IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 1174 OF 2006

BETWEEN

JAILOS MAIZA ..... PLAINTIFF

-AND-

SOUTHERN BOTTLERS LIMITED ..... DEFENDANT

CORAM : **T.R. Ligowe : Assistant Registrar**

Likomwa : Counsel for the Plaintiff

Manda : Counsel for the Defendant

RULING

The defendant organized, what they called, "Win a football trip of a lifetime" promotion which ran from 15th May to 31st August 2006. The rules of the game as are material to this case were that:

- The promotion was open to everyone living in the Republic of Malawi, over the age of 18 years.
- By entering the promotion all participants and winners agreed to be bound by the rules which would be interpreted by the organizers and their decision regarding any dispute would be final and binding.
- To enter the promotion one had to purchase any of the five Carlsberg beer brands and attach four "Football Trip" under liners to any eligible paper with their name address and telephone number.

The plaintiff entered the promotion and eventually won the primary prize that; he would travel to Germany with three friends to watch the World Cup Quarterfinals. He received that communication from the defendants by way of a phone call, radio announcements and newspaper articles.

The plaintiff commenced action against the defendants basically claiming for the amount of money equivalent to the cost that would have been incurred under the contract and costs of the action. The cause according to the plaintiff is that the defendants unlawfully disqualified him from the competition at the prize presentation ceremony when they inquired about his age, arguing his appearance was not matching with the age of 18.

The defendant now applies for a disposal of the case on a point of law under Order 14A rule 1 of the Rules of the Supreme Court. The questions are:

(i) Whether the plaintiff was bound by the rules of the "Win a trip of a life time" the subject of the proceedings herein.

(ii) Whether in view of (i) above the plaintiff is precluded from legally challenging the defendant's assessment of his age in the absence of any reliable proof for such age.

(iii) Whether the defendant was entitled to disqualify the plaintiff from the promotion.

(iv) Whether in view of the defendant's assessment of the plaintiff's age, there never existed a valid contract on which the plaintiff could sue the defendant.

(v) Whether in view of (i) and (iv) above the plaintiff was not entitled to any prize from the "Win a trip of a life time" promotion.

The application is supported by an affidavit which deposes *inter alia* that when the plaintiff presented himself for the prize presentation ceremony,

the defendant required him to prove his age and it transpired that at the time of entering the promotion, he had not yet attained the cut off age of 18 years and so the defendant disqualified him from the promotion. It is argued in the affidavit that the defendant having adjudged the plaintiff not to have attained the minimum age at the time he entered the promotion, there never existed a contract on the basis of which the plaintiff would have brought the proceedings herein. Further, the defendant having found as a matter of fact that the plaintiff had not at the material time reached the age of 18, the plaintiff was, in line with the rules of the promotion, bound by the defendant's such finding of fact. And, the defendant's finding as a fact that the plaintiff had at the material time not reached the age of 18 was binding and final and the plaintiff was therefore precluded from subsequently commencing action. The defendant prays the action be dismissed with costs.

Let me point before I go any further that an affidavit is evidence presented in written form to the court. Order 41 rule 5 of the rules of the Supreme Court provides that an affidavit may contain **only such facts** as the deponent is able of his own knowledge to prove. It is commented at Para. 4/5/2 that the effect of the rule is to require that an affidavit **must contain the evidence** of the deponent as to such facts only as he is able to speak to of his own knowledge, and to this extent, equating **affidavit evidence** to oral evidence given in Court. *(Emphasis supplied).* Reading this rule therefore, it is not proper to advance arguments in an affidavit. Doing so amounts to presenting arguments as though they were evidence.

The affidavit in opposition deposes *inter alia* that the plaintiff was not told by the defendant to bring with him any document stating his age, and when asked, the defendant was informed that the plaintiff was born

on 30th November 1987 and at the time of the competition the plaintiff was 18 years and seven months old. That the defendant however informed the plaintiff that he could not match with his age and proceeded to disqualify the plaintiff immediately and offered him a t/shirt instead as consolation which the plaintiff refused to receive. The defendant did not inquire from the plaintiff whether he had any other evidence to prove his age, for if the defendant had done so the plaintiff would have informed the defendant, available in "Ulendo Wa Banja Lathu La Chikhristu" a book containing all the particulars of the plaintiff's family provided by the Catholic Church at a time when the plaintiff's parents were blessing their marriage.

Under Order 14A of the Rules of the Supreme Court the Court has authority to determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that - (a) such question is suitable for determination without a full trial of the action, and (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein. And it is further required that the defendant must have given notice of intention to defend; and the parties must have had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination.

In this case the defendant gave the notice of intention to defend and even served their defence and the parties have been heard before this court.

For a question to be suitable for determination without a full trial of the action, it means that all material facts must be available to the court at the time of making the decision. In ***Korso Finance Establishment***

Anstalt v. John Wedge (unrep., February 15 1994, CA Transcript No. 94/387) (cited at Para. 14A/2/5 of the Rules of the Supreme Court 1999) where the ambit of Order 14A was considered by the Court of Appeal of England, Sir Thomas Bingham expressed unease at "… deciding questions of legal principle without knowing the full facts." And these are facts which have been proved or admitted not hypothetical or future facts. (***Summer v. William Henderson & Sons***[1963] 1 W.L.R. 823.)

On the requirement that the question of law should be one whose determination will finally determine the entire cause or matter, it is commented at para. 14A/2/10 of the Rules of the Supreme Court that:

> "Upon making its determination of the question of law or construction, the Court may dismiss the action or make such order or judgment as it thinks just. In this way, the action will be finally disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action."

An order 14A application is premised on the understanding that there are no facts in dispute they having either been proved or admitted. However I notice in this application that the defendant says that the plaintiff had not yet attained the cut off age of 18 years at the time of entering the promotion. And the plaintiff says the defendant was informed that the plaintiff was born on 30th November 1987 and at the time of the competition the plaintiff was 18 years and seven months old. That the defendant however informed the plaintiff that he could not match with his age and proceeded to disqualify the plaintiff immediately. The defendant did not inquire from the plaintiff whether he had any other evidence to prove his age, for if the defendant had done so the plaintiff would have informed the defendant, available in "Ulendo Wa Banja Lathu La Chikhristu" a book containing all the particulars of the plaintiff's family provided by the Catholic Church at a time when the

plaintiff's parents were blessing their marriage. There is an apparent dispute on that fact.

While there is that dispute, the defendant already made a decision to disqualify the plaintiff from the promotion. In view of that and the rules of the competition the questions for the court to determine are:

(i) Whether the plaintiff was bound by the rules of the "Win a trip of a life time" the subject of the proceedings herein.

(ii) Whether in view of (i) above the plaintiff is precluded from legally challenging the defendant's assessment of his age in the absence of any reliable proof for such age.

(iii) Whether the defendant was entitled to disqualify the plaintiff from the promotion.

(iv) Whether in view of the defendant's assessment of the plaintiff's age, there never existed a valid contract on which the plaintiff could sue the defendant.

(v) Whether in view of (i) and (iv) above the plaintiff was not entitled to any prize from the "Win a trip of a life time" promotion.

There are apparently enough facts upon which these questions can be determined.

It is the second rule that is in question, namely:

> "By entering the promotion all participants and winners agreed to be bound by the rules which would be interpreted by the organizers and their decision regarding any dispute would be final and binding."

A similar rule was under scrutiny in ***Baker v. Jones and Others*** [1954] Q.B.D. 533. The Central Council of the British Weightlifters Association (B.A.W.L.A.) authorized the use of the association's funds in paying legal costs of some of its members in defending proceedings for tort brought against them in their individual capacities. The plaintiff was saying the

members of the central council were not so authorized because the rules of the association did not authorize it. The defendants on the other hand, contended that, not only did the rules authorise them so to use the association's funds for that purpose but also contended their decision could not be challenged by the courts. They relied on rule 34 and rule 40(vii) and (viii). Rule 34 vested the government of B.A.W.L.A. in the central council. Rule 40(vii) set out powers of the central council which included:

> "To be the sole interpreters of the rules of the B.A.W.L.A. and to act on behalf of the B.A.W.L.A. regarding any matters not dealt with by the rules."

Rule 40(viii) provided:

> "The decision of the central council in all cases, and under all circumstances, shall be final."

LYNSKEY J. said at p. 558, 559;

> "The defendant's contention, no doubt, would be right if their rules are valid and binding on the plaintiff, but I have to consider whether the rule which makes the central council the sole interpreters of the rules and their decision final in all cases is valid and binding on the plaintiff.
>
> B.A.W.L.A. is an unincorporated association. It has no legal entity. The relationship between its members is contractual. That contract is contained in, or to be implied from the rules. The courts must consider such a contract as they would consider any other contract. Although parties to a contract may, in general, make any contract they like, there are certain limitations imposed by public policy, and one of those limitations may be that parties can not, by contract, oust the ordinary courts from their jurisdiction: ***Scott v. Avery*** (1856) 5 H.L. Cas.811. The parties can, of course, make a tribunal or council the final arbiter on questions of fact. They can leave questions of law to the decision of a tribunal, but they can not make it the final arbiter on questions of law. They can not prevent its decisions being examined by the courts. As

DENNING L.J., says in ***Lee v. Showmen's Guild of Great Britain*** [1952] 1 All E.R. 181:

> "If parties should seek, by agreement, to take the law out of the hands of the courts and into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void."

With this statement of the law I respectfully agree. The interpretation of the rules is a question of law which the courts will examine. In my view therefore, the provisions in the B.A.W.L.A. rules, making the central council the sole interpreter of the rules and their decision in all cases final, is contrary to public policy and void."

Similarly in the present case, I hold that in as far as the rule makes the defendant the final authority on interpretation of the rules of the promotion and **any** dispute arising from the promotion, it is contrary to public policy and void.

The decision the defendant made in this case is of course on a matter of fact within the powers of any tribunal other than the courts, but natural justice requires that no man should be judge in his own cause. The rule that the organizers' decision regarding any dispute would be final and binding would make sense if it was a dispute between parties other than the organisers themselves. The present dispute about the age of the plaintiff is between the plaintiff as a participant of the promotion and the defendants as organizers. It is therefore against natural justice for the defendants to decide on that dispute, albeit on a question of fact. It was held by CRAM J. in ***R v. Yasaya*** 1961-63 ALR Mal 118 after he had discussed ***Frome United Breweries Co. Ltd. v. Bath County Borough JJ*** [1926] A.C. 586, that where a person who is a party to a dispute also

sits as a judge in that dispute, his decision will be vitiated. I hold a similar view with regard to the present case.

Having come this far I should have determined in favour of the plaintiff and grant him judgment as claimed, but for the dispute I earlier pointed out where the defendant says that the plaintiff had not yet attained the cut off age of 18 years at the time of entering the promotion, and the plaintiff says the defendant was informed that the plaintiff was born on 30th November 1987 but the defendant disqualified him because he could not match with his age without asking for further proof of his age.

A determination of the questions in this case therefore does not finally determine the entire cause. The application is dismissed with costs.

Let me say it obiter before I close that since by its nature, an Order 14A application will decide the rights of the parties and will terminate the action or otherwise finally dispose of it, practice requires that the affidavits for use in proceedings under O.14A may depose only to such facts as the deponent is able of his own knowledge to prove not statements of information or belief with the sources and grounds thereof. (See para. 14A/22/8, Rules of the Supreme Court and cases cited there under.) This practice is more often, like in the present case, observed in breach but has to always be adhered to.

Made in chambers this …… day of August 2007.

T.R. Ligowe
ASSISTANT REGISTRAR