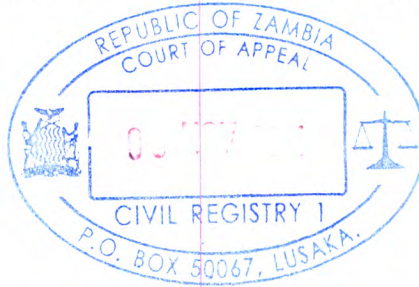


**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**BETWEEN:**

**PHOENIX CONTRACTORS LIMITED  
GOSHAUK ADVISORY LIMITED**

**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT**

**AND**

**ATTORNEY GENERAL**

**RESPONDENT**

**CORAM: Chashi, Chishimba and Ngulube, JJA**

**ON: 21<sup>st</sup> September and 5<sup>th</sup> November 2021**

*For the 1<sup>st</sup> and 2<sup>nd</sup> 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**

**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 11<sup>th</sup> 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 21<sup>st</sup> 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 25<sup>th</sup> February 2010, the 1<sup>st</sup> Appellant commenced proceedings against the Respondent claiming the sum of US\$21,064,497.52 being the amount owed to the 1<sup>st</sup> 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 1<sup>st</sup> Appellant by deed, assigned the debt to the 2<sup>nd</sup> Appellant.
- 2.4 When the parties failed to submit themselves to arbitration due to what they termed as "*prohibitive cost of arbitration,*" the 1<sup>st</sup> Appellant filed into court an application for an order to lift the stay of proceedings and once that was done, to join the 2<sup>nd</sup> Appellant as a plaintiff to the proceedings.



2.5 Shonga, J in her understanding of the application took the view that the 1<sup>st</sup> 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 1<sup>st</sup> 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 2<sup>nd</sup> Appellant as a party.

### **3.0 THE 1<sup>ST</sup> APPEAL**

3.1 Dissatisfied with the ruling by Shonga J, the Appellants appealed to this Court on 22<sup>nd</sup> 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 2<sup>nd</sup> Appellant as 2<sup>nd</sup> plaintiff to the proceedings.

#### **4.0 THE 2<sup>ND</sup> APPEAL**

4.1 The second appeal is targeted against the ruling by Wood, J granted on 11<sup>th</sup> 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

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 1<sup>ST</sup> APPEAL**

5.1 At the hearing of the appeal, Mr. Ndalameta relied on the Appellant's heads of argument filed into court on 23<sup>rd</sup> 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**<sup>1</sup> 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



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

to Counsel, it was clear that arbitration was never commenced because of the prohibitive high cost and the Appellants exhibited correspondence between the parties to that effect. That it was therefore fatal for the court to make a finding not anchored on the evidence on record.

5.5 In respect to the fourth ground, Counsel submitted that as argued under the first ground, the court below was clothed with jurisdiction to hear and determine the application to join the 2<sup>nd</sup> Appellant to the proceedings. That the court therefore erred in refusing the joinder application.

## **6.0 APPELLANTS ARGUMENTS IN SUPPORT OF THE 2<sup>ND</sup> APPEAL**

6.1 The first and second grounds were argued together. Counsel drew our attention to Rule 6 (i) and Section 10 of **The Arbitration Act**<sup>1</sup>, which provisions directs that the court may refer parties to arbitration where a party to the proceedings has so requested. Counsel submitted that in the absence of such a request there can be no referral. To buttress that, the case of **Champ Health Solutions v ER 24 EMS (PTY) Limited and Another**<sup>2</sup> was cited and



submitted that an arbitration clause does not preclude a party to proceed with an action in court. Our attention was also drawn to the case of **Vedanta Resources Holdings Limited v ZCCM Investment Holdings PLC**<sup>3</sup> where this Court recognized the fact that a matter may only be referred to arbitration where a party to the proceedings requests for such referral. We further stated that only a party to the proceedings can apply for a stay of proceedings and reference to arbitration.

6.2 Counsel contended that **The Arbitration Act**<sup>1</sup> does not give the court the power on its own motion to refer the matter to arbitration.

6.3 In respect to the third ground, reliance was placed on the case of **Pouwels Construction Zambia Limited v Inyatsi Construction Limited**<sup>4</sup> where the Supreme Court held that:

*“it is trite that notwithstanding the existence of an arbitration agreement, the parties may still proceed to litigation with mutual consent or acquiescence.”*

6.4 It was submitted that in this case, both parties did not wish to have their dispute determined at arbitration. That this necessitated the application to discharge the stay of proceedings, so as to continue the action in the court below.

## **7.0 RESPONDENTS ARGUMENTS IN OPPOSING THE TWO APPEALS**

7.1 The Respondents did not file any arguments to oppose the appeal. Neither were they before Court when the matter came up on the hearing of the appeal.

## **8.0 CONSIDERATION AND DECISION OF THE COURT**

8.1 We decided to proceed and hear the appeal in the absence of the Respondent upon being satisfied that they were served with the court process and notice of hearing. We are of the view that they were aware of the proceedings and they will therefore not be prejudiced by our having proceeded to hear the appeal.

8.2 We have considered the two rulings being impugned and the arguments by the Appellants. It is our view that the outcome of the first appeal against the ruling of Shonga J,

will have a bearing on the second appeal. We will determine the four grounds in the first appeal together as they are entwined.

8.3 We note from the record of appeal (the record) in particular at page 38, that the Appellants on 12<sup>th</sup> June 2020 filed in the court below a composite application by summons for an order to lift stay of proceedings and to add the intended 2<sup>nd</sup> plaintiff as the 2<sup>nd</sup> plaintiff. The applications were made pursuant to Order 3/2 and 14/5 (i) of **The High Court Rules<sup>2</sup> (HCR)** as read with Order 15/6 (2) (b) of **The Rules of the Supreme Court<sup>2</sup> (RSC)**

8.4 We further note from the affidavit in support, that despite Wood J, having on 11<sup>th</sup> October 2010 referred the parties to arbitration and staying the proceedings in the court below, arbitration was never commenced. According to the Appellants, the parties were unwilling to proceed with arbitration due to the prohibitive high cost involved.

8.5 It is clear from the application that the Appellants wanted the court below to discharge the order for stay of proceedings which was granted by Wood J, and join the



2<sup>nd</sup> Appellant as the 2<sup>nd</sup> plaintiff and thereafter proceed with the court proceedings.

8.6 However, Shonga J, after hearing the application had this to say in her extempore ruling appearing at page 23 of the record:

*"I have heard the submission of Counsel and considered the affidavit evidence that is on file. In summary, Counsel's argument is that in the light of the **Champ Health Solutions**<sup>2</sup> case, This Court has jurisdiction to discharge the stay and continue with the proceedings on the basis that the court earlier misdirected itself when it referred the matter to arbitration **suo moto**. Against that backdrop, I consider that the issue raised is a matter for appeal. As I see it I would be acting as an appellate court if I were to reverse that decision by discharging that stay and proceeding. Consequently, I do not consider that this is an appropriate case for me to discharge the stay and continue with proceedings. The application therefore fails and is dismissed. Coincidentally I have*

*no jurisdiction to join a party at this stage as the matter remains stayed.”*


8.7 In our view, it is evident from the extempore ruling that Shonga J, in her understanding misapprehended the application which was before her. The learned Judge took the view that the Appellants were questioning the ruling made **suo moto**, by Wood J to refer the parties to arbitration and stay of proceedings. It was on the strength of that misapprehension that the learned Judge opined that the issue which was being raised was a matter for appeal and that consequently she had no jurisdiction at that stage to join the 2<sup>nd</sup> Appellant as a party.

8.8 In the view that we have taken that the learned Judge misapprehended the application and in the face of the summons and affidavit evidence clearly showing that the application was for discharge of the order for stay of proceedings as the parties wished to continue with the court proceedings as they had failed to go for arbitration, the first appeal succeeds.

8.9 The first appeal having succeeded, we accordingly set aside the orders contained in the extempore ruling by Shonga J. In its place we order the discharge of the stay of proceedings which was granted by Wood J. In addition, we remit the matter back to Shonga J, for hearing of the application for joinder of the 2<sup>nd</sup> Appellant.


8.10 In light of the outcome in the first appeal, the second appeal which in our view was being argued in the alternative, becomes otiose.

8.11 Costs of the appeal will abide the outcome of the case in the court below.



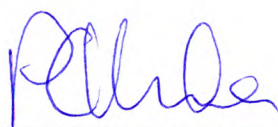
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**J. CHASHI**  
**COURT OF APPEAL JUDGE**



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**F.M CHISHIMBA**  
**COURT OF APPEAL JUDGE**



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**P.C.M NGULUBE**  
**COURT OF APPEAL JUDGE**