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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.

On 21st May 2019, the ZCCM-IH commenced winding up proceedings by way of a petition in the High Court of the Republic of Zambia with the view to wind up KCM based on the allegation that the mine was being mismanaged by Vedanta, contrary to the provisions of the Shareholders Agreement that was executed between the Appellants and the Respondents. 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;
- Vedanta had been operating in a manner that was not environmentally friendly or

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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 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.
- That at the same time that the winding up proceedings where commenced, the ZCCM-IH obtained an ex-parte order appointing a Provisional Liquidator over Konkola Copper Mines and the order of appointment gave the Provisional Liquidator very wide powers over and above the requirement to preserve the assets of the company.

Vedanta applied for a stay of execution in these liquidation proceedings because the Shareholders Agreement between the Government of Zambia and Vedanta, contained an arbitration clause.[3] 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.[4] 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.[5]

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.[6] 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

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

> 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 argued 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 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.[7] 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.[8]

The High Court held that it had exclusive jurisdiction to oversee the liquidation proceedings. The ultimate aim of such proceedings was to protect third parties.[9] 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

[7] R23
[8] ibid
[9] ibid

arbitration is displaced and rendered inoperative."[10] 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.[11]

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.[12] Given this fact, the arbitration agreement was inapplicable. As such, the High Court dismissed the application to stay the liquidation proceedings.[13]

Grounds for Appeal

Dissatisfied with the decision of the High Court, Vedanta launched an appeal before the Court of Appeal. Among other things, Vedanta contended that after finding that there was in fact an arbitrable dispute between the parties, the learned High Court judge should have referred the matter to arbitration, pursuant to section 10(1) of the Arbitration Act.[14] Furthermore, Vedanta contended that the learned judge erred in finding that the arbitration clause was inoperable.

Holding

The Court of Appeal held that Vedanta had substantially succeeded in its appeal against the High Court's refusal to stay proceedings and refer the matter to arbitration.[15] This was owing to the fact that *inter alia* that there was indeed a dispute between the parties as defined in the Shareholders Agreement. In addition to this, the Court of Appeal held that Vedanta possessed the requisite *locus standi* to apply for a stay of the winding up petition and refer the matter to arbitration. Moreover, the Court of Appeal opined that the disputes between the parties were referable to arbitration. As such, the arbitration agreement between the parties was indeed arbitrable.[16]

The Court of Appeal opined that there was indeed a dispute between the parties. The Court first looked at the meaning of 'dispute' under the Shareholders Agreement, which defined it as meaning, "any dispute, disagreement, controversy, claim or difference of whatsoever nature

[10] R24-R25
[11] ibid
[12] R25
[13] R27
[14] J16
[15] J73
[16] Ibid

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."[17] Moreover, under Clause 26.1 of the Shareholders Agreement, the parties consented to submit "any dispute" to arbitration.

The Court of Appeal opined that according to Clause 3 of the Shareholders Agreement, the primary object of the company was to conduct business and carry it out in accordance with scheduled programmes.[18] The main business of KCM was mining. The fact that ZCCM-IH had taken issue with the manner in which mining operations were being conducted meant that there was a dispute which fell "clearly within the ambit of arbitration as agreed".[19]

The Court contended that the matter should be referred to arbitration because the dispute concerned here arises from the performance of obligations imposed on KCM and Vedanta under the Shareholders Agreement. The Court of Appeal contended that the case of *Ody's Oil Company,*[20] on which the High Court based its decision, was distinguishable and opined that:

> In that case the court refused to refer the matter to arbitration because the contractual agreement was tainted with illegality. In addition to this, another party which was a stranger to the arbitration agreement was involved. The court was of the view that referring part of the case to arbitration would lead to multiplicity of actions, which could result in conflicting decisions.

The Court of Appeal opined that that was not the case here. The grievances arose from the Shareholders Agreement and was a dispute among the shareholders. As such, the interests of third party creditors did not arise, because third party creditors were not precluded from approaching the court in their own right. As such, the Court of Appeal found that the arbitration agreement was operative and capable of performance between the parties to the Shareholders Agreement.[21] The Court of Appeal thus set aside the decision of the High Court, ordered a stay of the winding up proceedings and referred the matter to arbitration as requested by Vedanta.

Significance

[17] J42
[18] J45
[19] Ibid
[20] Citation needed
[21] J69

As a general rule, the arbitration clause forms the basis of the arbitration. By entering into an agreement to arbitrate, the parties essentially commit to submit certain disputes which may arise to arbitration, rather than the Courts. As such, the parties grant jurisdictional powers to private individuals (the arbitrators) to determine their dispute and issue an arbitral award thereafter. This fact is underscored in section 10(1) of the Arbitration Act, No. 19 of 2000 which says:

> 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.

Therefore, as a general rule, the courts must refer a matter to arbitration, where there is an arbitration clause, provided one of the parties requests the matter be referred to arbitration. The Court of Appeal in the earlier case of *Beza Consulting Inc. Limited v Bari Zambia Limited and Gidey Genremariam Egziabher*,[22] gave guidance when they stated that:

> What section 10 [of the Arbitration Act] does, however, is to require the ouster of the Court's jurisdiction to be triggered by a request by a party to the arbitration agreement, which party must also be a party to the proceedings.

Based on the foregoing Court of Appeal authority, which was confirmed in the *Vedanta* judgment, before the Court can consider referring the matter to arbitration, all the parties to the proceedings before it must also be parties to the arbitration agreement, and at least one of them must refer it to arbitration. Indeed, in both Beza Consulting and the Vedanta case, the Court of Appeal confirmed that the only exception to this rule that the matter must be referred to arbitration is where the court finds that the arbitration clause is null and void, inoperative or incapable of being performed. According to the Court of Appeal, third party interests do not fall within the stipulated exceptions.

The Court of Appeal's decision to quash that of the High Court is a welcome one. Investors elect to have disputes settled through arbitration for a plethora of reasons. The first is that it is relatively quicker than litigation through the national courts. Litigation disputes can take

[22] CAZ Appeal No. 171/2018.

several years to bring to finality. Arbitration on the other hand, can take only a matter of months. There is also greater confidentiality during the arbitral proceedings. Moreover, investors are more confident of having their dispute heard in a neutral forum, because arbitral proceedings take place above the fray of the justice system of the host State. This decision ensures that where there is a dispute, the investor can still have their dispute heard expeditiously and in a neutral forum, without the other party using the courts as a delaying tactic. Holding otherwise would have set a bad precedent for the area of International Commercial Arbitration in Zambia.

This decision by the Court of Appeal is also welcome, as it shows that the courts are an effective buffer against the resource nationalism cycle. The advanced stages of the resource nationalism cycle invariably manifest, when the State seeks to exercise greater control over natural resource development and to limit the operations of the investor.[23] This is typically sparked by an increase in the prices of natural resources on the international market. In such instances, the State wishes to gain more revenue from its natural resource, either by reversing any tax breaks the investor has previously enjoyed, or outrightly nationalizing their assets.[24]

Whether or not a resource rich nation succeeds in that endeavour, depends largely on its institutions and the checks and balances that exist. Where institutions are weak, it is easier for the host State to pursue a resource nationalist agenda.[25] Where institutions are strong and independent, it is a lot harder for the host State to do so. This decision of the Court of Appeal demonstrates that there exist institutional constraints in the form of checks and balances. As such, the Zambian judiciary has demonstrated that it can be a highly effective buffer against the resource nationalism cycle in Zambia.

[23] Paul Stevens, "National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle" (2008) 1 *Journal of World Energy Law & Business* 5.
[24] Sangwani Patrick Ng'ambi, *Resource Nationalism in International Investment Law* (Routledge 2016) 30.
[25] See Sergei Guriev, Anton Kolotilin and Konstantin Sonin, "Determinants of Nationalization in the Oil Sector: A Theory and Evidence from Panel Data" (2009) 27 *The Journal of Law, Economics & Organization* 301.