

**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 59 OF 1999**

BETWEEN

A.A. MIRZA PLAINTIFF

AND

AMI (MALAWI) LTD DEFENDANT

CORAM : CHOMBO, J.

: Theu, Counsel for the Plaintiff
: Njobvu, Counsel for the Defendant
: Chulu, Court Interpreter

RULING

Before me is an appeal against the order of the Assistant Registrar disallowing the defendants' application to have the plaintiff's claim dismissed.

The matter was set down for hearing on 14 November 2007 at 09.30 am. At 09.40 am only the applicant's lawyer presented himself before court. He stated that the defendants' lawyer had made a commitment that he would be attending court. There being no word explaining Counsel's absence the Court, instead of dismissing the matter for want of prosecution, proceeded to receive the submissions of plaintiff's Counsel. However, when Counsel for the defendant finally appeared it was after the plaintiff's Counsel had

already appeared, made his submissions and left. Counsel therefore was only allowed to file his submissions without being heard.

The grounds on which the appeal is based are that the plaintiff, after purchasing various goods in Dubai, contracted a company called A.M.I. International to ship the goods to Malawi. A Bill of Lading was issued in Dubai and is dated 7 August 1998. The shipment was discharged at the Port of Beira where the cargo was carried by some undisclosed hauliers and this was to be carried to Lilongwe. The haulier, consigned by the defendants, was involved in an accident enroute to Malawi and the plaintiff suffered loss. The plaintiff is now claiming special and general damages from the defendant. The defendants deny

being liable claiming one or two main things:

- (a) the Bill of Lading specifically provides for the terms of the contract and the specific law governing the parties in case of dispute in respect of the same – the Bill of Lading provides that it is the Belgian law and determined by the courts of Antwerp to the exclusion of the jurisdiction of the courts of any other country, or if the plaintiff to the claim or dispute shall so elect by the court of the place where the Defendant has his registered office, which for the CTO is Antwerp, and then in accordance with the law of that Court”

According to the defendants this agreement, reached between the contracting parties, automatically excludes the jurisdiction of the courts in Malawi.

- (b) The defendants submit further that since the contract of haulage was between the plaintiff and A.M.I. International, the defendants, A.M.I.

(Malawi) cannot be sued for the acts of A.M.I. International. A.M.I. Malawi was only to act as agents of A.M.I. International at the destination port in Lilongwe.

The Assistant Registrar found that the Malawi Courts had jurisdiction over the matter and that the defendants were liable for the damage and loss of the property of the plaintiff.

The questions before the Court, as ably put by the parties are (a) jurisdiction of the courts and (b) liability of the defendants as agents of A.M.I. International Limited.

The first question that I need to respond to is whether the courts in Malawi can exercise jurisdiction over this matter, bearing in mind the strict provision in the Bill of Lading.

The ruling of H/H Assistant Registrar Ligowe is very useful and enlightening, to say the least. As was observed by Tucker L.J.

“To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat’ in this way without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.”

It is my considered opinion that the Constitution of Malawi was driven by the same spirit when it provided in section 103(2) that “The

Judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.” (Underlining supplied for emphasis).

In my view, this provision, coupled with the five principles to be taken into consideration when foreign law is involved, as laid down by *Brandon, J. in The Eleftheria* case, the courts in Malawi do have jurisdiction over this issue. The principles laid down in that case were that:

1. Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has discretion whether to do so or not.
2. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
3. The burden of proving such strong cause is on the plaintiffs.
4. In exercising its discretion the Court should take into account all the circumstances of a particular case.
5. In particular, but without prejudice to (4) the following matters, where they arise may properly be regarded.

- (a) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
- (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.
- (c) With what country either party is connected, and how closely
- (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages
- (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:-
 - (i) be deprived of security for their claim
 - (ii) be unable to enforce any judgment obtained
 - (iii) be faced with a time bar not applicable in England
 - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

(Underlining supplied for emphasis).

It is clear from the case that contracting parties cannot oust the jurisdiction of particular courts; even where foreign law is involved.

What I have failed to appreciate however is the bases on which the plaintiff decided to sue the agent and not the principal. The contract in dispute was clearly between the plaintiff and A.M.I. International with A.M.I. Malawi Limited as “AGENTS at DESTINATION”. It is a well established principle in agency agreements that:

‘as a general rule “an agent is neither liable under, nor entitled to enforce a contract he makes on behalf of his principal”.’ [The Law of Contract, 6th ed. Treitel. G.H. (1983 Stevens and Sons, London at 547. But in the case in question it was not even the agent who entered into contract with the third party. Now if an agent cannot be liable on a contract entered into by him/her as an agent on behalf of the principal, I fail to see how the agent should be made liable for a contract entered into by the principal.

There is no doubt that there was loss and damage suffered by the plaintiff as a result of acts of the agent who hired hauliers to transport the goods from the Port of Beira to Malawi, but we should not lose sight of the fact that the defendants were mere agents of A.M.I. International, the party that entered into a contractual agreement with the plaintiff.

It is the principal who is liable to the third party as the principle provides “*the general rule is that a principal, whether disclosed or undisclosed, is liable to the third party.*” At p546. Put simply and briefly I find that the wrong party has been sued and the plaintiff’s claim cannot succeed against the defendants. The defendants’ appeal to dismiss the plaintiff’s claim must therefore be allowed. I order that costs be in the cause.

MADE in Court this 4th day of December 2007.

E.J. Chombo
J U D G E