NU.COM (PRIVATE) LIMITED
and
CHAKANYUKA KARASE
and
MATIPEDZA KARASE
versus
NU AERO (PRIVATE) LIMITED
and
FLY AFRICA LIMITED
and
LOW COST ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 28 & 29 March 2018 & 4 March 2019

Opposed Matter

Prof *L. Madhuku,* for the applicants
Adv *T. Zhuwarara*, for the respondents

CHIWESHE JP: The first applicant seeks an order declaring, inter alia, that is it the holder of 51% of the shares in the first respondent, and, that the purported sale of the first applicant's shares in the first respondent to the third respondent is null and void and of no legal force or effect.

The applicant's founding affidavit is sworn to by one Chakanyuka Karase its managing director. He is also the second respondent in his capacity as the holder of 50 per cent shares, in the first applicant. The third applicant M. Karase is the other shareholder in the first applicant. He holds the other 50 % of its share.

The background facts to this application are largely common cause. The first applicant and the second respondent entered into a shareholder's agreement with respect to the share capital of the first respondent, Nu Aero Pvt Ltd.

In terms of the agreement, the first applicant would hold 51% of the shares and the second respondent the remaining 49%. The shareholders' agreement reflected the country's indigenisation laws at that time. The shareholders' agreement was pursuant to a joint venture agreement between the parties in terms of which the parties were to provide "affordable low cost air travel" using the first respondent as the vehicle for doing so. It is thus in the second respondent that the shares are issued at 51% and 49% respectively.

After a few months of operation disputes arose between the joint venture partners. These were to do primarily with finances and operational capacity. The disputes spilled into this court under HC 10476/15. A provisional order, which is yet to be confirmed, was issued, restraining the second applicant from taking unilateral decisions. As a result of these disputes the first applicant sought to sell its 51% shareholding. It wrote to the second respondent notifying it of its intentions and inviting second respondent to indicate its acceptance of the right of first offer and payment of the offer price of US$1 400 000.00 (one million four hundred thousand United states dollars). The second respondent was given 14 days within which to indicate this acceptance.

In response, the second respondent wrote to the first applicant advising that the first applicant's shares had already been sold to the third respondent pursuant to clause 21 of the Shareholders agreement. It was also indicated that the first applicant had failed to act as per the default call option that was then exercised by the second respondent.

However, the first applicant insists that it never sold its shares and that it still holds 51% shareholding in the first respondent. It states that on 26 October 2015 it received, from the second respondent, a "Default Call Option Notice" dated 23 October 2015. Within a day, that is on 27 October 2015, the first applicant responded seeking further particulars. There was no response to that letter. It finds the assertion that it had sold its shares as not supportable at law.

According to the first applicant, clause 21 of the agreement was never intended to be a basis for compulsory acquisition of property as suggested by the second respondent. In any event, argues the first applicant, such interpretation of clause 21 given by the second respondent would render clause 21 void for being contrary to the Companies Act [*Chapter 24:03*].

The first applicant submits that the procedures for invoking clause 21 were not followed. The letter giving notice should have been accompanied by a statement indicating the default. Further clause 21 .4 requires that shares be evaluated at 80% of their fair market value. The valuation process is rigorous. No such process was ever carried out argues the first applicant. Further, clause 21 requires the purchase price to be deposited in a separate bank account and to be held in Trust. That was not done, hence, according to the first applicant, the default call notice cannot hold on account of failure to comply with these procedural requirements.

The first and third respondents have raised some points in *limine* chief among which is the question whether this court has jurisdiction to determine the dispute between the parties in view of the provisions of clause 39 of the shareholders' agreement. That clause requires that any dispute or difference between the parties must initially be resolved through the process of mediation, failing which the dispute must be referred for arbitration in the United Kingdom in accordance with the Arbitration Rules of the London Court International Arbitration.

Clause 39 provides for mediation and arbitration as the forum for resolving disputes between the parties. It reads, inter alia,

"39 ARBITRATION

39.1 In any case any dispute or difference shall arise between the parties hereto as to the construction of this Agreement any matters of whatsoever nature arising hereunder or in connection therewith, including any question regarding its existence, validity or termination ("dispute"), the Parties agree to first use their reasonable efforts to resolve such dispute in good faith via mediation or similar methods of dispute resolution.

39.2 In the event that Parties are unable to resolve the dispute in accordance with clause 39.1, such Dispute shall be submitted to and finally resolved by arbitration in the English Language in United Kingdom in accordance with the Arbitration Rules of the London Court of International Arbitration (the "LCIA") for the time being in force, which rules are deemed incorporated by reference in this clause 39.2.

39.3 ……

39.4 …….

39.5 The forum agreed to in clause 39.2 shall be the exclusive forum for resolving any disputes in connection with this agreement. No party shall bring any other proceedings in connection with this agreement in <u>any other court or forum</u>

whatsoever, provided that this will not prevent any party from bringing enforcement proceedings in any other court or tribunal to enforce an award duly made by the SIAC. Each party hereby renounces any right it may otherwise have to appeal or seek relief from the award or any decision of the arbitrators contained therein and agrees that in accordance with Article 60 of Law No 30 of 1999 of the United Kingdom on Arbitration and Alternative Dispute Resolution (The "Arbitration Law"), no Party shall appeal to any court from the award or decision of the arbitrators contained therein.

39.6 The decision of the arbitrators shall be final, binding and incontestable and may be used as a basis for judgment thereon in Zimbabwe or elsewhere.

……

39.7 For the purpose of enforcing arbitration award in Zimbabwe, the parties in Zimbabwe, the Parties choose to without prejudice to the rights of the Parties, to enforce any arbitration award in any court having jurisdiction over the other or its assets." (My own underlining)

From the foregoing it is clear that the parties intended that any dispute arising from the Shareholding Agreement be resolved through mediation, failing which the parties would proceed to arbitration. The term "dispute" or its ambit has been defined under clause 39 (1) above as any dispute or difference to do with the construction of the agreement including its existence, validity or termination. The present dispute between the parties has to do with the construction of clause 21 of the agreement, which provides for the "Default Call Option". The first applicant contends that the default call option should not have been exercised, and even it were to be exercised, the prescribed procedures were not complied with. According to clause 39.1 differences to do with the construction of provisions of the Shareholders' Agreement must be resolved through mediation or arbitration. In any event the exercise of the default call option by either party would lead to termination of the agreement. And again in terms of clause 39.1 disputes or differences to do with the existence, validity or termination of the agreement should be referred to mediation or arbitration. Clearly the dispute is to do with the acquisition of shares. It falls squarely within the provisions of the Shareholders' Agreement.

In my view therefore, the dispute at hand falls within the purview of the arbitration clause. By that clause the parties' intention is bold and unequivocal. The clause ousts the jurisdiction of this court and any other Zimbabwean authority to adjudicate any dispute that may arise between the parties. Instead, the parties chose a foreign body to regulate their affairs. Exclusive jurisdiction

was conferred on the London Court of International Arbitration. Local institutions, including this court, were conferred with the residual power of enforcement of any arbitral award obtained from that forum. The language used under clause 39 is clear, unambiguous and emphatic.

Now an arbitration clause in a contract is binding on the parties. The court is under an obligation to give effect to it. See Article 8 (1) of the UNCITRAL Law on International Commercial Arbitration (First Schedule to the Arbitration Act [*Chapter 7:15*]. See also *Bitumat Ltd v Multicom Ltd* 2000 (10 ZLR 637 H at 639 – 40 where SMITH J had this to say:

> "In my opinion, where parties have entered into an agreement which contains an arbitration clause that is clearly intended to be widely cast, the court should not be astute in trying to reduce the ambit of the arbitration clause. Where an arbitration clause exists in any such agreement, the court is required to give effect thereto."

Similarly, I must give effect to the provisions of clause 39 of the agreement, the arbitration clause, and decline jurisdiction, so clearly ousted therein. I hold that the dispute between the parties falls squarely within the ambit of the arbitration clause agreed to by the parties in the Shareholders Agreement. I must therefore decide this point in *limine* in favour of the respondents.

For these reasons the application must be dismissed with costs. It is so ordered.

Mundia & Mudhara, applicants' legal practitioners
Kantor & Immerman, 1st & 3rd respondents' legal practitioners