

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2017/HP/1856

BETWEEN

HORN AFRIC MOTORS LIMITED

AND

PUMA ENERGY ZAMBIA PLC



PLAINTIFF

DEFENDANT

Before the Honorable Lady Justice C. Lombe Phiri in Chambers

For the Plaintiff : *Mr Y. Silomba - Robson Malipenga & Co*

For the Defendant : *Mr M. Chiteba- Mulenga Mundashi LLP*

RULING

CASES REFERRED TO:

1. **Finsbury Investments Limited v Antonio Ventriglia & Manuela Ventriglia 2008/HPC/366**
2. **Kufamuyeke Mukelebai vs Esther Nawaiba, Commissioner of Lands & The Attorney General (2013) Vol 2 ZR 312**
3. **Fredday Hirsch Group Limited v Auto Care Limited 2016/HPC/0085**

**4. James Milling Company Limited v Imex International Limited (2002)
ZR 19**

5. Mukelabai v Nalwauba and Others (2013) Vol2 ZR 312, Chali J

LEGISLATION REFERRED TO:

- 1. Order 33 Rule 3 of the Rules of the Supreme Court (White Book) 1999 ed**
- 2. Section 10 of the Arbitration Act, No. 19 of 2000.**

This Plaintiff in the matter filed into Court a Notice of Intention to raise preliminary issues pursuant to Order 33 Rule 3 of the Rules of the Supreme Court (White Book) 1999 ed and Section 10 of the Arbitration Act, No. 19 of 2000. The Preliminary issues were on a point of law as follows:

- 1. Whether the Transportation Agreement dated 1st March, 2017 marked "KL1" in the Defendant's Affidavit in support of Application to stay proceedings and refer Parties to Arbitration is operative or applicable to the Plaintiff and the Defendant in light of the fact that the transaction upon which the parties have a dispute before this Court occurred from 20010 to 2013.*
- 2. Whether the Defendant's Application to Stay Proceedings and Refer Parties to Arbitration herein pursuant to the Transportation Agreement executed on 1 March, 2017 with the same commencement date is sustainable when the*

transactions upon which the parties have a dispute before this Court accord from 2010 to 2013.

The said application was supposed by skeleton arguments. It was submitted that the Application by the Defendant the was previewed as an Arbitration Agreement that was executed between the parties on 1st March, 2017 therefore the agreement is inoperative or incapable of being performed in support of the current dispute between the parties as the dispute is contained on transaction that happened before the Agreement came into operation.

It was submitted that the provisions of the 2017 Arbitration Agreement cannot stand as the said agreement did not govern the parties during their course of business from 2010 to 2013. That the said March 2017 Agreement only came into effect on 1st March, 2017 and cannot apply retrospectively to the parties in this matter. It was thus prayed that the Application to refer the matter to Arbitration and Stay Proceedings be dismissed as it is incompetent and misconceived.

In response the Defendant filed into Court skeleton arguments in opposition. The gist of their argument was that the Plaintiff had wrongly moved the Court under the provisions of Order 33 Rules 3 of the Rules of the Supreme Court. That in order for the Court to have been moved there was need for the Plaintiff obtain the leave of Court. Also that it is mandatory before preliminary issues can be heard and determined by a Court under Order 33 Rule 3 of the white book that there be an Order of the Court. The Court was referred to the cases of **Finsbury Investments Limited v Antonio Ventriglia & Manuela Ventriglia 2008/HPC/366,**⁽¹⁾ **Kufamuyeke Mukelebai vs Esther Nawaiba,**

Commissioner of Lands & The Attorney General (2013) Vol 2 ZR 312⁽²⁾ and Fredday Hirsch Group Limited v Auto Care Limited 2016/HPC/0085⁽³⁾. It was pointed out that the Plaintiff simply filed the notice and this Court has not granted any Order for the trying of the issues as a special case thereby entailing that the preliminary issues are improperly before this Court. Further, that the requirement for the Court to issue an Order setting out the issues to be addressed is mandatory as it assist the Court to narrow down the issues for determination in an orderly manner and to ensure that the parties do not stray into matters that are part of the substrate action for determination. It was submitted that the Plaintiff's Notice of Intention to Raise Preliminary issues is irregular on account of failure to comply with Order 33 Rules 3 of the White Book. The case of James Milling Company Limited v Imex International Limited (2002) ZR 19⁽⁴⁾ was relied to demonstrate the commence of non-compliance with procedures of the Court.

The Defendant also proceeded to submit on the issues raised in the Notice by the Plaintiff. In the submission reference was made to the affidavit sworn in support and the evidence contended therein. However, I will not delve into their detail as this would substantially determine the application by the Defendant that is yet to be heard by this Court.

The Plaintiff sought an opportunity to file into Court arguments in Reply but none were forth coming. At the hearing of the application both parties relied entirely on what they had filed into Court.

I have carefully considered the submissions of both parties. I will begin by considering the arguments of the Defendants first as their determination if in favour of the Defendant may render the Plaintiff's preliminary issue irregular.

Order 33 r3 of the Rules of the Supreme provides that:

“3. The Court may Order any question or issue arising in a cause or matter, whether of factor law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as the matter in which the question or issue shall be stated.”

Clearly from the foregoing it is necessary for the Court to order any question.

In the case of **Mukelabai v Nalwauba and Others (2013) Vol2 ZR 312, Chali J⁽⁵⁾** discussed the contest under which Order 33 r 3 can be used. It was his position that the rule was not suited to disposing of the cause or matter on a point of law as is envisaged under Order 14A. In the Editorial introduction to Order 33 it is made clear that the rules in Order 33 deal with the Court's power to determine the place of trial and the mode of trial. The notes to the Rule 3 clearly state further that the rule should be read with Order 14A, Order 18 r11 and with rule 4(2).

The issues being raised under the Order 33 Rule 3 application in relation to whether the Transportation Agreement contains the supposed Arbitration clause can be used in these proceedings. This Court is being called to enquire the validity of the Arbitration clause. A clear reading of Order 33 and

the case law cited clearly shows that it was misconceived for the Plaintiff to raise the preliminary issue under Order 33. The correct procedure would have been for the Plaintiff to move the Court under Order 14A. Better even the Plaintiff should have just opposed the application instead of raising another application. The application by the Plaintiff under Order 33 is therefore dismissed.

Costs in the cause.

Delivered at Lusaka this 30th day of September, 2020.



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C. LOMBE PHIRI
JUDGE