matter to arbitration. Further, that the parties were not given an opportunity to argue on the issue of the arbitral clause. The Respondent relied entirely on heads of arguments filed on record.

9.0 ANALYSIS AND DECISION OF THE COURT

9.1 We have considered the appeal, the authorities cited and arguments advanced by the learned counsel. It is not in dispute that the Appellant and Defendant signed various contracts for the sale of Stand No. 1274, Chelston, Lusaka. It is further not disputed that the contracts between the parties incorporated the Law Association of Zambia General Conditions of Sale, 2018.

9.2 The facts surrounding the transaction were the subject of dispute before the lower Court. In her ruling, the learned trial Judge took the view that the existence of Condition 27 in the Law Association of Zambia General Conditions of Sale, 2018 coupled with the lack of adherence to it, deprived the High Court of jurisdiction and warranted dismissal of the action.

- 9.3 Flowing from this and the Appellant's grounds of appeal, the main issue for determination is whether the learned trial Judge erred in law by dismissing the action for want of jurisdiction based on Condition 27 or whether, having found the dispute to be subject to an arbitration agreement, the Court ought instead to have stayed the proceedings and referred the parties to arbitration.
- 9.4 The Appellant contends that the learned Judge misdirected herself by treating the arbitration clause as an absolute bar to court proceedings, contrary to **Section 10 of the Arbitration Act, No. 19 of 2000**. It was argued that this provision mandates the High Court to stay the proceedings and refer the parties to arbitration. The Respondent, on the other hand, maintains that Condition 27 establishes conditions precedent which are mandatory in nature, which were not complied with. That this therefore, deprived the High Court of jurisdiction to entertain the matter.
- 9.5 We have considered the two opposing arguments. Perusal of the Record of Appeal reveals that the parties executed three contracts of sale regarding the sale of Stand No. 1274, Chelston.

All three contracts were expressly subject to the Law Association of Zambia General Conditions of Sale, 2018, and none of the special conditions varied or excluded Condition 27.

9.6 It is equally not disputed that Condition 27 prescribes the manner in which disputes under the conditions are to be addressed. Notably, the process begins with the negotiation process between the parties. Where this fails, parties then seek recourse in arbitration. For clarity, we will restate the entire provision below:

Dispute resolution

a) Condition precedent to start of proceedings

If any dispute between the parties arises out of or in connection with the terms of this document (whether before or after Completion) (Dispute), the parties agree to resolve it in the matter [sic] set out in this clause, and a party may not commence court proceedings or arbitration concerning the Dispute unless:

- (i) the party starting proceedings has complied with this clause; or**
- (ii) the party starting proceedings has complied with this clause; or**
- (iii) the party starting proceedings is seeking urgent interlocutory relief; or**

- (iv) another party has first started proceedings other than under this clause.

b) Notice of dispute

Where a Dispute has arisen, the party claiming that a Dispute has arisen must notify the other party to the Dispute, specifying the nature of the claim (Dispute Notice).

c) Resolution of dispute by negotiation

(i) During the five (5) Business Days after the date the Dispute Notice is given each party must: prepare, and exchange with the other parties: a brief statement setting out its own position on the Dispute and its reasons for adopting that position; and give to the other parties any information they may reasonably require to consider the issues relevant to the Dispute.

(ii) Within five (5) business days after the date the statements are due to be exchanged, the chief executive officer of each party (or the party in person, if the party is a natural person) must meet and use their best endeavours to resolve the Dispute, each having full authority to do a Resolution of issues by consent of the parties

d) Resolution of dispute by arbitration

In default of resolution of a dispute by negotiation all disputes, controversies or claims arising from the interpretation, performance or non-performance or enforcement of the Contract between the parties or any and all transactions related to these General Conditions of Sale (including, but not limited to, the validity, scope and enforceability of this provision, or disputes under rights granted pursuant to law) shall be finally and completely resolved by arbitration before a single arbitrator

in accordance with the provisions of the Arbitration Act No.19 of 2000 of the Republic of Zambia (or any statutory modification thereof applicable at the time of the issuance of the Dispute Notice).

The place and seat of arbitration shall be Lusaka, Zambia. The language to be used in the arbitral proceedings shall be English.

- 9.7 Paragraph (a) is couched in clear language and provides that a party “may not commence court proceedings or arbitration” unless the steps set out therein have been complied with, subject only to limited exceptions, including the pursuit of urgent interlocutory relief.
- 9.8 There is no evidence on the record that the Appellant issued a notice of dispute, engaged in negotiations, or referred the matter to arbitration prior to commencing proceedings in the High Court. Nor is it apparent that the relief sought fell within the narrow exception of urgent interlocutory relief contemplated by the clause.
- 9.9 Having said that, we have had occasion to consider our decision in **Beza Consulting Inc Limited v Bari Zambia Limited and Another**⁽⁷⁾. In that case we addressed the question of the effect of an arbitration clause on a court’s jurisdiction. We held, in clear terms, that the mere existence

of an arbitration agreement does not automatically oust the jurisdiction of the court. The ouster contemplated by **section 10 of the Arbitration Act** is not self-executing; it is triggered only upon a request by a party to the arbitration agreement. In the event that such a request is not made, a court cannot decline jurisdiction of its own motion.

9.10 We further held that **section 10** is couched in mandatory terms that only after a party has applied can a Court stay proceedings and refer the parties to arbitration. Until that point, the court remains vested with jurisdiction and must proceed in accordance with the law.

9.11 Applying that principle to the present case, the record demonstrates that neither party applied under **section 10 of the Arbitration Act** for a stay of proceedings and referral to arbitration. In those circumstances, the lower Court was not entitled to decline jurisdiction solely on the basis of Condition 27.

9.12 The Respondent argued that Condition 27 establishes conditions precedent to the commencement of proceedings and that failure to comply therewith deprived the court of

jurisdiction. While parties are generally bound by contractual conditions precedent, such provisions cannot be construed in a manner that circumvents the statutory framework governing arbitration. In **Gass Transport and Construction Limited v Impala Terminals Zambia Limited**⁽⁸⁾ we found that parties cannot contract outside the provisions of the law.

9.13 It therefore follows that lower Court's decision to dismiss proceedings on its own motion is inconsistent with section 10 of the Arbitration Act in line with our guidance in **Beza Consulting (Supra)**

9.14 In this regard, we hold the view that both grounds of appeal have merit. The Court below erred when it dismissed the matter for want of jurisdiction on the ground that the matter could only be resolved through arbitration when neither party applied to have the matter stayed and parties referred to arbitration. Further, the learned Judge ought to have given the parties an opportunity to submit on the issue of the arbitral clause. The proper course of action was for the Court below to stay proceedings and refer the parties to arbitration. The Court erred by dismissing the matter outright merely because the

contract\agreement between the parties contained an arbitration clause.

10.0 CONCLUSION

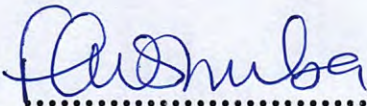
10.1 We hereby set aside the decision of the Court below dismissing the matter on account of lack of Jurisdiction. We remit the matter back to the High Court to assume jurisdiction on the matter before another Judge. The party that wishes to proceed to arbitration must make a request to the Court below to stay proceedings and refer the parties to arbitration. Costs to the Appellant to be taxed in default of agreement.



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M. J. Siavwapa

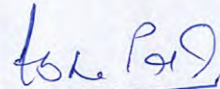
JUDGE PRESIDENT



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F. M. Chishimba

COURT OF APPEAL JUDGE



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A.N. Patel S.C

COURT OF APPEAL JUDGE