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Facts

In November 2004, the Government of the Republic of Zambia had concluded an agreement in which Vedanta Resources Holdings Limited ("Vedanta"), acquired a majority shareholding interest in Konkola Copper Mines ("KCM"). Following this acquisition, ZCCM Investment Holdings Plc ("ZCCM-IH") negotiated and executed a Shareholders Agreement and Articles of Association. Among other things, the aforementioned agreements provided that Vedanta would be responsible for appointing the Chief Executive Officer, who in turn was responsible for appointing a Chief Operating Officer, Chief Financial Officer and other senior management.

In the petition filed by ZCCM-IH it was alleged that Vedanta had managed KCM in a manner that was detrimental to the interests of ZCCM-IH. Among other things it was alleged that:

- Vedanta had only declared dividends five times in the fifteen years amounting to a total of USD 67.105 Million. Furthermore, Vedanta had failed to pay ZCCM-H the sum of USD 10,305,000.00 which was the latter's share of the dividend, despite the fact that it was declared in 2013;
- Vedanta had operated at a loss for the preceding seven years. Cumulatively these losses amounted to USD 1.2623 billion;
- Vedanta was not able to meet its operating costs between 2013 and 2019;
- The company was failing to pay its debts. For example, it owed Copperbelt Energy Corporation Plc the sum of USD 24,064,722 and Ndola Lime sums of USD 468,036.25 and ZMW 199,941;
- That Vedanta had been operating in a manner that was not environmentally friendly or sustainable. They had polluted and continued to pollute water sources in and around the mining licence areas. Consequently, they were found liable for polluting the Kafue River by the Supreme Court of Zambia under Appeal No. 1 of 2012;
- They had provided a mining plan pursuant to section 35(1)(b) of the Mines and

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> Minerals Development Act, 2015 and failed to abide by it. For example, they had failed to develop the mining areas in Chingola and Chililabombwe and to carry out mining operations with due diligence. This meant that they continued to operate below capacity. Failure to adhere to the requirements of the Mines and Minerals Development Act, meant that the Ministry of Mines issued a default notice against Vedanta.

It is against this backdrop that on 21st May 2019, ZCCM-IH applied to the Lusaka High Court of Zambia to have KCM placed in provisional liquidation. Vedanta applied for a stay in these liquidation proceedings because the Shareholders' Agreement between the Government of Zambia and Vedanta, contained within it an arbitration clause.[2] Under this arbitration clause, all disputes arising out of the Shareholders' Agreement were to be settled by arbitration. The term 'dispute' was defined quite broadly in the Shareholders' Agreement.[3] Vedanta contended that since ZCCM-IH felt that KCM was being managed in a manner that was detrimental, there was a dispute between the parties as per the Shareholders Agreement, and therefore it should be referred to arbitration.[4]

Counsel for Vedanta contended that since there was an arbitration clause, the Court was compelled to stay the liquidation proceedings and accordingly refer the matter to arbitration, by virtue of section 10 of the Arbitration Act of 2000.[5] This is because section 10 of the Arbitration Act was couched in mandatory terms. The aforementioned provision says that:

> **(**1) A court before which legal proceedings are brought in a matter which is the subject of 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.
> (2) Where proceedings referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

In advancing their argument, counsel for Vedanta relied on the case of *Konkola Copper Mines v NFC Africa Mining* (2006), under which the Supreme Court held that where there is an arbitration clause and a party applies for a stay of proceedings under section 10 of the

[2] R7
[3] R9
[4] ibid
[5] R11

Arbitration Act, the Court has no choice but to refer a matter to arbitration. The only exception to this rule is if the arbitration agreement is null and void, inoperative or incapable of performance.

The High Court disagreed. In their view this was not a proper case to refer the parties to arbitration. As far as the High Court was concerned, the arbitration agreement was "null and void, inoperative or incapable of being performed". The court acknowledged that section 10 was couched in mandatory terms.[6] However, it noted that this same section also provided that the Court should refuse to stay proceedings in the event that it finds that the arbitration clause is null and void, inoperative or incapable of being performed.[7]

The Court held that it had exclusive jurisdiction to oversee the liquidation proceedings. The ultimate aim of such proceedings was to protect third parties.[8] Included in the category of third parties are the creditors of a company which is to be wound up. The High Court noted that creditors had already filed their Notices of Intention to be heard in the winding-up petition. Thus, despite the fact that there was a dispute between the parties to the Shareholders' Agreement, the Court had a duty to consider the interests of third parties, in the matter before it.

The High Court opined that where third party rights were involved in liquidation proceedings, "the private agreement between shareholders and a company to submit their dispute to arbitration is displaced and rendered inoperative."[9] This is owing to the fact that the other competing interests are completely separate from the interests of the parties to the arbitration process. The former thus supersedes the latter because it can only be taken care of through the court process.[10]

In addition to this, the Court was of the view that the arbitration agreement itself did not apply to the creditors, whose Notice of Intention to be heard was already before the court.[11] Given this fact, the arbitration agreement was inapplicable. As such, the High Court dismissed the

[6] R23
[7] ibid
[8] ibid
[9] R24-R25
[10] ibid
[11] R25

application to stay the liquidation proceedings.[12]

Significance

This case is significant because these very facts were presented to the South African High Court and had a totally different outcome. The South African proceedings in *Vedanta Resources Holdings Ltd v ZCCM Investment Holdings Plc and Milingo N.O. Lungu (In his official representative capacity as the Provisional Liquidator of Konkola Copper Mines PLC)*[13] had been decided by the High Court of South Africa a few weeks earlier. This case concerned the liquidation proceedings in the Zambian High Court. In this instance, Vedanta sought to restrain ZCCM Investment Holdings (the first respondent) from taking any further steps in furthering the winding-up proceedings.

As with the case before the Zambian High Court, one of the issues in contention before the South African High Court was the arbitration clause in the Shareholders' Agreement.[14] The parties had actually selected Johannesburg as the seat of the arbitration proceedings.[15] The issue here was whether there was a "dispute" between the parties. The Court looked at the definition of dispute contained in the Shareholders' Agreement and found that it was couched in very wide terms, which connotes that it was the intention of the parties to extend rather than limit the definition of "dispute".[16] They particularly focused on the usage of terms such as, "dispute, disagreement, controversy, claim or difference" meant that in an event that the parties do not adopt the same position or view on an issue, then there is in fact an arbitrable dispute.[17]

The South African High Court held that liquidation proceedings initiated before the Zambian High Court, amount to a dispute. Therefore, this matter is subject to arbitration as contemplated in the Shareholders' Agreement. Furthermore, since Johannesburg was the seat of the arbitration, the South African High Court had jurisdiction as a supervisory court.[18] For this reason, the South African High Court held *inter alia* that the respondents must litigate its disputes by arbitration in Johannesburg. As such, they were prevented from instituting any further winding-up proceedings, until a final determination was rendered by an arbitral

[12] R27
[13] Case No. 2019/23462
[14] ibid at 2
[15] ibid at 6
[16] Ibid at 7
[17] Ibid at 14
[18] Ibid at 14-16

tribunal.[19]

The fact that there was an arbitration clause, connotes that the parties intended the dispute to be settled in a neutral forum, outside the mechanisms of national law. Having the dispute heard before a court in the national jurisdiction may have not only led to years of litigation but also would have given ZCCM-IH the home-turf advantage.[20] This is further underscored by the fact that Johannesburg was chosen as the seat of the arbitration. This would suggest that it was within the realm of contemplation of the parties, that in the event that a dispute arises, then it would be settled by arbitration in Johannesburg.

Furthermore, the author agrees with the South African High Court, when it asserts that the term dispute was couched in very broad terms. It said that "dispute" means "any dispute, disagreement, controversy, claim or difference of whatsoever nature arising under, out of, in connection with or relating (in any manner whatsoever) to this Agreement or the interpretation or performance of this Agreement or the breach, termination or validity thereof." From this, it is conceived that the meaning of "dispute" is very wide, rather than very narrow. As such, any dispute arising, under, out of, in connection with or relating to this matter would fall within the scope of this contractual provision. This would include the liquidation.

Furthermore, section 10 of the Zambian Arbitration Act is couched in mandatory terms.[21] As a general rule, this means that the Court must compel the parties to go to arbitration, in the event that there is an arbitration clause. In other words, Courts must decline to hear a dispute in the event that there is a written arbitration agreement, if one party so requests.

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[19] ibid at 24

[20] See the case of *Fiona Trust & Holding Corp and Others v Privalov and Others* [2007] UKHL 40. Where Lord Hoffmann opines that the purpose behind an arbitration clause is to ensure that disputes are decided "by a tribunal which they have chosen, commonly on grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in the proceedings before a national jurisdiction". See also Sangwani Patrick Ng'ambi and Kangwa-Musole George Chisanga, *International Investment Law and Gender Equality: Stabilization Clauses and Foreign Investment* (Routledge 2020) 127.

[21] See also the Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which provides that, *"A court before which an action is 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, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed." and Article II.3 of the New York Convention which says,* "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

The exception under Zambian law, appears to be that the Court will accept jurisdiction over a matter in the event that the arbitration clause is null, void, inoperative or incapable of being performed. The decision of the Zambian court hinges on the fact that since there are third party interests to protect, the Court had jurisdiction over the matter and the arbitration clause was displaced and rendered inoperative. What is unclear is the connection between the interests of third parties in a liquidation and the inoperability of the arbitration clause. To strengthen its contribution to existing jurisprudence, this should have been made more explicit, thereby enriching the current discourse among scholars in International Commercial Arbitration.