Library

IN THE SUPREME COURT OF ZAMBIA **SCZ/8/069/2013**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

METALCO INDUSTRIES LIMITED **APPELLANT**

AND

NUBIAN RESOURCES LIMITED **RESPONDENT**

CORAM: Mwanamwambwa, Ag/DCJ. Muyovwe and Hamaundu J.J.S.

On 24th July, 2013 and 23rd July 2014

For the Appellant: Mr. N. Yalenga–Messrs. A. M. Wood & Company.

For the Respondent: Mr. S. Chisenga–Messrs. Corpus Legal Practitioners.

JUDGMENT

Mwanamwambwa J, delivered the Judgment of the Court.

LEGISLATION REFERRED TO:

(1) **SECTION 12 (4) AND (5) OF THE ARBITRATION ACT, NUMBER 19 OF 2000**

(2) **RULE 10 OF THE ARBITRATION (COURT PROCEEDINGS) RULES 2001**

When we heard this matter on the 24th July, 2013, we dismissed this appeal and said that we would give our reasons later. This we now do.

Brief facts leading to the appeal are that the appellant appealed against the ruling of the learned trial judge in which she ordered that an arbitrator be appointed by an independent lawyer within 14 days. The trial judge further ordered that in the event of default, the court would appoint the arbitrator to arbitrate on the dispute under the contract between the parties. This order was made following an application by the respondent. The appellant lodged an appeal challenging that decision.

The respondent then filed an application before a single judge seeking to have the appeal dismissed for irregularity or incompetence on the ground that no appeal lies against a decision on the appointment of an arbitrator. The single judge ruled that the application should be made before a full bench in open court. The respondent made its application before the full bench by the notice of motion before us. The motion was supported by an affidavit.

The appellant opposed the respondent's application on the grounds that the agreement containing the arbitration clause was between the appellant and a company called ICS Copper Systems Limited. The respondent was not party to that agreement. In any case the appeal related to matters other than the appointment of an arbitrator, namely the inoperativeness or otherwise of the arbitration clause.

The respondent filed an affidavit in reply in which it stated that the appellant was aware that the respondent underwent a name change where it was formerly called ICS Copper Systems Limited. A certificate of Change of Name was exhibited to the affidavit. That the issue of the respondent's name was an afterthought on the part of the appellant because it was never raised in the court below. The ruling of the trial judge clearly adjudicated on the appointment of the arbitrator only.

The respondent also filed heads of arguments in support of this motion. The gist of their argument was that **Section 12 (5) as read with section 12(4) of the Arbitration Act, Number 19 of 2000** does not allow a party to appeal against a decision made by the court in respect of the appointment of an arbitrator. It was argued that since the parties had requested the court to make the appointment of an arbitrator after failing to reach an agreement, they were bound by the court's decision which was final and could not be appealed against. That the appellant's appeal flew in the teeth **of Section 12 Sub sections (4) and (5) of the Arbitration Act, Number 19 of 2000**.

At the hearing of the appeal Mr. Chisenga relied on the affidavit in support of the notice of motion, the affidavit in reply and the respondent's heads of arguments. On the other hand, Mr. Yalenga relied on the affidavit in opposition particularly paragraph 7.

We scrutinized the affidavits filed by both parties as well as, the ruling of the learned trial judge which was subject of the appeal. We also analyzed the respondent's written heads of arguments which were presented before us. The respondent's motion was anchored on the provisions of **Section 12 subsections (4) and (5) of the Arbitration Act, Number 19 of 2000** which provides as follows:

"**12. (4) Where, under an appointment procedure agreed upon by the parties-**

(a) a party fails to act as required under such procedure; or

(b) the parties, or two arbitrators, are unable to reach an agreement, expected of them under such procedure; or

(c) a third party, including an arbitral institution, fails to perform any functions entrusted to it under such procedure,

Any party may request the court to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by subsection (3) or (4) to the court or to an arbitral institution shall not be subject to appeal."

When we perused through the ruling of the learned trial judge, it was so apparent to us that the appellant's appeal squarely fell within the provisions cited above. We say so because the ruling categorically stated that respondent had applied for an order appointing an impartial arbitrator pursuant to **Section 12 of the Arbitration Act, Number 19 of 2000 and Rule 10(1) of the Arbitration (Court Proceedings) Rules 2001.** For the avoidance of doubt, **Rule 10 of the Arbitration (Court Proceedings) Rules 2001,** makes provision for the mode of application for the appointment of an arbitrator. We have no doubt that this case was well within the provisions of **Section 12 (4) (b) of the Arbitration Act, Number 19 of 2000** in that parties failed to reach an agreement on the appointment of an arbitrator under the appointment procedure they agreed upon. The court granted the application by the respondent. Under **Section 12 (5) of the Arbitration Act, Number 19 of 2000** cited above, a decision of the court on the appointment of an arbitrator is not subject to appeal.

Therefore, the appellant's purported appeal on other matters relating to the inoperativeness or otherwise of the arbitration clause is unfounded. It was incompetent for the appellant to appeal against those other matters when the trial judge's ruling only dealt with the appointment of an arbitrator which could not be appealed against. The appellant also advanced a feeble argument that the respondent was not

party to the agreement which contained the arbitration clause. However, that argument was rebutted by the affidavit in reply which showed that the respondent was party to the agreement except that it had changed its name. We were satisfied with the Certificate of Change of Name which was exhibited to the affidavit in reply. In fact, the appellant was fully aware of the change of name and this was evident from a letter which was previously written by the appellant's lawyers to the respondent.

It was for the foregoing reasons that we dismissed this appeal. Costs to follow the event, to be taxed, in default of agreement.

.....
M.S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

.....
E.C. MUYOVWE
SUPREME COURT JUDGE

.....
E. M. HAMAUNDU
SUPREME COURT JUDGE