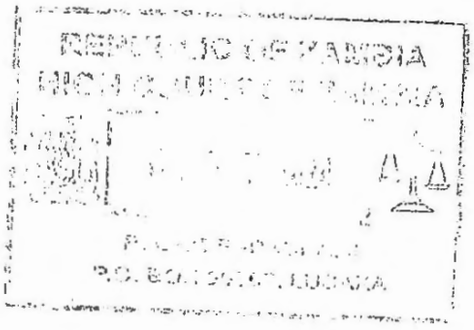
IN THE HIGH COURT FOR ZAMBIA **2019/HP/688**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

KAPIRI TRNSPORT LIMITED **APPLICANT**

AND

CLA COMMERCIAL VEHICLES LIMITED **RESPONDENT**

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 3rd day of September, 2020

For the Applicant: Mr K. Chipuya, Messrs G.M. Legal Practitioners

For the Respondent: Ms N. Mbuyi & Mr C. Mukatu, Messrs Paul Norah Advocates

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RULING

Cases referred to:

1. *Ody's Oil Company Limited vs The Attorney General & Constatinos James Papoutsis SCZ No. 4 of 2012*
2. *Ocean Bulk Shipping and Trading SA vs TMT Asia Limited and Others [2014] UK SC 44*
3. *Stanley Mwambazi vs Morester Farms Limited (1977) Z.R 108*
4. *Audrey Nyambe vs Total Zambia Limited, SCZ Judgment No. 1/2015*
5. *Cutts vs Head (1984) Ch 290*
6. *Lusaka West Development Company, BSK Chiti (Receiver), Zambia State Insurance Corporation vs Turnkey Properties Limited (1990-1992) Z.R 1 (S.C)*

Legislation referred to:

The Arbitration Act, No. 19 of 2000

Rules of the Supreme Court, 1999 Edition, The White Book

Other works referred to:

Halsbury's Laws of England, page 151, para. 212

Zambian Civil Procedure, Commentary and Cases, Volume 1, Patrick Matibini, Lexis Nexis, 2017

The respondent in this matter on the 1st September, 2020 filed a Notice to raise Preliminary Issues to dismiss the application for irregularity pursuant to *Order 2 Rule 2, Order 14A Rule 1* and *Order 33 Rule 3* of the *Rules of the Supreme Court, 1965 (1999) Edition (The White Book)* to be determined by this court.

The issues are outlined below as follows:

The Respondent herein intends to raise in *limine videlict;* to dismiss the applicant's application on the following grounds:

(i) That the application filed on the 24th day of June, 2020 be set aside on the ground that an Arbitration Agreement is a separate and an independent which survives the termination of the underlying agreement. This is known as the doctrine of separability/severability.

(ii) That the applicant in its application has exhibited documents which are *void ab initio* specifically exhibit "JM3" and "JM5". That the said documents need to be expunged from the court record as the documents authored by the respondent's advocates were on a without prejudice basis.

The respondent filed an affidavit in support of the Preliminary Issues raised sworn by Nathalie Mbuyi counsel for the respondent. In that affidavit counsel avers as follows: The applicant has applied to set aside Order for Stay of Execution dated 6th June, 2020. The respondent entered into a lease agreement with the applicant relating to Stand No. 6876 and 6877, Natwange Road, Kitwe. The lease agreement under clause 20.2 provided that the dispute be referred to Arbitration. The applicant alleges that the lease agreement is null and void for failure to register at the Lands and Deeds Registry. It is the respondents stance that an arbitration agreement is a separate and an

independent agreement which remains valid even after termination of the agreement or any irregularity thereof and this includes failure to register the said agreement. The applicant in its application has exhibited documents which are *void ab initio* specifically "JM3", and "JM5" which records need to be expunged from the court record as the said documents authored by the respondents advocates are on a without prejudice basis. The applicant has exhibited documents which are *void ab initio* by suppressing material facts and misrepresentation in a bid to obtain a favourable outcome from this Court. The applicant having been aggrieved by the respondent ought to have taken the appropriate steps to submit the matter to Arbitration but they have failed and neglected to do so. In light of the above the application for the applicant be dismissed.

In opposing the preliminary issues raised, the applicant filed submissions at the behest of the Court on the 10th September, 2020. The gist of the applicant's submissions are as follows:

In relation to the first issue it was counsel's considered view that as the arbitration clause was part of a lease that was not registered, the said arbitration clause perishes with the lease as the lease is void for want of registration. Counsel argued in the alternative that should this court find that the arbitration clause is severable and should be enforced as a separate agreement then the respondent has by its own assertions and conduct waived its right to arbitrate. Counsel explained that since the respondent obtained the stay of proceedings, they have never prosecuted their application by either initiating or supporting Arbitration proceedings and have overtime unequivocally indicated that they do not intend on doing so which intention was confirmed in writing as the respondent confirmed that the Arbitration process was too expensive. It was counsel's considered view that the respondents' sentiments confirmed their intention not to be bound by the very Arbitration agreement on which the stay of proceedings was based. In concluding this point counsel contended that the judgment that has been

stayed for the last one year contains aspects such as the payment of utility bills for water and electricity to third parties. Counsel explained that Nkana Water & Sewerage Company Limited are owed K21,486.00 by the respondent for water consumed and has now placed the applicant on notice over non-payment of this amount. Counsel opined that the rights of a third party should never be affected by an Arbitration agreement that they are not party too. The Court was referred to the case of **Ody's Oil Company Limited vs The Attorney General & Constatinos James Papoutsis**[1]

In relation to the second issue Counsel acknowledged that while the without prejudice rule exists, there are exceptions to this rule as outlined in the case of **Ocean Bulk Shipping and Trading SA vs TMT Asia Limited and Others**[2], where the court held:

> *"i) where a clear statement is made in the without prejudice communications, that is relied on by the other party, giving rise to an estoppel. This decision confirmed the case of* ***Hodgkinson and Corby Limited vs Wards Mobility Services [1997] FSR 178.***
>
> *ii) where there is evidence of perjury, blackmail or other serious and unambiguous impropriety*
>
> *iii) evidence of negotiations that may be given to explain delay or apparent acquiescence during the course of civil proceedings."*

Counsel added that even though a document is marked without prejudice it does not mean that it is so. Counsel contended that the documents exhibited in their affidavit marked "JM3" and "JM5" qualify as an exception to the without prejudice rule as they have been produced as an estoppel against the applicant from alleging that they are pro-arbitration when in fact they are not interested in doing so. It was counsel's considered view that these documents were critical as the respondent would have misled this Court to grant a stay of proceedings pending arbitration when in fact, the respondent never intended on initiating or proceeding to arbitration in order to resolve this

dispute. Counsel went on to add that the documents exhibited and marked JM3 and JM5 explain the delays during the purported proceedings as over a year has lapsed since the stay of proceedings was granted and the arbitration order made by the court to the applicants without there being any progress or conclusion on the same. Counsel opined that the respondent has neglected to see that as litigants they do owe this Court an explanation as to what transactions have taken place over the last 12 months. Counsel reiterated the position that the arbitration clause should perish as the lease on which it is premised is *void ab initio* and against public policy. Counsel referred the court to the case of **Stanley Mwambazi vs Morester Farms Limited**[3] in asking the court to note that the respondent obtained an ex-parte stay of proceedings one year ago and that before the matter could be heard inter-parte at the instance of the applicant's application to discharge the stay, the respondent has raised these preliminary issues to dismiss the application. Counsel argued further that had the applicant not made an application to discharge the stay the respondent would have continued sleeping. It was counsel's considered view that whereas the respondents are entitled to make as many applications, their conduct gives the impression that they do not intend to have this matter determined on its merits and that whatever rent that is due be paid as the respondent has no defence to this claim. In concluding his arguments, counsel prayed that these documents not be expunged from the record as they serve a critical role to the dispensation of justice by estopping the respondent a right to arbitration when their conduct unequivocally punctuates a contrary intention.

At the hearing of the matter, learned counsel for the respondent relied on the affidavit in support, and their skeleton arguments filed into court on the 1st September, 2020. Learned counsel for the applicant essentially repeated the applicant's submissions that were subsequently filed on the 10th September, 2020. Additionally counsel for the applicant argued that the effect of non-registration of a lease by a period of 1 year renders such a document null and void.

I am indebted to counsel for their arguments and submissions. I have taken into consideration the said arguments raised and the authorities cited for and against the current application.

In addressing the first preliminary issue counsel for the respondent has argued that the arbitration clause survives the termination of the lease based on the doctrine of severability and as such the applicant's application to set aside order for stay of execution be dismissed for irregularity. Counsel for the applicant on the other hand has argued that as the lease was void for want of registration then the arbitration clause perishes with it.

The *severability* principle advocates that although an arbitration clause is part of an underlying agreement or contract, it is independent of the other clauses in the agreement or contract. The need for the doctrine arose so as to curtail parties from using the argument that the main agreement is not valid and thereby the arbitration clause forming part of the main agreement also becomes invalid. Be that as it may however on the issue of referring matters to Arbitration as per *Section 10* of the *Arbitration Act*, the Supreme Court guided in the case of **Audrey Nyambe vs Total Zambia Limited[4],** when it stated as follows:

> *"Counsel for the respondent is right that we have passed a number of decisions where we have given effect to section 10 of the Act. However, in determining whether a matter is amenable to arbitration or not, it is imperative that the wording used in the arbitration clause itself are closely studied."*

Further *Section 10* of the *Arbitration Act No. 19 of 2000* provides:

> *"A court before which legal proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so requests 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."

In *casu* clause 20.4 of the lease provides that:

"This clause 20 shall be severable from the rest of this Lease and shall remain in effect even if the Lease terminates."

There is a difference between the termination of a lease and the lease being *void ab initio* for want of registration. Termination simply means that the agreement has come to an end whereas the term null and void or *void ab initio* refers to the validity of the agreement. Using the literal rule or plain meaning rule of interpretation, which says that ordinary words must be given their ordinary meaning, the arbitration clause in this lease agreement only survives the lease when it comes to an end and not when the lease is *void ab initio.* A perusal of the lease confirms that the said lease is for a term of 5 years and that the same has not been registered. In effect a yearly lease has been created which will be the subject of the main matter. *Section 10* of the *Arbitration Act* clearly mandates this court not to refer a matter to Arbitration if it is found that the agreement is *void ab initio.* As such I accept the argument by counsel for the applicant that as the lease between the parties is in fact null and void for want of registration the arbitration clause in effect perishes with the said lease. This preliminary issue therefore fails for want of merit.

Turning now to the second preliminary issue, counsel for the respondent has argued that the documents exhibited in the respondents' application and marked "JM3" and "JM5" should be expunged from the record as they are marked without prejudice. It is trite that without prejudice communication or correspondence in litigation is not to be admitted into evidence. The rationale was explained in the case of **Cutts vs Head[5] per Oliver J**, when the court held that:

"It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be

discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings."

That being said however, there are exceptions to this rule as rightly pointed out by counsel for the applicant. A fundamental application of this principle is that parties must be seen to be attempting to settle the dispute. The learned author of **Zambian Civil Procedure Commentary and Case, Volume 1, Lexis Nexis, 2017,** Justice Matibini at page 654 states as follows:

"....the marking of a document 'without prejudice' per se, will not make it privileged if in fact the substance of the communication is not a genuine approach to attempt settlement of the dispute."

Justice Matibini goes on to exemplify that the Supreme Court in the case of **Lusaka West Development Company Limited, BSK Chiti (Receiver), Zambia State Insurance Corporation vs Turnkey Properties Limited**[6] guided on the issue of dealing with the production of without prejudice communication when it referred to **Halsbury's** as follows:

"Letters written and oral communications made during a dispute between the parties which are written or made for the purpose of settling the dispute and which are generally expressed or otherwise proved to have been made without prejudice cannot generally be admitted into evidence. The rule does not apply to communications which have a purpose other than settlement of the dispute. Thus it does not apply in respect of a document which, from its character may prejudice the person to whom it is addressed."

On a correct reading of the documents exhibited in the applicant's affidavit marked "JM3" and "JM5" it is apparent that there is no genuine effort on the part of the respondent to attempt to settle this matter via arbitration which is what the stay of proceedings which they procured was obtained for. I

am as such inclined to agree with counsel for the applicant that equity must not only be done but be seen to be done and as it is clear that after a period of 12 months the parties have not even formed a quorum for purposes of arbitration it is clear that this avenue has failed even when the avenue should not have been available to the parties in the first place.

Consequently it is only just that the applicant be given an opportunity to be heard on their application to discharge the stay of proceedings and all matters be determined on their merits as espoused in the case of **Stanley Mwambazi vs Morester Farms Limited** as cited by the applicant.

The upshot of the matter is that the respondent's application fails and the preliminary issues are dismissed. The applicant's application to discharge the stay shall now be determined on the 26th October, 2020 at 11:30am.

Leave to appeal is granted.

Dated the 1st day of October 2020

Ruth Chibbabbuka

JUDGE