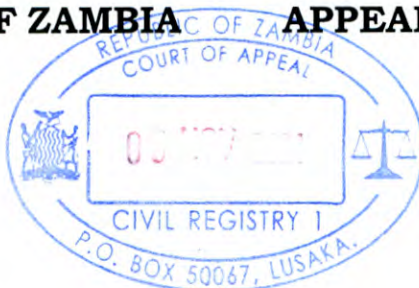


IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 081/2021**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

**PHOENIX CONTRACTORS LIMITED
GOSHAUK ADVISORY LIMITED**

**1ST APPELLANT
2ND APPELLANT**

AND

ATTORNEY GENERAL

RESPONDENT

CORAM: Chashi, Chishimba and Ngulube, JJA

ON: 21st September and 5th November 2021

*For the 1st and 2nd Appellants: N. Ndalameta and D Nalishuwa (Ms)
Messrs Musa Dudhia and Company*

For the Respondent: N/A

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

- 1. Electricity Supply Nominees Limited v Farrell (1997) 2 All ER, 499**
- 2. Champ Health Solutions v ER 24 EMS (PTY) Limited and Another – SCZ Appeal No. 89 of 2015**
- 3. Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC - CAZ Appeal No. 181 of 2019.**
- 4. Pouwels Construction Zambia Limited v Inyatsi Construction Limited – SCZ Appeal No. 23 of 2016**

2.0 BACKGROUND

- 2.1 On 25th February 2010, the 1st Appellant commenced proceedings against the Respondent claiming the sum of US\$21,064,497.52 being the amount owed to the 1st Appellant, interest and damages relating to road construction works. The Respondent settled its defence.
- 2.2 When the matter came up before Wood J, for a scheduling conference, the learned Judge noted that the documents subject of the contention had an arbitration clause. It was on that basis that the learned Judge referred the parties to arbitration and stayed the proceedings.
- 2.3 Sometime in 2016, the 1st Appellant by deed, assigned the debt to the 2nd Appellant.
- 2.4 When the parties failed to submit themselves to arbitration due to what they termed as "*prohibitive cost of arbitration*," the 1st Appellant filed into court an application for an order to lift the stay of proceedings and once that was done, to join the 2nd Appellant as a plaintiff to the proceedings.

Legislation referred to:

1. **The Arbitration Act No. 19 of 2000**

Rules referred to:

1. **The High Court Rules under The High Court Act, Chapter 27 of the Laws of Zambia**
2. **The Supreme Court Practice (White Book) 1999**

1.0 INTRODUCTION

1.1 This is a consolidated appeal in respect to the following two interlocutory appeals:

(a) An appeal against the ruling by Hon. Mr. Justice A.M Wood delivered on 11th October 2010. In the said ruling, the Judge on his own motion referred the parties to arbitration and stayed the proceedings which were before him.

(b) An appeal against the extempore ruling by Hon. Mrs. Justice B.G Shonga given on 21st January 2021. In the said ruling, the Judge refused to lift the stay of proceedings which was ordered by Wood, J when the parties were referred to arbitration.

2.0 BACKGROUND

- 2.1 On 25th February 2010, the 1st Appellant commenced proceedings against the Respondent claiming the sum of US\$21,064,497.52 being the amount owed to the 1st Appellant, interest and damages relating to road construction works. The Respondent settled its defence.
- 2.2 When the matter came up before Wood J, for a scheduling conference, the learned Judge noted that the documents subject of the contention had an arbitration clause. It was on that basis that the learned Judge referred the parties to arbitration and stayed the proceedings.
- 2.3 Sometime in 2016, the 1st Appellant by deed, assigned the debt to the 2nd Appellant.
- 2.4 When the parties failed to submit themselves to arbitration due to what they termed as "*prohibitive cost of arbitration*," the 1st Appellant filed into court an application for an order to lift the stay of proceedings and once that was done, to join the 2nd Appellant as a plaintiff to the proceedings.

2.5 Shonga, J in her understanding of the application took the view that the 1st Appellant was questioning the ruling of Wood J, to refer the parties to arbitration *suo moto*. It was on that basis, she opined that the issue that the 1st Appellant was raising was a matter for appeal and refused the application for discharge of the stay of proceedings. Consequently, she ruled that she had no jurisdiction at that stage to join the 2nd Appellant as a party.

3.0 THE 1ST APPEAL

3.1 Dissatisfied with the ruling by Shonga J, the Appellants appealed to this Court on 22nd February 2021 advancing four grounds of appeal as follows:

- (i) The court below erred in law and fact when it found that it did not have jurisdiction to discharge the order that stayed proceedings and referring the parties to arbitration.
- (ii) The court below erred in law and fact when it overlooked the provisional nature of an order staying proceedings and held that discharging the order staying proceedings is a matter for appeal and that

it would be acting as an appellate court if it proceeded to discharge the order staying proceedings.

- (iii) The lower court misdirected itself when it ignored affidavit evidence that circumstances had arisen which necessitated resuming the proceedings and instead decided that the basis of the application to discharge the stay was that the stay was erroneously done.
- (iv) The court below erred in law and fact when it found that it did not have jurisdiction to join the 2nd Appellant as 2nd plaintiff to the proceedings.

4.0 THE 2ND APPEAL

4.1 The second appeal is targeted against the ruling by Wood, J granted on 11th October 2010. The Appellants have advanced three grounds of appeal as follows:

- (i) The court below erred in law and fact when it stayed the proceedings and referred the matter to arbitration without a request from either of

own proceedings. It was Counsel's contention that the court below had jurisdiction to hear and determine the application by the Appellant to discharge the order that stayed proceedings and referred the matter to arbitration.

5.3 In respect to the second ground, Counsel submitted that it is trite law that a stay of proceedings halts further proceedings in an action. It may therefore be lifted depending on the events that occur after the stay is ordered. It was further submitted that the circumstances in which the stay of proceedings was ordered in the present case, shows that it was temporal as it was ordered to facilitate the arbitration. That where the purpose for which it was ordered failed or does not exist, there is no reason why the stay ought to continue. Counsel submitted that there is a good cause to remove the order staying proceedings as it was not permanent in nature.

5.4 In arguing the third ground, Counsel submitted that the court below failed in its duty when it did not consider the evidence before it which showed that circumstances had arisen to necessitate the discharge of the stay. According

it would be acting as an appellate court if it proceeded to discharge the order staying proceedings.

- (iii) The lower court misdirected itself when it ignored affidavit evidence that circumstances had arisen which necessitated resuming the proceedings and instead decided that the basis of the application to discharge the stay was that the stay was erroneously done.
- (iv) The court below erred in law and fact when it found that it did not have jurisdiction to join the 2nd Appellant as 2nd plaintiff to the proceedings.

4.0 THE 2ND APPEAL

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- (i) The court below erred in law and fact when it stayed the proceedings and referred the matter to arbitration without a request from either of

the parties to have their dispute determined by arbitration.

- (ii) The court below erred in law and fact when it issued a stay of proceedings and referred the matter to arbitration on its own.
- (iii) The court below erred in law and fact when it stayed the proceedings and denied the parties their day in court.

5.0 APPELLANTS ARGUMENTS IN SUPPORT OF THE 1ST APPEAL

5.1 At the hearing of the appeal, Mr. Ndalameta relied on the Appellant's heads of argument filed into court on 23rd April 2021. In respect to the first ground of appeal, Counsel submitted that, by finding that the court lacked jurisdiction to discharge the stay of proceedings, it essentially decided that it does not retain inherent jurisdiction to supervise its own orders and proceedings.

5.2 Counsel drew our attention to the case of **Electricity Supply Nominees Limited v Farrell**¹ and submitted that all orders of the court carry with them an implied liberty to apply and the court has an inherent power to control its

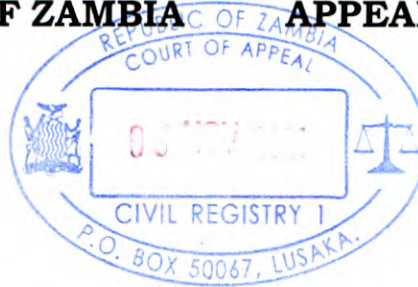
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