IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 16/2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: ARTICLE 16(3) OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) MODEL LAW, SCHEDULE I TO THE ARBITRATION ACT NO. 19 OF 2000 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: REGULATION 11(1) (c), 2 AND 3 OF THE ARBITRATION (COURT PROCEEDINGS) RULES STATUTORY INSTRUMENT NO. 75 OF 2001

BETWEEN:

VICTORIA FINDLAY HUWILER	**APPELLANT**
AND	
CPD PROPERTIES LIMITED	**1ST RESPONDENT**
CPD INVESTMENTS LIMITED	**2ND RESPONDENT**
CHARLES MANDY DAVY	**3RD RESPONDENT**

Coram: Mchenga DJP, Mulongoti and Lengalenga, JJA

On 24th April, 2018 and 1st August, 2018

For the appellant: *Mr. K. Nchito of Kapungwe Nchito Legal Practitioners*

For the respondent: *Mr. M.M Mundashi SC & Mr. C. Salati of Mulenga Mundashi Kasonde Legal Practitioners*

J U D G M E N T

MULONGOTI, JA, *delivered the Judgment of the Court.*

Cases referred to:

1. **Savenda Management Services Limited v. Stanbic Bank Zambia Limited SCZ Selected Judgment No. 39 of 2017**
2. **Cash Crusaders Franchising Pty Ltd v. Shakers and Movers Zambia Limited (2012) 3 ZR 174 (HC)**
3. **Stephen Mwaura Njunguna v. Douglas Kamau Ngotho Civ. Appeal No. 90 of 2005 (Kenya)**
4. **Paolo Marandolo and 2 others v. Gianpietro Milanese and 4 others SCZ Appeal No. 248 of 2007**
5. **Matildah Mutale v Emmanuel Munaile (2007) ZR 188**
6. **Mususu Kalenga Building Limited and another v Richman's Money Lenders Enterprises SCZ Judgment No. 4 of 1999**
7. **Heyman v Darwins (1942) 1 ALL ER 337 (HL)**
8. **Ody's Oil Company Limited v Attorney General and Constantinos James Popoutsis (2012) 1 ZR 164 (SC)**
9. **Anzen Limited and others v Hermes One Limited (2016) UK PC 1**

Legislation referred to:

1. **The Arbitration Act No.19 of 2000**
2. **UNCITRAL Model Law**

This is an appeal against a ruling of the High Court Commercial List, dated 13th October, 2017, which set aside the Arbitrator's award on jurisdiction. The background to this appeal is that on 2nd April, 2009, the appellant and the 2nd respondent entered into a Shareholders Agreement (hereafter, the first SHA), to govern their

relationship as shareholders in the 1st respondent, (CPD Properties Limited). Clause 9 of the first SHA contained an arbitration clause in the following terms:

> *"9.1 Should any dispute arise between the shareholders in connection with-*
>
> *9.1.1 the formation or existence of*
>
> *9.1.2 implementation of*
>
> *9.1.3 the interpretation of the provisions of*
>
> *9.1.4 the parties' respective rights and obligations in terms of or arising out of or the breach or termination of*
>
> *9.1.5 the validity, enforceability, rectification, termination or cancellation whether in part of this agreement or any document furnished by the parties pursuant to the provisions of this agreement or which relates in any way to any matter affecting the interests of the parties in terms of this agreement then that dispute shall, unless resolved amongst the parties to the dispute, be referred to and be determined by arbitration in terms of this clause.*
>
> *9.2 Any party to this agreement may demand that a dispute be determined in terms of this clause by written notice given to the other parties..."*

Subsequently, there was an addendum executed as part of the first SHA. The parties to the addendum were the 1st respondent, (CPD Properties Limited), the 2nd respondent, (CPD Investments Limited), the 3rd respondent, (Charles Davy) and the appellant, (Victoria Findlay Huwiler), thus incorporating the 1st respondent, CPD

Properties Limited and the 3rd respondent, (Charles Davy), to the earlier agreement.

On 29th April, 2010, the appellant entered into a Share Purchase Agreement (SPA) with the 2nd respondent, (CPD Investments Limited) and Renaissance Roma Limited. By clause 4.4 (a) (ii) of the SPA, it was agreed that the first SHA dated 2nd April, 2009 between the appellant and the 2nd respondent and the addendum thereto were terminated. The SPA also contained an arbitration agreement in clause 19.2, in the following terms:

> ***"Any party may give either party written notice of a dispute under this Agreement. The dispute shall be referred to, and finally settled by arbitration in London conducted in the English Language under the rules of the London Court of International Arbitration. Each Party shall nominate one arbitrator and the two nominated arbitrators shall appoint the third arbitrator, who shall act as chairman of the tribunal."***

After executing the SPA, the appellant entered into a fresh shareholders' agreement (2nd SHA) with the 2nd respondent, (CPD Investments Limited), and Renaissance Roma Limited, also dated 29th April 2010, which was the new agreement to govern the

shareholders' relationship. Thereafter, the appellant and the 1st, 2nd, and 3rd respondents together with Renaissance Roma Limited executed a Deed of Termination of the 1st SHA pursuant to clause 4.4 (a) (ii) of the SPA.

A dispute arose between the parties. The appellant sued the respondents in the High Court under cause number 2014/HPC/0182. The defendants to the action were the 1st, 2nd, and 3rd respondents as 1st, 2nd and 3rd defendants, together with Shawn Donald Davy, Andrew Guy Howard and Munakupya Hantuba as the 4th, 5th and 6th defendants, respectively.

At a status conference held on 4th September, 2015, the trial Judge who we shall refer to in this Judgment as the first Judge, moved *suo mutu*, and referred the parties to arbitration on the basis that all the agreements from which the dispute arose, had an arbitration clause. The parties engaged in correspondence to appoint an arbitrator. On 2nd March, 2016, Mr. Geoffrey Simukoko was appointed sole arbitrator and he accepted the appointment on the basis of the first SHA.

Following the arbitrator's appointment, the respondents raised issue with the arbitrator's jurisdiction on the ground that the 4th, 5th, and 6th respondents were not party to the SPA and first SHA, as they were not shareholders in the 1st respondent, at the time of execution of the agreements. In that regard, parties made oral and written representations before him. On 18th August, 2016 the sole arbitrator rendered an award in which he ruled that his appointment was valid and that he had jurisdiction to hear and determine the dispute. In addition, the arbitrator severed the 4th and 5th respondents from the proceedings as they were not parties to the first SHA. The costs were reserved to the final award. This prompted the respondents to this appeal to institute fresh proceedings in the High Court Commercial List Registry under cause number 2016/HPC/458 to challenge the arbitrator's award on jurisdiction. The action was commenced by Originating Summons pursuant to **Article 16(3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law First Schedule of the Arbitration Act as read with Regulations 11(c), 2 and 3 of the Arbitration Court Proceedings Rules.** This

matter was allocated to a different Judge who we shall refer to as the second Judge.

After hearing the matter, the second Judge found that clause 9.6 of the arbitration agreement in the first SHA on which the arbitrator relied to determine his jurisdiction and pursuant to which the parties under cause number 2014/HPC/182 were referred to arbitration by the first Judge, though valid was inoperative and incapable of being performed. The ratio being that the other parties to cause number 2014/HPC/182, namely Shawn Donald May, Andrew Guy Howard and Munakupya Hantuba were not parties to the first SHA and thus not bound by the terms of the arbitration agreement and ultimately not bound by the outcome of the arbitral proceedings between the respondents and the appellant. The second Judge accordingly set aside the arbitrator's award, hence the present appeal.

The appellant has raised four grounds of appeal as follows:

1. ***The court below erred in fact and law and fell in grave error when it set aside the arbitrators award on jurisdiction dated 18th August, 2016 because the court cannot stay the award of an***

arbitrator and had no jurisdiction to stay that which it had not rendered.

2. ***The court below erred in fact and law, and fell in grave error and was misdirected when it set aside the arbitrator's award on jurisdiction dated 18th August, 2016 because it had no jurisdiction to interfere with the decision of the judge who sent the matter to arbitration under cause number 2014/HPC/0182.***
3. ***The court below erred in fact and law and fell in grave error when it did not specify and make a definitive order concerning the matter under cause number 2014/HPC/0182 after staying the arbitrators award on jurisdiction dated 18th August, 2016 leaving matter the under cause number 2014/HPC/0182 in abeyance.***
4. ***The court below erred in fact and law in awarding costs to the respondents when the appellant had properly commenced the action under cause number 2014/HPC/0182 and the judge in that matter referred the matter to arbitration and the court has condemned the appellant in costs for a decision made by a judge under cause number 2014/HPC/0182.***

Learned counsel for the appellant also filed the appellant's heads of argument. In arguing ground one, counsel submits that the reliefs that were granted by the court below were improperly before it for lack of jurisdiction because under **section 20 (1) of the Arbitration Act,** an award made by an arbitral tribunal is final and binding on the parties. Additionally, that the basis upon which the respondent challenged the arbitral award was not provided under

section 17 (2) of the Arbitration Act which specifies instances when an award can be challenged. Therefore, the proceedings were improperly before the second Judge for want of jurisdiction.

Furthermore, that arbitration is resorted to where the parties do not want to subject resolution of their disputes to court process which is what the parties did in this case. The cases of **Savenda Management Services Limited v. Stanbic Bank Zambia Limited**[1] and **Cash Crusaders Franchising Pty Ltd v. Shakers and Movers Zambia Limited**[2] were cited to support this position.

Regarding ground two, counsel contends that the second Judge erred when it interfered with the decision of another Judge of equal jurisdiction who initially referred the matter to arbitration *suo mutu* as all High Court Judges have, in terms of **section 3 of the High Court Act**, equal power and authority. If the respondent was dissatisfied with that decision, they could have appealed as opposed to subjecting themselves to the arbitral process and when the award on jurisdiction was not in their favour, they decided to commence another action before another judge of equal jurisdiction.

The Kenyan case of **Stephen Mwaura Njunguna v. Douglas Kamau Ngotho**[3] is relied upon where it was held that-

> ***"The learned judge had no jurisdiction to determine a matter that was decided by a fellow judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J, a judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court not by a judge of the high court as the appellant sought."***

According to counsel, the court below erred in law and fact to entertain the matter because it had no jurisdiction to determine and set aside the arbitral award on jurisdiction because the matter was sent for arbitration by another court of equal jurisdiction. The avenue that was available to the respondents, if they disagreed with the decision of sending the matter to arbitration, was to appeal and not commencing another action before another judge.

In ground three, counsel contends that the court below erred when it did not specify and make a definitive order concerning the matter under cause number 2014/HPC/0182 which was left in abeyance. It is submitted that the decision of the court below resulted in an absurdity because the dispute between the parties is not being

resolved by either arbitration or litigation. The parties have been left with no forum and in a limbo.

Counsel referred us to the **Handbook of Arbitration practice** 2nd edition by **Robert Bernstain and Derek Wood** at para 27.7.1 on the principle of *res judicata*. To that effect, it is submitted that the parties have been before three separate forums dealing with the same subject matter. Thus, the issues are *res judicata*. Relying on the case of **Paolo Marandolo and 2 others v. Gianpietro Milanese and 4 others**[4], that the purpose of arbitration is to ensure that matters are disposed of speedily, it is argued that the parties were bound by arbitration and if the respondents were aggrieved, they should have appealed.

In ground four, counsel argues that the appellant is being punished in costs for defending a decision of the court which had original jurisdiction. Therefore, the costs were not awarded judiciously and should be set aside.

The respondent's counsel filed heads of argument in response to the appellant's arguments. In response to grounds one and two, counsel submits that there was no order made by the second Judge in the court below that the arbitrator's award be stayed. It is contended that the respondent's application cause 2016/HPC/458 was pursuant to Article 16 (3) of the UNCITRAL Model Law which gives an arbitral tribunal authority to rule on its own jurisdiction. Hence, the court below was well within its jurisdiction to address the respondent's application to set aside the arbitral award.

It is the further submission of counsel that arising from the wording of Article 16 (3) of the UNCITRAL Model Law, it is inevitable for this court to determine whether the appeal is competently before it. Counsel went on to submit that this appeal should not be entertained because when the arbitrator assumed jurisdiction in the primary proceedings, the respondents challenged his jurisdiction. When the arbitrator ruled that he had jurisdiction, the appellants swiftly proceeded to file an application that culminated into these proceedings. When the court made its ruling on the application anchored on Article 16 (3) of the UNCITRAL Model Law,

the full provisions of Article 16(3) were triggered and such a decision cannot be appealed against. Further, that the use of the word ***'shall'*** in Article 16 (3) connotes that the provision is mandatory. The case of **Matildah Mutale v Emmanuel Munaile**[5] was cited as authority on the interpretation on the use of the word ***'shall'.***

Counsel distinguished the provisions of **Article 16(3) of the UNCITRAL Model Law and section 20 (1) of the Arbitration Act** arguing that the former relates to an award on jurisdiction while the latter relates to an award on the merits. To that effect, it is argued that the respondent had the liberty to rely on Article 16 (3) and was not barred by **section 20 (1) of the Arbitration Act**.

It is further submitted that the appellant's argument that by setting aside the decision of the arbitrator, the second Judge actually interfered with the first Judge's decision is self-defeating because the first Judge simply ordered that the matter goes to arbitration which meant that the matter was not heard on the merits. The second Judge did not interfere with the decision by the first Judge,

he simply decided that the matter was not competent to be determined by an arbitrator because the 4th, 5th and 6th respondents were not party to the arbitration agreement. This did not amount to reopening, reconsidering or interfering upon a matter already determined by another court. Counsel pointed out that the appellant's argument does not address the fact that the first Judge in the primary proceedings mistakenly assumed that the 4th, 5th and 6th respondents were party to the arbitration agreement when in fact not. In addition, the arbitrator's decision to sever the 4th, 5th and 6th respondents is bizarre because the issues affecting them would remain undetermined.

Relying on the case of **Mususu Kalenga Building Limited and another v Richman's Money Lenders Enterprises**[6], counsel submits that the contention that the recourse available to the respondent was appeal if they were dissatisfied with the first Judge's decision to refer the matter to arbitration is untenable. The issue was not raised either before the arbitrator or the court below and cannot be raised at appeal stage.

Furthermore, counsel contends that the appellant's argument that the challenge to an award should be under **section 17 (2) of the Arbitration Act** is incorrect. This is because a party challenging an award on its merits, can do so under section 17 (2), while a challenge on the arbitrator's jurisdiction, is specifically provided for under Article 16 (3) of the UNCITRAL Model Law. What is being challenged in this appeal is an award on jurisdiction, and the cases cited by the appellant on **section 17 (2) of the Arbitration Act** are therefore inapplicable.

As regards ground three, counsel argues that following the decision by the second Judge, it follows that the case now reverts to the first Judge or the judge having conduct of the primary proceedings and the suggestion that the case is in abeyance is grossly misleading.

In response to ground four, it is submitted that the court below had discretion to grant costs and the appellant has not demonstrated that the court below did not act judiciously. Further, that the appellant has not presented any argument steeped in law which

would allow for this court to overturn the decision on costs by the court below.

At the hearing, Mr. K. Nchito, who appeared for the appellant reiterated his arguments as contained in the appellant's heads of argument with emphasis on the point that the appeal is competent and properly before us. Mr. Mundashi SC, who appeared for the respondents also relied on and recapped the respondent's heads of argument. He stressed that the matter was not heard on its merits but was dealt with pursuant to Article 16 (3) of the UNCITRAL Model Law, which provides that the court's decision on a challenge of the arbitrator's jurisdiction is final and there is no appeal on that decision.

We have considered the arguments and submissions by both counsel. The central issue this appeal raises is whether the High Court decision on the arbitrator's jurisdiction can be appealed against. Key to the issue are the questions whether the High Court can stay arbitral proceedings and whether the second Judge, by ruling that the arbitrator had no jurisdiction because the 4th, 5th

and 6th respondents were not party to the arbitration agreement, had thereby interfered with the order by the first Judge referring the matter to arbitration.

It was not disputed that the first Judge, on his own motion, referred the matter cause No. 2014/HPC/0182 to arbitration. Once the arbitrator was appointed, the issue of his jurisdiction arose such that the respondents refused to attend the preliminary meeting. This is outlined in the arbitrator's award at page 290 of the record of appeal. The arbitrator then invited the parties to appear before him and submit on the preliminary issues which had arisen in relation to his jurisdiction. The issues centered on Article 16 (1) of UNCITRAL Model Law. Article 16(1) provides that the arbitral tribunal may rule on its own jurisdiction. After considering the submissions by the parties, the arbitrator, in his award on jurisdiction, declared first that his appointment was valid. Second, he had jurisdiction to decide on the substantive matters in dispute arising from the first SHA. Lastly that the 4th, 5th and 6th respondents, who are non parties to the first SHA, were beyond his jurisdiction.

This then prompted the respondents to move the High Court by Originating Summons pursuant to Article 16 (3) of the UNCITRAL Model Law, contending that the first SHA upon which the arbitrator had established his jurisdiction had been terminated and was thus inoperative and incapable of being performed. The High Court Judge (second Judge) found that the Arbitration Agreement in the first SHA though valid, was non operative and not capable of being performed due to the fact that the other parties to the dispute (4th, 5th and 6th respondents), were not parties to the first SHA and the addendum, thereto, which contained the arbitration clause that the arbitrator relied on to establish his jurisdiction.

It is clear therefore, that the appeal revolves around Article 16 in particular Article 16(3) of the UNCITRAL Model Law. We now turn to an analysis of Article 16 (3) against the backdrop of these facts. Article 16(3) is couched thus-

"The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of the ruling, the Court

specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award... *(Underlined for emphasis)*

It is clear to us that in *casu*, the issue of the arbitrator's jurisdiction was dealt with as a preliminary issue. Article 16 (3) is clear that after the arbitrator rules on his jurisdiction as a preliminary issue (or on the merits) any party may request, within 30 days, the Court to decide on the matter and the decision of the Court shall be subject to no appeal.

This is precisely what the respondent did when it issued Originating Summons in the High Court pursuant to Article 16(3). The High Court then decided the matter via ruling of 13th October, 2017 subject of this appeal. We must state here that in terms of Article 16 (2), a party is not precluded from raising a plea that an arbitrator has no jurisdiction even though he appointed the arbitrator or participated in the appointment.

Article 16 (3) clearly stipulates that once the Court (High Court in this case,) decides on the issue of the arbitrator's jurisdiction, there can be no appeal on the matter.

We would therefore agree with State Counsel that this appeal is incompetent. It would be inimical to the clear provision of the Model Law, for us to entertain this appeal.

We are cognisant of Mr. K. Nchito's arguments that the court below erred when it set aside the arbitrator's award on jurisdiction and that it cannot stay that which it had not rendered. At page 321 of the Record of Appeal, the stay of the arbitral proceedings was granted pending an application to stay the arbitral proceedings. The record is not showing what became of this application. It is clear though that the arbitral proceedings were indeed stayed.

However, we are of the firm view that the issue of the stay being irregular has been raised too late in the day. Article 16 (3) is clear that during the hearing or request for the Court to determine the application on jurisdiction of the arbitrator, the arbitral tribunal

may continue the arbitral proceedings. It was therefore, wrong for the High Court Judge to have stayed the arbitral proceedings as the arbitrator is empowered to hold parallel proceedings.

Furthermore, it is settled law that an arbitration agreement/clause survives termination of the main agreement as canvassed by Mr.K Nchito and also found by the High Court. See **Heyman v Darwins**[7].

This entails that the arbitrator had jurisdiction and he could have continued with the arbitral proceedings. He even had the power to sever the 4th, 5th and the 6th respondents or have them consent to being parties to the proceedings. We must state that unlike the Courts which cannot refer to arbitration non parties to the arbitration agreement or even sever the parties, as held in **Ody's Oil Company Limited v Attorney General and Constantinos James Popoutsis**[8], the arbitrator can hear the non parties once they consent or even sever the parties. Thus, it follows that the first Judge should not have referred the matter to arbitration because the 4th, 5th and 6th respondents were not parties to the arbitration

agreement. However, once this was done the arbitrator could proceed as he did.

Be that as it may, the arbitral proceedings were stayed. After the stay, the appellant did nothing to challenge the stay which was contrary to Article 16 (3). The appellant, instead opted to wait for the outcome of the challenge on the arbitrator's jurisdiction in Court. When the High Court determined that the arbitrator had no jurisdiction, that is when the appellant decided to appeal and also challenge the stay. Rightly or wrongly, there can be no appeal to this ruling especially the determination that the arbitrator had no jurisdiction in line with Article 16 (3). This is one of the drawbacks of arbitration.

The parties agreed to be bound by the arbitral rules when they executed the arbitration agreement. It is equally worth mentioning that had the arbitrator proceeded and delivered an award on the merits, in the face of the pending ruling on jurisdiction in the High Court, the parties would have been bound by the award even if the Court later found that the arbitrator had no jurisdiction. This is so

because an award on the merits is final and binding and to which there can be no appeal in terms of **section 20(1) of the Act**. This is the nature of arbitration to which the parties consented to and to which the Courts can only interfere in limited circumstances.

The House of Lords observed in **Anzen Limited and others v Hermes One Limited**[9] that consent is the hallmark of arbitration. The appellant is bound by the rules of arbitration including Article 16 (3) of the Model Law, to which it consented to once it agreed to arbitrate.

Accordingly, the High Court is empowered by Article 16(3) to set aside the arbitrator's award on jurisdiction, if it is established that he had none. In *casu,* the second Judge found that the arbitrator had no jurisdiction on a preliminary issue and not an award on the merits which can only be set aside in line with section 17 of the Act. In this case therefore, section 17 does not arise as canvassed by Mr. Mundashi, SC.

In light of the foregoing, the net result is that the appeal is incompetent and not properly before us. It is accordingly dismissed.

The parties are to revert to the High Court Commercial List for litigation under cause 2014/HPC/0182 before a different Judge. That matter is still active as section 10 of the Act, which empowers the High Court to refer matters to arbitration, stipulates that the proceedings before the court are stayed and not dismissed.

In the circumstances of this appeal, we order each party to bear own costs in this Court.

C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

J.Z.MULONGOTI
COURT OF APPEAL JUDGE

F.M. LENGALENGA
COURT OF APPEAL JUDGE