RABSON NKOMO
(In his capacity as the Executor Dative of Estate Late Juawo Nkomo)
versus
MINERALS IDENTITY (PVT) LTD
and
MASTER OF THE HIGH COURT, HARARE N.O
and
THE PROVINCIAL MINING DIRECTOR
MASHONALAND EAST PROVINCE
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MAKOMO J
HARARE, 7 February & 14 September 2022

Opposed Matter

I Mataka, for the applicant
R G Zhuwarara for the first respondent

MAKOMO J:

[1] The applicant is the executor and a beneficiary in the estate of the late Juawo Nkomo ("Juawo"), his father. During his lifetime and in particular on 20 August 2013, the late Juawo entered into a mining joint venture agreement ("the agreement") with the 1st respondent, a company duly incorporated in terms of the laws of the country. He was the registered owner of the mine called Koodoo 10 Mine, Makaha ("the mine") situate in Mudzi district.

[2] In terms of the agreement, Juawo would facilitate change of ownership of the mine to incorporate the 1st respondent as co-owner of the mine to reflect both their names as the syndics operating the mine. On its part, 1st respondent would bring in operating equipment, financial resources and expertise for the success of the venture. The parties would then share the dividends on a ratio of 60:40 between the 1st respondent and Juawo respectively.

[3] It is claimed, which claim has not been seriously refuted by 1st respondent, that pursuant to the agreement Juawo never received even a single cent as part of his dividend from the 1st respondent who has effectively taken control of the mining site and the business. Unfortunately, the situation remained unresolved until Juawo met his demise in 2014. After his death, his

children or relatives attempted to assert his estate's rights and briefly repossessed the mine. They were unsuccessful in that vein as a spoliation order was granted against them and eleven others by this court on 27 May 2016 under case number HC 4874/16.

[4] The estate of the late Juawo was finally registered in 2018 and the applicant herein appointed executor, following which a certificate of authority was issued by the Master authorizing transfer of shares of the mine into applicant's name. Armed with this certificate of authority, the registration of the mine was changed from Juawo's name into that of applicant. Immediately thereafter, applicant commenced steps to cancel the agreement entered into between 1st respondent and Juawo. On 20 September 2021, the applicant addressed a letter through his lawyers to 1st respondent advising it of cancellation of the agreement. It would appear no prior notice was given to the 1st respondent to remedy its alleged breach before the cancellation as no such has been attached to the application before me. This is not surprising for the reason that, quite queerly, the written agreement does not provide a breach clause to direct parties as to what should happen should either party breach the agreement. It is for the confirmation of that cancellation of the agreement and eviction of 1st respondent and all claiming occupation through it that the applicant has now approached this court.

[5] Both 1st respondent and applicant have raised points *in limine*. First respondent argues that the matter is improperly before the court since in terms of the agreement, parties must refer any dispute that may arise to arbitration. In other words, the point taken is that this court has no jurisdiction to entertain this matter. On his part, the applicant has challenged the authority of deponent to 1st respondent's opposing affidavit one Danny Musukuma because no company resolution has been filed to prove such authority. It is merely stated that the deponent is the managing director of the 1st Respondent. I directed that only these two preliminary points be argued as I was of the view that they were both capable of disposing of the matter without going into the merits.

AUTHORITY TO REPRESENT 1ST RESPONDENT

[6] It was argued by Mr *Mataka* for the applicant that 1st respondent's deponent Mr Danny Musukuma lacked authority to represent it as no board resolution was attached as proof that he had been authorized to represent the company. As such it was argued that the opposing papers ought to be expunged and the matter proceed as unopposed. Despite this being raised in the answering affidavit, the 1st respondent still found no necessity to produce the authority as challenged even at the hearing.

[7] My view is that with regards companies, the rule applies strictly that for any person seeking to hold himself out as a representative of a company in litigation, either to institute or defend legal proceedings, a board resolution must always be attached as proof that he has been authorized thereto. I expressed a strong view on this point and the reasons therefor in *Beach Consultancy (Pvt) Ltd* v *Obert Makonya & Another* HH696/22. I repeat here what I said at p4 of the judgment:

> "The current position of the law is that it must be shown that the corporate is aware of the proceedings that it is authorising. The reason for insistence on the company being aware of the proceedings is to confirm that it is indeed the company that has taken the decision to participate in the court case and that it is not an unauthorized person who is dragging it to court without its knowledge. Knowledge on the part of the company is required for the purpose of binding it to all the consequences of the litigation including payment of costs. Once it properly authorizes its participation in the litigation, it is estopped from denying liability once such adverse orders are made against it. This also protects the other parties in the litigation."

[8] It was therefore not sufficient for the 1st respondent's deponent only to rely on his position in the company as a director. The point *in limine* is therefore upheld with the consequence that there is no opposition before the court.

COURT'S LACK OF JURISDICTION

[9] Notwithstanding the above, I formed the opinion that the question of the court's jurisdiction remained alive from the applicant's own papers. This would be the case because, despite the default by respondents, the court had to be satisfied that the matter was properly before it and that the applicant had established a cause of claim. Attached to the application as Annexure 'B', record p 10-15, is the joint venture agreement which the parties signed and applicant claims has been breached by 1st respondent and whose alleged cancellation the applicant now prays that the court must confirm. Clause 8 of that agreement contains an arbitration clause in the following terms:

> "**8. ARBITRATION**
> 8.1 Should any dispute arise between the parties, and after attempts have been made in good faith to resolve the dispute, the dispute shall be put before an arbitrator, in terms of the Arbitration Act, Zimbabwe.
> 8.2 Each such arbitration shall be held:
> 8.2.1 At Harare
> 8.2.2 In an informal summary manner without any pleadings or discovery of documents and without being necessary to observe the strict rules of evidence.
> 8.2.3 Forthwith with a view to its being completed within one month from the date on which the dispute is referred to the arbitrator.
> 8.3 The arbitrator shall be registered arbitrator duly appointed by the President for the time being of the Law Society of Zimbabwe.
> 8.4 The parties hereby irrevocably agree that the decision of the arbitrator in any such arbitration proceedings shall be final and brining (*sic*) upon both of them."

[10] It is trite that an arbitration clause constitutes a separate arbitration agreement between/among the parties. Though somewhat inelegantly drafted, that is the arbitration agreement that the parties drew for themselves and agreed to be bound by it. The court is there only to enforce the terms of the agreement no matter how unreasonable or unfair they may be against a party. That flows from the twin principles of freedom and sanctity of contract. The Supreme Court expressed this proposition in *Magodora & Others v Care International* 2014 (1) ZLR 397 (S):

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H."

[11] Mr *Mataka* for the applicant argues that since the applicant has cancelled the agreement there is no longer arbitration to talk about, thus Clause 8 of the joint venture agreement can no longer be invoked nor applied. What must now be considered by the court is the cancellation that has been effected by the applicant and to confirm it as prayed for, so goes the argument. He further contents that since the venture agreement did not provide for breach and how to proceed when a party is in such breach, the present dispute before the court does not constitute a dispute as contemplated in the arbitration clause. I am not persuaded by this proposition. The position of the law is that an arbitration clause constitutes a separate agreement and survives termination or declaration of invalidity of the contract. It does not derive its validity from the contract. It is severable from the entire contract. Clause 8 therefore remains valid and applicable notwithstanding the alleged cancellation.

[12] It is further argued for the applicant that, in the event that Clause 8 is found to be binding on the parties, that clause does not oust the jurisdiction of this court to hear the matter because it enjoys inherent jurisdiction. I am of the view that while correct that the court has inherent jurisdiction, I do not take the view that the court can go against the clear provisions of a law in pursuit of its inherent jurisdiction. Inherent jurisdiction of a superior court is limited, among others, by statute.[1] The discretion which a court previously had [2] has since been taken away by

[1] See, Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5th ed, p52-3.
[2] *Independence Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268.

amendments to the Model Law of the UNCITRAL (with modifications), First Schedule to the Arbitration Act [*Chapter 7:15*]. In the present instance, Article 8(1) of the Model Law is applicable, and provides:

"ARTICLE 8
Arbitration agreement and substantive claim before court

(1) "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests no later than not later than when submitting his first statement on the substance of the dispute, *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.
(2) …" (underling for emphasis)

[13] In *Zimbabwe Broadcasting Corporation* v *Flame Lilly Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H) the headnote reads:

> "Sections 3 and 4 of the Arbitration Act provide that the UNCITRAL Model Law, as modified by the Act, apply to all disputes which the parties in Zimbabwe have agreed to submit to arbitration, except those matters excluded by s 4(2) of the Act. Article 8(1) of the Model Law lays down that if the parties have agreed by contract to submit any dispute that may arise to arbitration and a dispute has arisen and one of the parties requests the court to refer the matter for arbitration, the court must stay the proceedings and refer the matter to arbitration unless the agreement is null and void, inoperative or incapable of being performed.
>
> The question of whether the dispute between the parties to a contract falls within the ambit of an arbitration clause is primarily a question of interpretation of the agreement and in particular the arbitration clause." (Underlining is for emphasis)

[14] And at p 451, with regards the court's discretion to refer a dispute to arbitration, the court found as follows:

> "In the *Independence Mining case supra* at 270G, CHIDYAUSIKU J said:
>
> "The question of whether a dispute between parties to a contract fell within the arbitration clause is primarily a B question of interpretation of the agreement and in particular the arbitration clause."
>
> After concluding that both causes of action in that case were covered by the arbitration clause he said that the court had a discretion as to whether or not the matter should be referred to arbitration. In so ruling, he was acting in accordance with the provisions of s 6(1) of the Arbitration Act [*Chapter 7:02*] which is now repealed." (Underlining for emphasis)

[15] The same position was endorsed in the latter case of *Waste Management Services* v *City of Harare* 2000 (1) ZLR 172 (H) @ 177F-178B:

> "In *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H), it was pointed out that, although it had been held in the *Independence Mining* case *supra* that the court had a discretion as to whether or not a matter should be referred to arbitration, in so ruling CHIDYAUSIKU JP had been dealing with the provisions of s 6(1) of the Arbitration Act [Chapter 7:02]. That Act has since been repealed by the Arbitration Act 6 of 1996 which came into operation on 13 September l996. That Act applies, with modifications,

the UNCITRAL Model Law for the purpose of giving effect to domestic and international arbitration agreements. Article 8(1) of the Model Law as modified, which is set out in the Schedule to Act No. 6 of l996, provides as follows:

> "(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, 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.
>
> Since the City has so requested, this court has no option but to stay proceedings under this case and refer the parties to arbitration in terms of clause 25(b) of the agreement they entered into."

[16] The repeal to the 1996 Act removed the court's discretion which no longer enjoys any discretion whether to refer to arbitration whenever a dispute arises in a matter between parties who have signed an arbitration agreement. The only exception is when the court itself holds that the agreement is null and void, inoperative or incapable of being performed. There is nothing which has been placed before me for the court to make such a finding.

[17] I note that the provision also says that the court must stay the proceedings and refer the matter to arbitration. That has also been Mr *Mataka's* argument. In my view, the proper construction that must be placed on the provision in this regard is that the court cannot *mero motu* refer the proceedings. A request for the referral must be made by any of the parties. A request is a prerequisite for referral. Absence of such request does not disenfranchise the court from making any other order within its powers to make, including granting or dismissing the prayer before it.

[18] It is the duty of the court to interpret the contract provision to ascertain whether a dispute between the parties has arisen. The disagreement between the parties is whether a dividend became payable at any time from commencement of the venture to date and, if so, whether the 1st respondent has failed to do so. The 1st respondent argues that the company has not registered any profit and no dividend became payable. This is disputed by the applicant who has based his cancellation of the agreement on the purported failure to pay such dividend. Clearly, this is a dispute that has arisen between the parties, whatever characterization that the applicant wishes to give it. His argument that failure to pay a dividend constitutes breach of the agreement although the agreement does not specifically provide for breach, and that he has exercised his right to cancel for breach does not detract from the fact that it is a dispute by another name. It is a dispute that stands to be referred to an arbitrator by the parties in terms of their agreement.

[19] It is sad that the so-called venture is replete with unreasonable clauses which work against the applicant to an extent that the venture agreement is literally a surrender of the mine to the 1st respondent by the applicant. As stated before, the court's duty is to enforce terms of a contract as are, whatever the consequences that may have on one party. This present application is an attempt to wriggle out of this totally non-beneficial agreement by the executor who is a beneficiary of the estate late Juawo Nkomo.

CONCLUSION

[20] I arrive at the conclusion that this dispute is one falling within the ambit of the arbitration agreement of the parties. It stands to be referred for arbitration by the parties themselves. The applicant has not demonstrated any legally acceptable reason why their dispute should not be resolved in terms of the dispute resolution mechanism chosen by the parties. In the absence of a request that I stay proceedings and refer the matter to arbitration I cannot *mero motu* do so.

DISPOSITION

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. Applicant to pay costs.

Chambati Mataka & Makonese, applicant's legal practitioners
Chinawa Law Chambers, first respondent's legal practitioners