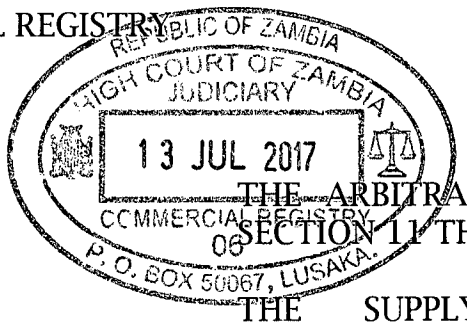
IN THE HIGH COURT FOR ZAMBIA 2017/HPC/0247
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



IN THE MATTER OF: THE ARBITRATION ACT OF ZAMBIA, SECTION 11 THEREOF

IN THE MATTER OF: THE SUPPLY AGREEMENT FOR CONCRETE AND AGGREGATE DATED 21ST JUNE, 2015

IN THE MATTER OF: ORDERS 27 RULE 4 AND 30 RULE 11 OF THE HIGH COURT RULES A.R.W. ORDER 29 OF RULES OF THE SUPREME COURT, 1999 EDITION

BETWEEN

KEREN MOTORS LIMITED APPLICANT

AND

DAEWOO ENGINEERING AND CONSTRUCTION COMPANY LTD RESPONDENT

CORAM: Hon. Lady Justice Dr. W.S. Mwenda in Chambers at Lusaka this 13th day of July, 2017

For the Applicant : Mr. B. Gondwe of Messrs Buta Gondwe and Associates appearing with Mr. L. Mudenda of Messrs. Kalokoni and Company.

For the Respondent : Mr. J. Akafumba of Messrs Mak Partners appearing with Mr. P. Chuula of Messrs Chibesakunda and Company and Mr. M. Cheelo of Mak Partners

RULING

Cases referred to

1. *Bristol Corporation v. Aird (1913) A.C 241*
2. *Numerical Registered Company v Simpson (1875) 19 EQ 462.*
3. *Krige and Another v Christian Council of Zambia (1975) Z.R. 152*
4. *Ahmed Abad v Turning and Metals Limited (1978) ZR. 86*
5. *Channel Tunnel Group Limited v. Balfour Beatty Construction Limited (1993) A.C. 334*
6. *Shell and BP Zambia Limited v. Conidaris and Others (1975) ZR 74.*
7. *Turnkey Properties v. Lusaka West Development Limited & Others (1984) ZR. 85.*

8. *Chrispin Livali, Saviour Chisimba, Stephen Mubanga Chitalu and 26 Others v Edward Mumbi, Michael Chilufya Sata and the Attorney General - SCZ Judgment No. 7 of 2009.*

Legislation referred to:

1. *Order 27, rules 1 and 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
2. *Order 29 of the Rules of the Supreme Court, 1999 Edition*
3. *Sections 10 and 11 of the Arbitration Act, No. 19 of 2000.*

This is an application by the Applicant for an order of Mandatory and Prohibitory Injunction against the Respondent pursuant to Order 27 rules 1 and 4 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 29 of the Rules of the Supreme Court, 1999 Edition. This application was filed in Court on 5th June, 2017 together with an Originating Summons supported by a combined affidavit of even date verifying the Originating Summons and Ex-parte Summons for Mandatory and Prohibitory Injunction.

The remedies sought in the Originating Summons were: -

"1. That the Respondent be ordered to adhere to the terms of the Supply Agreement dated 21st June, 2015 and to give full effect to the Arbitration Clause therein, namely, Clause 16.1 with respect to amicable resolution of all disputes, controversies or differences in relation to the Supply Agreement or submit thereafter any subsisting disputes to arbitration.
2. That in the meantime, the Respondent be restrained by way of injunction whether by itself, its agents or servants until determination of this matter as per 1 above.
3. Costs."

In the combined Affidavit in Support of Originating Summons and Ex-parte Summons for Interlocutory Injunction deposed to by Masautso Lungu, the Director of Finance in the Applicant Company, the deponent asserted that in 2015 the Applicant executed a Supply Agreement with the Respondent for the

maintenance of a quarry for supply of rock, crushed aggregate, concrete and sand to the Kazungula Bridge Project as evidenced by exhibit "ML1" annexed to the affidavit.

The affidavit discloses further that it was a term of the agreement that it would be governed by the Laws of Zambia and that any disputes would be settled, if not amicably, by arbitration. The agreement was effected and operative until purportedly terminated on 21st May, 2017 by the Respondent on the ground that the Applicant had been placed under receivership. In a bid to resolve the issue amicably, the Applicant wrote to the Respondent expressing the view that the appointment of the Receiver on some of the Applicant's assets was wrongful and unjustified and that an injunction had in fact been secured to this effect.

It was the Applicant's further evidence as deposed by Masautso Lungu that in its letter of 27th May, 2007 the Respondent insisted, despite the fact that the Applicant had challenged the appointment of the Receiver by Zambia National Commercial Bank Plc, that their termination of the Supply Agreement still stood and copied the said letter to its advocates implying that the termination was final and also that a dispute or disputes had arisen.

The Applicant also averred that it is not true that the receivership affected key assets funded by First National Bank which is one of the reasons why the injunction was in fact granted and challenged in cause Number 2017/HPC/0231 but First National Bank did not recall its loan and the Applicant is confident that the Kazungula Bridge Project works will be completed as scheduled.

It was the Applicant's further evidence that it had given an assurance to the Respondent that Kazungula Project works would not be affected adversely and/or as alleged by the Respondent or feared by them as the Applicant had taken steps to remedy the unwarranted receivership which the Respondent was deliberately and adamantly turning a blind eye to. Additionally, that the

Respondent's notice of termination had not complied with the termination clause in the Supply Agreement executed by the parties.

The Applicant averred that the Respondent was also in breach by disregarding and not giving effect to the Supply Agreement and working towards an amicable solution and submitting to an arbitral process if the amicable solution is not possible. That unless restrained and compelled to adhere to the Supply Agreement the Respondent threatens and intends to continue breaching the terms of the Supply Agreement as it relates to the termination of the said agreement and/or its arbitration clause and the Applicant stands to suffer irreparable damage and also a run by all its other creditors which will affect is operations adversely

At the *inter-partes* hearing of the application for injunction, learned Counsel on both sides made oral submissions. Mr. Gondwe, Counsel for the Applicant submitted that his client would rely on the four affidavits filed on various dates in support of the application and Skeleton Arguments filed on 5th June, 2017 and 22nd June, 2017. The gist of his submission was that the agreement executed by the parties subject of litigation requires that all disputes, controversies and differences should be amicably solved and if that fails, to be resolved by arbitral process. Counsel submitted that there is no denial that the clause is there and also that there are disputes between the parties. Further, that there is a misconstruction by the Respondent of the termination clause in that according to the Applicant only one set of circumstances could induce immediate termination of the contract without notice of 14 days and that is receivership on account of insolvency. It was Counsel's further submission that either party could invoke the arbitration clause. That the parties should not burden the Court in dealing with substantive issues but rather that the Court should maintain the *status quo* and refer the matter for determination by arbitral process.

Making submissions in support of reference of the matter to arbitration, Mr. Gondwe cited the case of ***Bristol Corporation v. Aird***[1] where Lord Moulton

stated that an arbitral clause is a substantial portion of the contract and requires a good reason if it has to be departed from.

According to Counsel, the celebrated case of ***Numerical Registered Company v Simpson***[2], brought out the principle that if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty to contract and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice. Counsel submitted that this is precisely what they are seeking from this Court. Counsel also referred this Court to the case ***Krige and Another v Christian Council of Zambia***[3] where the Supreme Court held that there can be no estoppel to provisions of statute. According to Counsel, in the present case the parties contracted freely that the matter in dispute be submitted to arbitration if an amicable solution failed, and therefore the Court has no jurisdiction to override Parliament.

In opposing the application Mr. Akafumba, Counsel for the Respondent submitted that they would be relying on the Affidavit in Opposition to Summons for Order of Mandatory and Prohibitory Injunction and the Respondent's Skeleton Arguments both dated 26th June, 2017. That they would also rely on the Further Affidavit dated 7th July, 2017 and the case of ***Ahmed Abad v Turning and Metals Limited***[4].

Mr. Chuula, co-Counsel for the Respondent, submitted that the Respondent's opposition is based firstly, on non-disclosure of material facts by the Applicant and secondly, the principles surrounding the granting of injunctions. To support the allegation of non-disclosure, Counsel referred this Court to paragraphs 4, 7 and 8 of the Respondent's Further Affidavit filed with leave of Court on 7th July, 2017 and exhibits "AS2", "AS3", "AS5" and "AS6" annexed thereto. Counsel also referred the Court to Editorial Note 29/1A/24 of Order 29 in the Rules of the Supreme Court 1999 on the need for an Applicant in an *ex-parte* application to make full and frank disclosure of all material facts.

Counsel submitted that contrary to the Applicant's submission, the Respondent was supportive and protective of the Applicant's interests both financially and in securing assets for the Applicant which were under threat of purported third party creditors. It was Counsel's further submission that Section 11 of the Arbitration Act No. 19 of 2000 gives the Court the discretion to grant interim injunctions. However, the purpose of section 11 is for the interim relief to be granted and for the Applicant to proceed to arbitration. Counsel submitted that in this case a novel cause of action has been instituted to compel the Respondent to go to arbitration. It was Counsel's view that such an order would be an absurdity since the party that feels aggrieved is at liberty to commence, the arbitral process.

Counsel pointed out to the Court that the Originating Summons that commenced the present action contains a stand-alone claim that is independent of the claim for injunction, and seeks the order of the Court to the effect that the Respondent adheres to clause 16 of the Supply Agreement. Counsel submitted that section 11 of the Arbitration Act does not envisage that the Court should be burdened with making determinations that go beyond the granting of interim orders. According to Counsel, Courts are reluctant to grant interim injunctions which could prejudice the outcome of arbitral proceedings and in that regard, cited the case of ***Channel Tunnel Group Limited v. Balfour Beatty Construction Limited***[5], specifically at pages 367 and 368, which raises the issue of the tension between courts and arbitral panels and why courts are cautious when granting injunctions, especially when the decision of the court in granting the injunction will leave very little to be decided upon by the arbitrator.

Counsel submitted further that from the way the Originating Summons were crafted and the way the Summons and Order of Injunction were crafted; there appears to be an abuse of the court process in terms of section 11 of the Arbitration Act. Counsel submitted in addition that the arrangement between the Applicant and Respondent is contractual, that the quantification of

damages could clearly be ascertained and the Applicant could be adequately atoned for in damages. He cited the cases of ***Shell and BP Zambia Limited v Conidaris and Others***[6] and ***Turnkey Properties v. Lusaka West Development Limited & Others***[7] on the principle that an injunction should not be granted where damages are an adequate remedy. For these reasons, it was Counsel's prayer that the *ex-parte* order of mandatory and prohibiting injunction be dismissed with costs.

In reply, Mr. Gondwe submitted that if the *status quo* is not maintained, even arbitration will be rendered academic. Further, that the interim relief is required pending the parties taking the rightful course as agreed, which is what the *ex-parte order* reflects. Regarding the issue of non-disclosure, Counsel submitted that the Applicant has made full disclosure; that when the Applicant obtained the injunction it did advise the Respondent as alluded to in paragraph 7 of the Affidavit in Support. Additionally, that with the Further Affidavits which both parties filed with leave of Court, there has been full disclosure by the Applicant, particularly so in the Applicant's Affidavit of 30th June, 2017 in paragraph 7 to 10. That in the circumstances, it is the Applicant's prayer that the application be granted with costs and the *ex-parte order* of interim injunction be confirmed.

Mr. Mudenda, co-Counsel for the Applicant, adopted Mr. Gondwe's submissions and pointed out that the case of Channel Tunnel Group Limited cited by the Respondent cannot be called to its aid in the circumstances because section 10 of the Arbitration Act read together with the observations of Chirwa J. S. in the case of ***Chrispin Livali, Saviour Chisimba, Stephen Mubanga Chitalu and 26 Others v Edward Mumbi, Michael Chilufya Sata and the Attorney General***[8], referred to on page 7 of the Applicant's Skeleton Arguments, are very instructive. Chirwa J.S. stated in that case that:-

> *"There is no need to consider injury when it comes to obeying the law nor need of consideration of balance of convenience. The nature of the case was such that the learned trial judge should have allowed the interim*

injunction to remain until the main action is tried because it involves the obedience or non-obedience of the law... it took the case out of the ordinary consideration of interim injunctions".

I have perused the various affidavits filed herein by both parties as well as the Skeleton Arguments in support of and in opposition to the Summons for Mandatory and Prohibitory Injunction. I am indebted to Counsel on both sides for the well-articulated arguments in support of their respective cases.

At this point I am not called upon to delve into the merits of the case but to address the application for interlocutory injunction and decide whether the same meets the requirements for the grant of an injunction which would lead to the confirmation of the *ex-parte order* of injunction granted on 22nd June, 2017. It is not in dispute that the Supply Agreement for Concrete and Aggregate entered into between the Applicant and the Respondent in 2015 provided in clause 16 for reference of disputes, controversies or differences to arbitration. Clause 16.1 stated as follows: -

"All disputes, Controversies or differences, which may arise out of or in relation to or in connection with the Agreement, or for the breach thereof, shall be amicably settled between the Buyer and the Supplier. In case no agreement is reached within a reasonable time, such disputes shall be finally referred to and settled by arbitration."

Clause 2 of the Supply Agreement headed "Definitions" states that 'Buyer' shall mean Daewoo Engineering and Construction Company Limited (the Respondent herein) and its legal representatives and Supplier shall mean Keren Motors Limited (the Applicant herein) and its legal representatives.

Section 10 of the Arbitration Act No. 19 of 2000 is the provision which gives the Court the power to refer a matter which is subject of an arbitration agreement to arbitration at any stage of the proceedings <u>if a party so requests</u>.

(underlining, the Court's for emphasis only). The operative words here are 'if a party so requests'.

In the case in *casu* the Applicant is seeking an order of the Court to compel the Respondent to observe the dispute resolution provision in the Supply Agreement including submission to arbitration through a Mandatory Injunction. The reasons advanced for the application for Mandatory Injunction are: -

> *"1) That the Respondent's Notice to Terminate has not complied with the termination clause in the Supply Agreement executed by the parties;*
> *(2) That the Respondent is in breach by not working towards an amicable solution through arbitration; and*
> *(3) That the Applicant will suffer irreparable injury and is also likely to have a run by all its creditors which will greatly affect its operations adversely."*

I am in agreement with the submission by Counsel for the Respondent that looking at the way the Originating Summons is couched, the matter before Court is a novel cause of action which has been instituted to compel the other party to submit to arbitration. It is my considered view that this is not what was envisaged by section 10 of the Arbitration Act under whose provision a party to an action before Court can request the Court to refer the matter to arbitration.

Having said the above, I also concur with the holding of Lord Moulton in ***Bristol Corporation v. Aird***[1] that an arbitral clause is a substantial portion of the contract and requires a good reason to be departed from.

However, the issue in the case in *casu*, which is out of the ordinary, is the manner in which the Applicant seeks to enforce the arbitral clause through a mandatory injunction. As the Respondent rightly submitted, the practical effect of the mandatory order of injunction would be to compel the

Respondent to restore the terminated contract. The *ex-parte order* of Mandatory and Prohibitory Injunction granted on 22nd June, 2017, provides, *inter alia*, as follows: -

> *"... It is hereby ordered than an injunction be and is hereby granted compelling the Respondent, their agents, servants, employees or whosoever to comply with the arbitral clause of the Supply Agreement dated 21st June, 2015 and or effect the said clause before terminating the Supply Agreement or considering the same terminated and exercising their termination rights including demanding for the advance payment guarantee from Cavmont Bank Zambia or the performance guarantee from Zambia State Insurance Corporation Limited or influencing the termination of any of the Applicant's contracts and or relationships with other creditors arising out of its relationship with the Applicant from the said Supply Agreement or stopping the Applicant from performing the said agreement with respect to the Kazungula Bridge Project works until conclusion of this matter by way of amicable resolution and or arbitration ..."* (underlining, the Court's for emphasis only)

In my view two of the reasons advanced for the application for mandatory injunction, namely, (1) that the notice to terminate has not complied with the termination clause in the Supply Agreement and, (2) that the Respondent is in breach of the Agreement by not working towards an amicable solution through arbitration, are issues that could have been brought in an action for breach of contract and not given as grounds for seeking a mandatory injunction.

As regards the third ground that the Applicant will suffer irreparable injury if the injunction is not granted, the Applicant cited the Supreme Court judgment of Chrispin Levali, Saviour Chishimba, Stephen Mubanga Chitalu and 26 Others where Chirwa JS held that when it comes to obeying the law there is no need to consider injury or the balance of convenience. That since reference to arbitration is a statutory provision, there is no need to prove irreparable

injury. In my view, that may be so, but in the case in casu there has been a misapplication of section in that there has been no application by the Applicant to the Court to refer the matter to arbitration. The Applicant has used the route of injunction to compel the Respondent to comply with the arbitral clause in the Supply Agreement.

In my opinion, that is not what the section is about. The section envisages a scenario where a party to proceedings requests the Court to refer the matter which is subject of an arbitration agreement, such as the case in *casu*, to arbitration.

Coming to the law on the granting of interlocutory injunctions, this was clearly articulated in the celebrated case of Shell and BP Zambia Limited v. Conidaris and Others, referred to above. In the said case the Supreme Court stated that a court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury was defined to mean injury which is substantial and can never be adequately remedied or atoned for by damages; not injury which cannot possibly be repaired.

In the case in *casu* the Applicant as a party to the Supply Agreement clearly has the right to have the matters in contention in the disputes that have arisen between the Applicant and Respondent relating to the said Supply Agreement resolved.

On the aspect of irreparable injury, the Applicant has cited the case of Chrispin Levali, Saviour Chisimba, Stephen Mubanga Chitalu and 26 Others where Chirwa J.S. had stated that there is no need to consider injury or balance convenience when it comes to obeying the law and argued that since in this case reference to arbitration is statutory, when deciding whether to grant the interlocutory injunction or not, there is no need to consider irreparable injury or balance of convenience. That indeed is the case but in the case in casu it is

my finding that section 10 has made reference of the matter to arbitration conditional upon a party requesting for the reference; which the Applicant herein has not done but has instead filed an Originating Summons to obtain an order to compel the Respondent to submit to arbitration. As stated earlier, this is a misapplication of the law. That notwithstanding, even if the irreparable injury or balance of convenience tests are not applied in this case, there is still the test of adequacy of damages to be met.

I am in agreement with the submission that the arrangement between the Applicant and Respondent is contractual and quantification of damages can clearly be ascertained and therefore, the Applicant could be adequately atoned for in damages.

Regarding the Respondent's allegation of non-disclosure of material facts by the Applicant, the Respondent has exhibited documents in its Further Affidavit filed with leave of Court on 7th July, 2017 which show that the Applicant was placed under receivership in February, 2017 and an advertisement to that effect was placed in the national press by the Receiver. A print out from the Patents and Companies Registration Agency also shows that the fact that the Applicant was placed under Receivership was registered at the Patents and Companies Registration Agency (see exhibits "AS2" and "AS3" in the Further Affidavit)

The Respondent through its advocates wrote to the Receiver on 24th April, 2017 to get clarity on the newspaper caption advising that Keren Motors was in receivership and his appointment as Receiver. In my opinion, had the Applicant informed the Respondent about the receivership, the Respondent would not have written to enquire about it from the Receiver. Notwithstanding the contesting of the appointment of the Receiver, the appointment should have been communicated to the Respondent.

Counsel for the Applicant submitted in response to the allegation of non-disclosure that when a Receiver is appointed he is the one who puts up notices.

In my view that fact does not take away from the Applicant's duty or responsibility to disclose its placement under receivership to the people it has been doing business with, such as the Respondent. Further, the Applicant did not disclose in the *ex-parte* application the fact of its non-disclosure to the Respondent that it had been placed under receivership. I, therefore, find that there was no full disclosure of all material facts to the Court.

As correctly submitted by Counsel for the Respondent, according to the Editorial Notes 29/1A/24 in the White Book, an applicant in any *ex-parte* application must proceed with the highest good faith. The fact that the Court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all material facts" (Underlining the Court's, for emphasis only). The Editorial Notes go on to state that without full disclosure the order may be set aside without regard to the merits.

Taking into account my findings on the issues for consideration, I am of the view that the Applicant has not met all the conditions required for the grant of a Mandatory and Prohibitory Interlocutory Injunction. Further, this Court cannot make an order compelling the Respondent to submit to arbitration. The application for reference to arbitration must come from the Applicant itself. For these reasons, the application for an order of Mandatory and Prohibitory Injunction is dismissed with costs to the Respondent, to be taxed in default of agreement. Consequently, the *Ex-parte* Order of Mandatory and Prohibitory Injunction granted on 22nd June, 2017 is discharged forthwith.

Leave to appeal is granted

Delivered at Lusaka this 13th day of July, 2017

W. S. Mwenda (Dr)
HIGH COURT JUDGE