IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 256 of 2022
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

KONKOLA COPPER MINES PLC (In Liquidation) Appellant

AND

HAUYOU (HONG KONG) CO. LIMITED Respondent

CORAM: Chashi, Sichinga and Sharpe-Phiri, JJA
on 27th March 2024 and 5th April 2024

For the Appellant: Mr. Chibeleka and Mr. N. Chaleka of Messrs ECB Legal Practitioners
For the Respondents: Mr. J. Sichinsambwe of Messrs Abercon Chambers

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J U D G M E N T

SHARPE-PHIRI, JA, delivered the judgment of the Court.

Legislation referred to:

1. *The Arbitration Act, No. 19 of 2000 of the Laws of Zambia*

Cases referred to:

1. *Chita Chibesakunda and Abode Properties Limited v J.Z. Morrison (Export) Limited CAZ Appeal No. 105 of 2018*
2. *Nyambe v Total Zambia Limited (SCZ Judgment No. 1 of 2015)*
3. *Konkola Copper Mines Plc v NFC Africa Mining Plc (SCZ Appeal No. 118 of 2006)*
4. *Leopard Ridge Safaris v Zambia Wildlife Authority (SCZ Appeal No. 184 of 2006)*

1.0 INTRODUCTION

1.1 This appeal is against a Ruling issued by Justice I.Z. Mbewe of the Commercial Division of the Lusaka High Court on 21 July 2022. By that Ruling, the learned trial Judge declined the Appellant's application to stay proceedings before her and refer the parties to arbitration. The Appellant was the Defendant in the Court below while the Respondent was the Plaintiff. They will be referred to as they appear in this court.

2.0 BACKGROUND

2.1 The case was initiated in the High Court Commercial Division by Hauyou (Hong Kong) Co. Limited as the Plaintiff (now the Respondent) against Konkola Copper Mines Limited (In Liquidation) as the Defendant.

2.2 The action was brought by writ of summons and statement of claim (*refer to page 21-27 of the Record of Appeal*). Through this action, the Respondent sought the following reliefs:

i. *Payment of the sum of the balance of USD 2,280,281.60;*
ii. *An Order to enter judgment on admission for the sum of USD 2,280,281.60;*
iii. *Damages;*
iv. *Interest pursuant to Section 2 of the Judgment Act, Chapter 81 of the Laws of Zambia;*
v. *Costs;*

vi. *Any other relief by this Honourable Court which it may deem fit and just in the circumstances.*

2.3 In the supporting statement of claim dated 24th August 2020, the Respondent alleged that on 14th December 2017, it entered into a sale and purchase agreement with the Appellant for the sale and purchase of copper cobalt alloys for the total tonnage of 18,000 to 24,000 metric tons to be derived from the Appellant's Nchanga Smelter.

2.4 The parties then amended a clause in the sale and purchase agreement by entering into a Rider agreement and in a clause 11.2 of the agreement, payment was to be made in US Dollars for 100 percent of the provisional values of the payable metals. Interest was to be charged on the number of days of delay at the rate of one month LIBOR plus 3 percent per annum calculated at 360 banking days.

2.5 The Respondent contended that it proceeded to make three advance payments as follows: on 22nd December 2017, the sum of US$ 8,068,828.49; on 2nd February 2018 the sum of US$ 7,542,421.76; and on 19th March 2018, the sum of US$ 7,101,204.20. That the Appellant neglected to make good its undertaking by failing to supply the agreed assays and the balance from the Respondent's three advance payments stood at US$ 1,849,263.65 which attracted a prepayment interest of US$ 272,622.71 as at 2 August 2019. In an attempt to settle ex-curia, the Respondent sent an introductory letter dated 30 April 2020, but the Appellant failed or neglected to respond to the said letter.

2.6 A follow up letter was then sent by the Respondent on 12th June 2020 but no action was taken by the Appellant to either respond or counter propose a meeting for purpose of resolving the matter ex-curia. A letter of demand was then written to the Appellant on 14th June 2020 demanding for payment of US$ 2,280,281.60 outstanding as at 30th June 2020. The Respondent gave the Appellant three (3) days to settle its indebtedness but the Appellant failed to respond.

2.7 On 20th July 2020, the Respondent applied for leave to commence legal proceedings against the Appellant, which was under provisional liquidation. Orders for direction were subsequently issued giving rise to the action in the Court below.

2.8 On 22nd March, the Appellant challenged the propriety of proceedings before the trial Court by filing summons for an order to stay proceedings and refer parties to arbitration on the premise that the sale and purchase agreement contained a dispute resolution clause which required disputes arising therefrom to be resolved by arbitration. This is the application that gave rise to the Ruling subject of the appeal before us.

3.0 DECISION OF THE TRIAL JUDGE

3.1 The trial Judge, in her Ruling of 21st July 2022 concluded at page R11 (found at page 19 of the record of appeal) that the arbitration agreement was incapable of being performed and therefore inoperative.

3.2 The trial Court made this conclusion after considering the dispute settlement and arbitration clause in the parties' agreement also shown at pages 47 to 75 of the record of appeal. The relevant clauses 23.1 and 23.2 of the said agreement provide that;

> ***"23.1 The parties shall in good faith attempt an amicable settlement of any dispute that may arise under this agreement.***
>
> ***23.2 If the parties fail to resolve the dispute as provided in sub-clause 23.1, within 30 days (30) such dispute (including the question regarding existence of the agreement, its validity or termination) shall be referred to and finally settled by arbitration at London Court of International Arbitration and which Rules are deemed to be incorporated by reference into this clause. The arbitration shall be conducted in English Language at London by Arbitral Tribunal consisting of three arbitrators, one to be appointed by each party and third to be appointed by President of London Court of International Arbitration. Any decision or award by arbitration tribunal stating in its award facts of the case and reason for its decision, shall be final and binding on both the parties."***

3.3 In construing the aforesaid provisions, the trial Judge observed, at page R8 of the Ruling appearing at page 16 of the record of appeal, that the clause had a two-step or multi-tiered process. The Court went on to opine that the first step is where a dispute arises under clause 23.1 under which the parties are to attempt an amicable settlement. She went on to hold that the second tier was one provided for in clause 23.2, where, when the parties fail to resolve amicably under clause 23.1 within 30 days, such dispute is to be referred to arbitration. The Court observed that the Respondent had attempted to settle the matter amicably via the correspondences to the Appellant dated 3rd April, 2020 which letter was resubmitted on 10 June 2020, but that the dispute remained unresolved as of 10th July, 2020. The Court further observed that neither party had actualized the second-tier level of dispute resolution as provided in the agreement.

3.4 The trial Judge then went on to hold at page R9 of its Ruling, also appearing at page 17 of the record of appeal that:

> *"In light of clause 23 of Sales and Purchase Agreement reproduced in the preceding paragraphs, it is my finding [that] the time limit within which the matter should have been referred to arbitration expired. Therefore, the arbitration agreement is not capable of being performed and is in fact inoperative."*

4.0 THE APPEAL

4.1 Being dissatisfied with the Ruling of Mbewe J of 21st July, 2022 the appellant filed a notice of appeal and memorandum of appeal on 19th August, 2022 containing the following:

i. *The learned Court below erred in law and fact by holding that the arbitration agreement between the Appellant and the Respondent had become inoperative;*

ii. *The learned Court below erred in law and fact by holding that the Defendant by its conduct, waived its right to stay proceeding and refer the matter to arbitration.*

iii. *Any other grounds that the Appellants might subsequently come up with on Appeal.*

5.0 HEARING OF THE APPEAL

5.1 The appeal was heard before us on 27th March, 2024. All the parties were represented by their respective counsel, as previously mentioned. Counsel for the respective parties relied on their filed arguments during the proceedings.

6.0 OUR DECISION ON THE APPEAL

6.1 We have given considerable attention to the Appellant's grounds of appeal, the record of appeal filed before us as well as the arguments advanced by both parties to this matter. The Appellant filed two grounds of appeal as shown above, but it abandoned the second ground and only argued the first ground of appeal.

6.2 We thus address ourselves to the sole ground of appeal in which the Appellant contends that the learned Court below erred in law and fact by holding that the arbitration agreement between the Appellant and the Respondent had become inoperative. The Appellant has argued that when a Court faced with an application for stay of proceedings and request for referral to arbitration under **Section 10 of the Arbitration**, must enforce an arbitration clause in an agreement, the stay proceedings and refer the parties to arbitration. The Appellant relied on the case of **Konkola Copper Mines Plc v NFC Africa Mining Plc**[1] and the case **Leopard Ridge Safaris v Zambia Wildlife Authority**[2] for this proposition.

6.3 The Appellant argued that the trial Court correctly interpreted the arbitration clause by holding that it provided for a time limit within which the dispute ought to be resolved amicably. That the said dispute resolution clause did not provide a timeframe on which either party could refer the dispute to arbitration after a failed amicable settlement. The Appellants advanced that after the trial Court had correctly interpreted the dispute

resolution clause, it reneged on its conclusion when it went ahead to hold at page R9 (page 17 of the record of appeal) that *'it is my finding that the time limit within which the matter should have been referred to arbitration expired. Therefore, the arbitration agreement is not capable of being performed and it is in fact inoperative'.*

6.4 The Appellant insisted that the trial Court erred when it held that the arbitral clause had become inoperative on account of time having run out when there was no timeframe specified in the arbitration clause.

6.5 The Respondent rebutted by submitting that the trial Court correctly interpreted the arbitration clause by holding that the said agreement had become inoperative. The Respondent relied on the case of **Nyambe v Total Zambia Limited**[3] in which the Supreme Court affirmed that, where an arbitration clause has a timeframe affixed to it, once the time lapses it becomes inoperative.

6.6 Before we consider the contentions of the parties, we first wish to recast the provisions of **Section 10(1) of the Arbitration Act** which gave rise to the application and Ruling before the trial Court below.

6.7 The said **Section 10** 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."

6.8 The import of the said provision in relation to the facts of the case before us was as determined by this Court in the case of **Chita Chibesakunda and Abode Properties Limited v J.Z. Morrison (Export) Limited**[4] 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.* This position was also earlier affirmed by the Supreme Court in the case of **Leopard Ridge Safaris v Zambia Wildlife Authority**. In that case, the Supreme Court held that:

"In consideration of the Respondent's application for the stay of proceedings under Section 10 of the Arbitration Act No. 19 of 2000, we find that the learned trial Judge had no choice but to refer the dispute to arbitration as provided for in the hunting concession agreement."

6.9 The law is well settled around the interpretation and application of Section 10 of the Arbitration Act. The proceedings must be stayed, and parties referred to arbitration where any of the parties makes an application under Section 10 aforesaid. However, this is only in cases where the arbitration agreement is not void, inoperative or incapable of being performed. The

Supreme Court in the case of **Nyambe v Total Zambia Limited** further held that:

> ***"It is clear that even if the Arbitration Act gives a guide on the form of an arbitration agreement, it does not dictate what terms the parties should include in their arbitration clause. We have no doubt that the parties before us were within their contractual rights when they agreed to limit arbitration to any disputes arising during the continuance of the agreement and to limit the time period within which the arbitration could be commenced.***
>
> ***We have no doubt that at the time the dispute between the parties arose, and indeed at the time the matter was referred to arbitration, the arbitration clause had become inoperative and incapable of being performed. In view of all the foregoing, we find that the learned Judge erred when she stayed the proceedings before her and referred the matter to arbitration.***
>
> ***Therefore, we set aside the order of the learned Judge. Instead we order that the matter be heard by the High Court before another Judge. All in all, we allow the appeal and award costs to the appellant to be taxed in default of agreement"***

6.10 In the ***Nyambe case*** mentioned above, the parties had an arbitration clause which required the parties to appoint arbitrators within 14 days from the date of expiry of written notice. The Supreme Court held that such an arbitration clause had become inoperative for failure to actualize it within the 14-day period agreed by the parties to the agreement. Consequently,

the matter was referred to the High Court for trial before another Judge.

6.11 We now task to consider the issue before us. We do agree with the observation of the trial Judge that the question of whether to stay proceedings before her and refer the parties to arbitration as provided under **Section 10 of the Arbitration Act** lay in the construction of clause 23 of the Sale and Purchase Agreement, which clause constituted a dispute resolution provision. A review of clause 23 of the arbitration agreement spells out under clause 23.2 that *'if the parties fail to resolve the dispute as provided in sub-clause 23.1, within 30 days (30) such dispute ... shall be referred to and finally settled by arbitration at London Court of International Arbitration'*. Our interpretation on the above clause is that the time frame of thirty (30) days being attributed to the period within which the matter was to be referred to arbitration. In relation to the facts of this case, there is no evidence of any thing having transpired after the Respondent sent correspondence to the Appellant on 30 April 2020 and 10th June 2020 until the Respondent commenced the action in the Court below on 24th August 2020.

6.12 We, therefore, affirm the trial Judge's conclusion that the clause had a time frame affixed to it and therefore, the arbitration clause had become inoperative for failure to actualize it within 30 days from date of failure of the amicable settlement attempt initiated by correspondence of the Respondent on 30 April 2020. As in the **Nyambe** case above, our view is that the arbitration clause required the parties to actualize it within 30 days

from date of failure of the amicable settlement. This ground of appeal therefore fails for the said reasons.

7.0 CONCLUSION

7.1 Ground one of appeal having failed and the Appellant having abandoned their second ground of appeal, we order and direct that the matter proceed for hearing before the same trial Judge of the High Court Commercial Division. The trial Judge shall issue fresh orders for directions accordingly.

7.2 We further order that the costs of this appeal be borne by the Appellant, and to be paid forthwith. The same to be taxed in default of agreement.

J. Chashi
COURT OF APPEAL JUDGE

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

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE