

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CA-00206-SCT

DELTA ELECTRIC POWER ASSOCIATION

v.

ARCHIE CAMPBELL, ET AL

DATE OF JUDGMENT: 01/23/2019
TRIAL JUDGE: HON. MITCHELL M. LUNDY, JR.
TRIAL COURT ATTORNEYS: JUSTIN RONALD GLENN
ALAN D. LANCASTER
JONATHAN RYAN TAYLOR
BRANNON LEE BERRY
CHRISTINA M. SCHWING
SAM N. FONDA
COURT FROM WHICH APPEALED: MONTGOMERY COUNTY CHANCERY
COURT
ATTORNEYS FOR APPELLANT: CHRISTINA M. SCHWING
SAM N. FONDA
ROBERT McLAUGHLIN GORE
JAY GORE, III
ATTORNEYS FOR APPELLEES: WALKER (BILL) JONES, III
MICHAEL D. SIMMONS
DAVID WAYNE BARIA
BRANNON LEE BERRY
JUSTIN RONALD GLENN
NATURE OF THE CASE: CIVIL - CONTRACT
DISPOSITION: REVERSED AND REMANDED - 09/03/2020
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE KING, P.J., COLEMAN AND BEAM, JJ.

KING, PRESIDING JUSTICE, FOR THE COURT:

¶1. Members of Delta Electric Power Association (Delta) filed a lawsuit against the cooperative seeking the return of excess revenue and receipts. Delta filed a motion to compel

arbitration. The trial court found that the arbitration clause contained in the bylaws was procedurally unconscionable and denied Delta’s motion to compel. After Delta appealed the trial court’s decision, this Court decided *Virgil v. Southwest Mississippi Electric Power Association*, 296 So. 3d 53 (Miss. 2020), in which it found an arbitration agreement contained in a cooperative’s bylaws to be valid and enforceable. Because the issues in this case are almost identical to the issues decided in *Virgil*, precedent requires this Court to reverse the trial court’s decision denying Delta’s motion to compel arbitration.

FACTS AND PROCEDURAL HISTORY

¶2. Delta is a not-for-profit electric cooperative corporation. In order to receive electrical service, a person was required to submit a one-page application. Although the application contained no reference to arbitration, it stated that “[t]he Applicant will comply with and be bound by the provisions of the charter and bylaws of the Corporation, and such rules and regulations as may, from time to time, be adopted by the Corporation, all of which are made a part of this contract.” As in *Virgil*, Delta’s board of directors had amended its bylaws to include an arbitration provision, stating,

Alternative Dispute Resolution. Unless otherwise prohibited by law, any controversy or claim arising out of or relating to these bylaws, or the breach thereof, or any controversy or claim arising out of or relating to patronage capital shall be resolved by binding arbitration administered by the American Arbitration Association in accordance with its arbitration rules after all conditions precedent as set forth in Article VIII, Section 8.01, if applicable, have been met. This agreement involves interstate commerce such that the Federal Arbitration Act, 9 U.S.C. § 1, et seq. shall govern the interpretation and enforcement of this arbitration agreement

The arbitration provision is almost identical to the arbitration provision at issue in *Virgil*.

Section 8.03 of Delta's bylaws also contained a provision stating,

To the extent the membership disagrees with the decisions of the Board of Directors with respect to the allocation or retirement of capital credits, the member may seek arbitration pursuant to Article XI, Section 11.06 of the Bylaws but only after the member has first provided written notice to the Board of Directors at least fifteen (15) days in advance of the next scheduled regular monthly Board meeting and provided the Board of Directors with a reasonable time to investigate and respond to the matter.

¶3. Under Mississippi Code Section 77-5-235,

The revenues and receipts of a corporation shall first be devoted to such operating and maintenance expenses and to the payment of such principal and interest and thereafter to such reserves for improvement, new construction, depreciation and contingencies as the board may from time to time prescribe. Revenues and receipts not needed for these purposes shall be returned to the members by such means as the board may decide, including through the reimbursement of membership fees, the implementation of general rate reductions, the limitation or avoidance of future rate increases, or such other means as the board may determine.

Miss. Code Ann. § 77-5-235(5) (Rev. 2018). On December 29, 2017, Archie Campbell and other cooperative members (Plaintiffs) filed a lawsuit against Delta alleging that Delta was retaining excess revenues that it did not need to fund its operations. Several similar cases also were filed in Mississippi against electric power cooperatives, including *Virgil, Coast Electric Power Association v. Lakesha Butler*, No. 2018-CA-01728, and *Dixie Electric Power Association v. William Willis*, No. 2019-CA-00007.

¶4. The Plaintiffs filed a Motion for Declaratory Judgment, requesting that the trial court find that the Plaintiffs did not agree to arbitrate the claims asserted and that the arbitration

provision contained in the bylaws was unconscionable and unenforceable. Delta then filed a Motion to Compel Arbitration and to Stay This Litigation Pending Arbitration. The trial court denied Delta's motion to compel arbitration and held that the arbitration provision was unenforceable for six reasons: 1) because the Plaintiffs did not agree to arbitrate the dispute; 2) because the bylaws contained two separate arbitration provisions, a mandatory and nonmandatory one, and the arbitration provisions conflicted, rendering them ambiguous and unenforceable; 3) because the word "may" as contained in the arbitration provision rendered the provision permissive; 4) because the mandatory arbitration provision did not apply retroactively; 5) because Delta had a duty to disclose or act affirmatively to explain the arbitration provision because of its fiduciary duty; and 6) because the mandatory arbitration provision was unconscionable.

¶5. Delta appealed and raised three issues, which are recited verbatim below:

1. Whether the lower court erred by failing to acknowledge the delegation clause in the parties' contracts for electrical service, and in so doing further erred by failing to apply the correct standard of review.
2. Whether the lower court violated the equal footing doctrine as set forth by the United States Supreme Court when it singled out the arbitration clause for disfavored treatment.
3. Whether the lower court exceeded its jurisdiction by considering challenges that implicated the parties' contracts as a whole, and further erred by failing to apply this Court's standard for conscionability.

Because this Court's holding in *Virgil* is dispositive as to the first issue, we decline to address the remaining issues.

ANALYSIS

¶6. “In reviewing an appeal of an order compelling arbitration, we review the trial judge’s factual findings under an abuse-of-discretion standard, and we conduct a de novo review of all legal conclusions.” *Virgil*, 296 So. 3d at 59 (internal quotation marks omitted) (quoting *Smith v. Express Check Advance of Miss., LLC*, 153 So. 3d 601, 605-06 (Miss. 2014)). “[T]he party resisting arbitration must shoulder the burden of proving a defense to arbitration.” *Id.* (internal quotation marks omitted) (quoting *Norwest Fin. Miss., Inc. v. McDonald*, 905 So. 2d 1187, 1193 (Miss. 2005)).

¶7. Delta’s board of directors amended its bylaws to include an arbitration provision almost identical to the arbitration provision contained in *Virgil*. Because the Plaintiffs in this case each signed a membership agreement that advised “that members would be bound by the bylaws and that the bylaws could be amended by the elected board,” under this Court’s precedent, the board’s amendment to include the arbitration provision was lawful. *Virgil*, 296 So. 3d at 60; *see also The Door Shop, Inc. v. Alcorn Cnty. Elec. Power Ass’n*, 261 So. 3d 1099, 1104 (Miss. 2018). Therefore, the parties entered into a valid arbitration agreement, and the trial court’s judgment denying Delta’s motion to compel arbitration was error. The issue of whether the inclusion of the arbitration provision without notice was unconscionable may be raised before the arbitrator.

CONCLUSION

¶8. We reverse the trial court’s judgment denying Delta’s motion to compel arbitration

and remand this case for further proceeding consistent with this opinion.

¶9. **REVERSED AND REMANDED.**

**COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ.,
CONCUR. RANDOLPH, C.J., AND KITCHENS, P.J., NOT PARTICIPATING.**