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IN THE HIGH COURT OF MALAWI

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PRINCIPAL REGISTRY

CIVIL CAUSE NO. 236 OF 1990

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BETWEEN:

LANDELL MILLS ASSOCIATES LTD. PLAINTIFF

AND

E.M.M. MARSHALL DEFENDANT

CORAM: BANDA, J.
Mbendera of Counsel for the Appellant
Nyirenda of Counsel for the Respondent
Kholowa, Court Clerk

Look 4 the
Registrar's
ruling

RULING

This is an appeal from the decision of the learned Registrar which was delivered on 28th November, 1990. The plaintiffs are appealing against the order of stay of proceedings which the Registrar granted.

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An appeal from the Registrar to this Court is by way of rehearing. This Court is not bound by the findings of the Registrar although due weight may be given to those findings. I must, however, treat this matter as if it comes before me for the first time. The appeal to this Court is founded on two grounds namely that the Registrar erred in both law and fact in dealing with the issues raised as though the foreign jurisdiction clause and law relating thereto applied to the facts of the case; and secondly that the Registrar erred in law in ordering a stay when the facts showed that the defendants, in taking steps in an action, have submitted to the jurisdiction.

The plaintiff is a limited liability company registered in England. It was appointed as managing agent for a Malawi company known by the style of Impala Farming Company Limited. Under the arrangement the plaintiff was required to employ a Financial Controller for the Malawi company. It was in pursuance of that arrangement that the defendant was employed by the plaintiff as Financial Controller to the Malawi company. In the present action the plaintiffs are suing the defendant for a sum of K114,600.00 as money paid by the plaintiffs to the Malawi company as money allegedly

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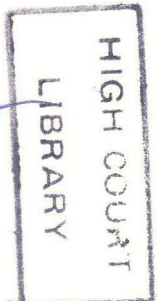
stolen by the defendant. There can be no doubt that the bone of contention is the interpretation to be placed on clause 17 of the agreement made by the plaintiff and the defendant. That clause is in the following terms:

"The provisions of this agreement are in all respects to be interpreted in accordance with the Law of England, all legal proceedings whatsoever in connection with the provisions of this contract and the performance of it shall be brought in the courts of England and you and the Company agree to submit to the jurisdiction of such courts."

Mr. Mbendera, who argued the appeal for the plaintiff, conceded that while clause 17 did confer jurisdiction to English Courts he contended that clause 17 and the language used did not confer jurisdiction on all conceivable matters that might arise between the parties. He submitted that clause 17 was intended only to apply to contractual disputes arising between the parties and it was his view that the action against the defendant is not intended to enforce any contractual right. Mr. Mbendera has further argued that the phrase "all legal proceedings whatsoever" is limited by the phrase "in connection with the provisions of this contract and its performance". He has contended that the performance of the contract by the defendant is irrelevant and should not be considered in resolving the issues raised in this appeal. He has submitted that the phrase "all proceedings whatsoever" must be restricted to mean "only proceedings in connection with matters in contract" and that the action against the defendant is not founded in contract.

On the second ground of appeal Mr. Mbendera has contended that the Registrar erred in ordering a stay in clear contravention of the provisions of Order 12/8. Mr. Mbendera submitted that a distinction must be made between cases where a court has jurisdiction and where it has no jurisdiction. In the latter case Mr. Mbendera contended that a court must discharge itself when its attention has been drawn to it by application or its own motion and whether it is at the beginning or at the end of a trial. However where a court has jurisdiction it was Mr. Mbendera's contention that a court cannot discharge itself from jurisdiction except by application and only in terms of Order 12/8. He submitted that inherent jurisdiction should be exercised judicially and cannot be exercised in such a way that runs counter to the rules of practice.

Mr. Nyirenda for the defendant has contended, on the other hand, that the action against the defendant is founded in contract. Mr. Nyirenda's contention in essence is that the plaintiff is saying to the defendant that "I seconded you to Impala but you have improperly performed the



obligations under the letter of appointment and that I must look to you for the amount I have paid to Impala". He has argued that in the action against the defendant the plaintiff will talk about the defendant's improper performance of his duties as Financial Controller of Impala. Mr. Nyirenda has sought to distinguish some of the cases Mr. Mbendera has cited on the ground that the cases cited by Mr. Mbendera represent decisions which were arrived at after hearing evidence as opposed to the present case where evidence has yet to be heard. He contended that what will be decided in the action against the defendant is whether in his performance of his contract he converted money to his own use and Mr. Nyirenda argued that no proper decision can be reached without looking at the performance of the contract. It was also Mr. Nyirenda's contention that the fact that there was the possibility of the defendant working in other overseas posts including the Head Office is a clear indication that it was not the intention of the parties that Malawi law should govern their contract.

Mr. Nyirenda has contended that the Registrar invoked the inherent jurisdiction of the court in ordering a stay of proceedings and that he did not act under the provisions of Order 12/8. It was Mr. Nyirenda's view that the Registrar properly exercised that jurisdiction.

It is clear that the learned Registrar in ordering a stay did not purport to act under the provisions of Order 12/8. Indeed Mr. Mbendera appeared to concede that a court has inherent jurisdiction but contended that in invoking that jurisdiction the discretion should be exercised judicially. He suggested that in ordering a stay contrary to the provisions of Order 12/8 the learned Registrar did not exercise the discretion properly. I am unable to accept that contention. In a very careful and elaborate decision the learned Registrar considered a number of factors and it was only after that consideration that he felt that the scale tilted in favour of granting a stay. He considered the issue of evidence, the applicable law in England, the connection of the parties to the courts in England, prejudice and the defendant's desire to have proceedings tried in England. I am satisfied that the issues in this case must be determined by the law with which the issue between the parties has the closest connection. It is important that courts should give effect to the contractual choice of forum made by the parties. Parties must be bound by agreements they have freely made.

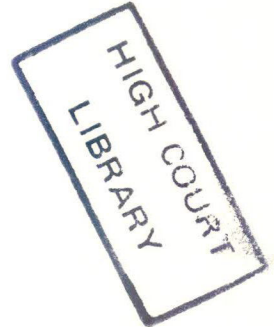
I have carefully considered the contentions of counsel before me and although I am not bound by the Registrar's finding I have also carefully considered the many authorities cited in his findings including the additional authorities which Mr. Mbendera cited. Some of those cases were not very relevant to the issues raised in the appeal before me. I have considered clause 17 and I find that it

HIGH COURT
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is very wide in its terms and I would find it difficult to place the limitations which Mr. Mbendera has contended should be placed on it. Clause 17 states that "all legal proceedings whatsoever in connection with provisions of this contract and the performance shall be brought in the courts of England". It is all legal proceedings whatsoever in connection with the contract and its performance which must be brought in the courts of England. The action against the defendant arose in course of the performance of the contract by the defendant. It is not possible, in my view, on whatever contorted interpretation is placed on clause 17, to take this action outside clause 17. I am satisfied, therefore, that this action against the defendant is within the provisions of clause 17 of the agreement between the plaintiff and the defendant. I can therefore find no sufficient cause to persuade me to decline to give effect to the exclusive jurisdiction which parties freely gave to the Courts of England.

I would dismiss this appeal with costs.

MADE in Chambers this 5th day of June, 1991.




R.A. Banda
JUDGE