

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**MISC. CIVIL CAUSE NO. 51 OF 2001**

**APEX OPERATIONS**

VERSUS

**WORLD FOOD PROGRAMME**

**CORAM:**

**Twea, J**

Kasambala of Counsel for the Plaintiff

Absent, Counsel for the Defendant

Mr Balakasi - Recording Officer

**RULING**

This is an originating summons brought under S.24(2) of the Arbitration Act to set aside the arbitration award made at the instance of the two parties.

The plaintiff is a company that buys produce and resale it at a profit. The defendant is a food aid organ of the United Nations. The parties, by a contract dated 5<sup>th</sup> December, 1988 agreed that the plaintiff company would supply 1,000 metric tons of pigeon peas to the defendant consignee at the price of

US\$220 per metric ton. The contract provided that in case of any dispute arising in the execution of the contract the dispute would be referred to arbitration in Lilongwe and that each party would choose one arbitrator. Should both parties not be satisfied by the settlement by the arbitrators the dispute would be referred to an umpire to be chosen by the two arbitrators. The decision of the umpire would be final and binding on the parties.

Suffice it to say a dispute arose which was referred to arbitrators chosen by the parties. After the settlement and award by the arbitrators the plaintiff company wrote the arbitrator to register their dissatisfaction with the award and requesting that they appoint an umpire. The arbitrators have since not done so. The plaintiff company now brings this summons that the award be set aside.

To begin with S.3 of the Arbitration Act is clear that the authority of the arbitrator or umpire appointed under an arbitration agreement is irrevocable except with the leave of the court. In the present case the arbitrators have the power to appoint an umpire and only they can appoint one where both parties are dissatisfied with the award.

It is on record that the plaintiff company raised their dissatisfaction and requested that an umpire be appointed - See **Ex HK2**. However, there is no such letter or request on record from the defendant. The plaintiff company has contended that the defendant lawyers are on the arbitration record that they would, in any event, appeal the outcome of the arbitration on behalf of their client. No such record however was produced before this court. Further, it should be observed that there is no procedure for appeal from such awards see **Chikosa vs Attorney General** 11 MLR 454 at 455. In that case Banda J, as he was then pointed out that the proper procedure where a party is not satisfied is to invoke S.24(2) of the Arbitration Act. It would therefore be pure speculation to determine what the said lawyers had in mind when they said they would appeal during the arbitration, bearing in mind that they knew that the arbitration agreement provided for the appointment of an umpire in case of dissatisfaction. Further, this having been raised before the settlement and award it begs the question as to the authority of the lawyers to bind their client before the issues are decided by the forum before which they voluntarily appointed and appeared. Again it is pure speculation whether they had such instructions and authority: See **Chikoko Trading Ltd vs Limited** Civil Cause



number 3178 of 2000 and also **A. Demetriou Estate Limited** vs **Nombo Estate Limited**, Civil Cause number 2004 of 1995. In any case the arbitration agreement having given them power to appoint one arbitrator each, which they did, it would be strange that they would begin by undermining the dispute settlement proceedings before the proceedings are started or completed. On these grounds I would have dismissed this summons.

I will however, proceed to look at the other issues.

The award stipulated that the plaintiff company claimed US\$55,000 as lost income when the contract was terminated by the defendant, general damages and costs for the arbitration proceedings. This is in para 9 of the award. However, the plaintiff company, despite getting an award of US\$63,294.01, now wants interest, storage charges, transport costs, fumigation cost, labour costs and loss of profit to be part of the damages - see para 10 and 11 of the plaintiff company's director's affidavit. I have examined the documents before me and I see nothing which would give rise to such claims. I acknowledge that the award of damages was not produced before this court, it would have been invaluable, but this notwithstanding, there is no justification

for the plaintiff company seeking to set aside the award merely because it wants to include more heads of damages, or intends to reformulate the heads.

It is my judgment that there is no misconduct on the part of the arbitrators which would justify intervention by this court. I therefore dismiss this summons with costs.

**PRONOUNCED** in Chambers this 14<sup>th</sup> day of May, 2001  
at Blantyre.



E. B. Twea

**JUDGE**