

Ungolo S.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 395 OF 1993

BETWEEN:

M H A KULESI.....PLAINTIFF

and

ROYAL INTERNATIONAL INSURANCE HOLDINGS LTD.....DEFENDANT

CORAM: JANE MAYEMU ANSAH (MRS) ACTING DEPUTY REGISTRAR

R J Mhone of counsel for the Plaintiff

J M Banda of counsel for the Defendant

RULING

By a contract of insurance entered by the parties on 1st may 1992, clause 9 provided that;

"All differences as to amount arising out of this policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators before entering upon reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the insurers."

The defendant in pursuant to the above quoted clause and section 6 of the Arbitration Act (cap 6:03), is seeking for an order that all further proceedings in this case be stayed. The facts of the case are that the parties entered into a contract of insurance. The plaintiff was covered by an insurance of money policy issued by the defendant to the plaintiff. That policy contains an arbitration clause. The plaintiff has suffered loss of actual cash through a theft that took place at his shop. The parties have exchanged letters since November last year trying to reach an agreement. It is the plaintiff's contention that he appointed an arbitrator but the defendant, did not show any willingness to have him, hence the matter was taken to court. Mr Banda the defence lawyer has argued that the correspondence between the parties was merely an effort to have the matter settled and does not indicate or show any unwillingness on the part of the defendant to appoint an

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arbitrator. I have looked at the exhibits by Mr Mhone, lawyer for the plaintiff, they consist of the correspondence between the parties. I agree with Mr Banda that indeed these letters were an effort to reach an agreement.. In fact one of the letters dated 23rd November 1992 is without prejudice letter. Therefore the position of the defendants cannot be influenced by the letters. Clause 9 of the contract is a condition precedent. In the case of Bruce Limited Versus Strong the learned Judge said:

"an arbitrator is necessary whatever view is taken because an award by the arbitrator is a condition precedent to the defendant's right to recover that sum of money to which they claim to be entitled....but it has never refused to stay action where it is obvious that the case must go to arbitration where an award is a condition precedent."

There is another point which the plaintiff's counsel has raised. The question of limitation of time and its extension. The arbitration clause provides that the time of arbitration is within one month from the occurrence of the incident. Section 14 (2) of the arbitration Act provides that:

"The time, if any limited for making an award, whether under this Act or otherwise, may from time to time be enlarged by an order of the court, whether that time has expired or not."

In the matter where there is a demand for arbitration, as long as the applicant shows readiness and willingness to do all that is required for an arbitration it is only right to stay proceedings for that purpose. Section 14(2) provides that the court has power to extend time otherwise it would give chance to the other party to wait for the elapse of the time and then issue a writ and use the time limit as an excuse. I am satisfied that the plaintiff's contentions are not sufficient for me to refuse stay of the action. I allow the defendant's application.

Made in chambers this 29 day of July 1993



Jane Mayemu Ansah (Mrs)
ACTING DEPUTY REGISTRAR

Mhone: Can I appeal? How soon can you get a Judge?

Court: You may appeal to a Judge in Chambers. The long vacation is coming next week therefore I cannot tell how long it would take to find a Judge.

