JUDICIARY

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NUMBER 2029 OF 2008

BETWEEN:

PETER JULIUS LIMBE…..…….PLAINTIFF

-AND –

WORLD VISION MALAWI……..…….DEFENDANT

CORAM: THE HONOURABLE JUSTICE E. B. TWEA
Mr Gwazatini, of Counsel for the plaintiff
Mr Nkhono, of Counsel for the defendant
Mr M. Manda – Official Interpreter

R U L I N G

Twea, J

The plaintiff, trading as Dziko Building Contractors, was employed by the defendant to execute some remedial and new works on a site belonging to one of the projects undertaken by the defendant. The total value of the works was K87, 340, 654.37. It was a requirement of the contract that the contractor should deposit a performance security bond of 5% of the contract price.

On 18th July, 2008 the contract manager, Messrs JMD Consultants terminated the contract. Their letter, Exhibited as PJL 2, among other things, read:

> "In view of the very slow late of progress on site and the fact that since the official contract completion date of 7th April, 2008 and the ex – gratia extension you were given up to 15th June 2008, no substantial work has been done on site to inspire confidence that the works will be completed within reasonable time frame.
>
> You have not given any contractual reasons for the delay apart from the non contractual claims relating to the exchange rate and cost escalation of materials, which the client is not willing to entertain this late into the project. Given this, we do not see how you are going to progress as the problem hinges on cash flows for the project".

The letter cited the above reasons and clause 58.4 of General Conditions of the Contract for the termination. Clause 58.4 reads as follows:-

> "Notwithstanding the above, the employer may terminate the contract for convenience".

The plaintiff took issue with the employment of this clause. It was deponed that he had executed 80% of the works. When the employer sought to cash the performance band with the bank, the plaintiff issued a writ and sought an injunction, ex – parte. The court ordered that the injunction be heard inter – parte. However, the defendant brought this motion for stay on account that the Special and General Conditions of Contract required disputes to be submitted for adjudication. Clause 24.1 on disputes read as follows:-

> "24.1 If the contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within fourteen (14) days of the notification of the Project Manager's decision".

Either party had the right to refer the decision of the Adjudicator to arbitration, if not satisfied, under Clause 25.2 otherwise the decision of the Adjudicator would be final and binding after expiration of twenty eight (28) days.

The defendant has argued that there are no special reasons shown for ignoring the terms of the contract. The plaintiff submitted that since the defendant did not notify him of the request to the bank to cash the

performance bond and that a new contractor was brought to assess the site, these are special reasons why it should not be referred for adjudication.

Both parties referred to the case of ***NICO Ltd VS Ngwira [1993]16(1) MLR***. I see no reason for departing from the findings of the Supreme Court in that case. An arbitration clause entered into freely must be respected unless there are special reasons for ignoring or severing it from the rest of the contract. I have considered the views taken by the plaintiff however, I would not find that the "General Conditions of Contract", in any way, gave the employer the power to termination the contract at "its convenience". The clause stipulates that the termination could be had for convenience. This would deponed on the circumstances of the case, and could be in favour of either of the parties. It is clear that the delay was not disputed. It is hardly reasonable to expect the employer to suffer the stoppage of work at the site. The employer was under a duty to mitigate the damage. The reasons cited by the plaintiff therefore are not sufficient to justify this court ignoring the arbitration clause.

I therefore find that there is no special reason for ignoring the arbitration clause. It must be respected and enforced. I therefore grant the stay of these proceedings pending adjudication.

I wish to point out however, that this case is commercial and should have been commenced in the High Court Commercial Division. In terms of Order 1 rule 4(3) of the High Court (Commercial Division) Rules, 2007, should the matter not be settled at the Arbitration level – it should then be properly commenced in the Commercial Division of the High Court.

Costs to the defendants.

Pronounced in Chambers this 4th day of September, 2008 at Blantyre.

E. B. Twea
JUDGE