Chatsika J.A.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.163 OF 1993

BETWEEN:

MAHOMED HANIF KASSAM ..... APPLICANT/DEFENDANT

AND

STURDYHAWK INTERNATIONAL ..... PLAINTIFF/RESPONDENT

CORAM: CHATSIKA, J.
Msisha, Counsel for the Applicant/Defendant
Mbendera, Counsel for the Respondent/Plaintiff
Ms Mkandawire, Court Clerk

RULING

This is an application made by the Defendant for an order that the arbitration award herein which was made by the arbitrator be either set aside or remitted to the arbitrator for further consideration. The applicant also applies for an enlargement of the period for making the application.

By an agreement entered into in writing on the 10th October 1990, the plaintiff agreed to build two houses for the defendant at a total cost of K442,000.00. It was alleged by the plaintiff that the cost of K442,000.00 was on the 25th November 1991 varied to K552,000.00. It was further alleged that the defendant awarded the contract relating to the preparation of the land on which the houses were to be build to an earthwork contractor. It was initially expressly agreed that the completion period would be 40 weeks from the 10th October 1990. Later the completion time was altered to November 1991.

It was alleged by the plaintiff that as the defendant contracted an earthworks contractor to prepare the site for construction of the houses it was impliedly understood by both parties that the preparation of the site would be completed in good time to enable the plaintiff to commence the building work

and complete the same within the stipulated period. It turned out, however, according to the plaintiff, that the defendant failed to hand over the site to the plaintiff in order to commence the construction of the buildings in good time and only did so on the 10th October 1990 when the plaintiff only managed to start the construction of House No.1 and that for the same reason construction of work on House No.2 only commenced 18 weeks after the 16th October 1991. It was further contended by the plaintiff that when the construction work commenced, siting problems were encountered arising from the presence of a sewer line underground which made it necessary for the house to be re-sited and that this unexpected impediment caused delay in the construction work.

The plaintiff stated that as a result of the foregoing problems he suffered loss to the extent of K87,793.00. The contractor claimed this amount including the cost of the proceedings from the defendant.

In his defence the defendant admitted that he entered into the said agreement on the 10th October 1990 and that it was mutually understood by both parties that agreement was entered into without further qualifications apart from the express terms of the agreement. To this end, it was the defendant's case that the contract was entered into on the basis of the site as it stood at the time of entering into the agreement. He states that the site was ready and level at the time of signing the agreement, and in any event the defendant casts the onus on the plaintiff to have proved that it was so before entering into the agreement. The defendant denies that the contract price was varied from K442,000.00 to K552,000.00. He states that the plaintiff met with some difficulties in the course of carrying out the construction work and that discussions were commenced aimed at altering some terms of the contract but denies that such discussions were concluded and that the contract price was changed to K552,000.00.

The defendant further contended that since the plaintiff did not continue with the construction work the question of discussing a variation of the contract cost would not arise. The defendant conceded that he had asked for a variation to House No.1 but states that such variation did not result in the period of completion being extended and that, in any event, the plaintiff did not seek an extention of the completion period on account of the variations.

With regard to the presence of the sewer line under the ground on which House No.1 was to be constructed, it was the defendant's defence that it was the responsibility of the plaintiff before entering into the contract to ascertain the state of the site and satisfy himself that it was suitable for the construction work to start before signing the agreement. He contends that as there was no term in the contract as to the state of the subsoil or things in it, the plaintiff ought to be deemed to have accepted to find the site in the condition in

which it was and that any of the subsoil or things found in it after the contract had been signed would not constitute a valid ground for breach of the contract by the plaintiff.

The defendant denied the allegations made by the plaintiff that he (the defendant) failed to hand over the site to the plaintiff by the 10th October 1990. The defendant also denied an allegation made by the plaintiff that he (the defendant) failed in terms of the contract to make prompt payments and he accordingly denied that the failure to make prompt payments, which is denied, caused loss of profits to the plaintiff. He asserted that all payments for the work were made in accordance with the terms of the contract and therefore denied that the plaintiff suffered loss of profits. He further asserted that if the plaintiff suffered any loss due to increases in prices of materials, this was due to his failure to finish the work within the contract period.

Under the arbitration clause contained in Clause 10 of the agreement between the parties, the matter was referred to an arbitrator. According to the arbitration clause, the arbitrator was to be appointed by the Chairman for the time being of the Association of Master Builders in Malawi and in accordance with the provisions of the Arbitration Act, 1967 (Cap.6:03). Mr. D.V. Self was accordingly appointed arbitrator to arbitrate in the dispute between the parties.

It is not clear when Mr. Self was appointed arbitrator. On the 24th October 1993, the arbitrator made the following award:-

"AWARD

IN THE MATTER OF THE ARBITRATION ACT (CAP 6:03) AND AN ARBITRATION BETWEEN STURDYHAWK INTERNATIONAL LIMITED OF P.O. BOX 572, BLANTYRE, MALAWI AND MAHOMED HANIF KASSAM OF P.O. BOX 5071, LIMBE, MALAWI.

WHEREAS, IN PURSUANCE OF AN AGREEMENT IN WRITING DATED 10TH OCTOBER 1990, MADE BETWEEN STURDHAWK INTERNATIONAL LIMITED AND MAHOMED HANIF KASSAM AND IN ACCORDANCE WITH THE CONDITIONS THEREIN. THE CHAIRMAN OF THE ASSOCIATION OF MASTER BUILDERS IN MALAWI HAS REFERRED TO ME DAVID SELF THE MATTERS IN DIFFERENCE BETWEEN THEM CONCERNING A BUILDING CONTRACT.

NOW I, THE SAID DAVID SELF HAVING DULY HEARD THE PARTIES AND CONSIDERED THE MATTERS SUBMITTED TO ME, DO HEREBY MAKE AND AWARD AS FOLLOWS:-

I AWARD -

(i) THAT MAHOMED HANIF KASSAM IS TO PAY STURDYHAWK INTERNATIONAL LIMITED THE SUM OF K41,258.00 IN FULL AND FINAL SETTLEMENT OF THE SAID DIFFERENCES REFERRED TO IN THESE PROCEEDINGS

(ii) THAT MAHOMED HANIF KASSAM SHALL BEAR HIS OWN COSTS OF ATTENDING THE ARBITRATION AND SHALL PAY TO STURDYHAWK INTERNATIONAL LIMITED ITS LEGAL COSTS OF ATTENDING THE ARBITRATION AND SHALL PAY MY ARBITRATION FEE OF K6,300.00.

Signature
Signed .....
Arbitrator

Dated the 24th August 1993"

On the 26th October 1993, two days after the award had been made the defendant, through his lawyers, wrote to the arbitrator asking for the reasons or grounds upon which the award was made. The arbitrator replied the letter from the defendant's lawyers on the 1st September 1993. That letter was not exhibited to this Court but it would appear from the tone of subsequent correspondence between the defendant's lawyers and the arbitrator that the arbitrator refused to give any reasons on which the award was made. On the 20th September 1993 the defendant's lawyers wrote the following letter to the arbitrator by way of a reply:

"Dear Sir,

RE: STURDYHAWK INTERNATIONAL v. M.H. KASSAM

We thank you for your letter of September 1, 1993.

Your award did not set out the reasons by which you came to the conclusion you reached. A litigant is entitled to know the factors which went into your decision in order to determine the validity of the decision of an arbitrator or a court. You have not even set out how you arrived at the figure you awarded as damages. Your award does not explain what happened to the Owner's counterclaim.

If you state your reasons in full, this may put the entire matter to rest. If you do not, you will compel the owner to lodge an application for review to the High Court.

In our opinion the court is likely to direct that you give the reasons for your award.

We await your advices.

Yours faithfully,

Signed
NYIRENDA & MSISHA

cc: M/s Savjani & Co
P.O. Box 5134
LIMBE"

On the 6th October 1993 the arbitrator wrote the following letter in reply to the letter from the defendant's lawyers of the 20th September 1993:

"Dear Sir,

ARBITRATION AWARD : STURDY HAWK INTERNATIONAL/
MR. M.H. KASSAM

I confirm receipt of your letter dated 20th September 1993 (ref MRM/1531/en) on the above matter and have noted its contents.

Please be advised that as stated in my award, in coming to a decision on this dispute I did hear the parties and did in fact consider all the matters submitted to me.

Therefore it is my opinion that no further explanation from myself is required and trust that this now puts the matter to rest.

Yours faithfully,

Signed
D.V. Self
For and on behalf of
HANSCOMB PARTNERS

Copy: M/S Savjani & Company
P.O. Box 5134
Limbe

On the 14th October 1993, the plaintiff obtained an order for the enforcement of the award.

On the 19th October 1993, the defendant obtained an order for a stay of the enforcement order on condition that the Sheriff's fees were paid; notice of appeal against the said award was filed within 7 days and the order for the stay was served on the plaintiff. On the 25th October 1993, the defendant filed a Notice of Motion to set aside or remit the award.

Mr. Msisha for the applicant (defendant) argued that the award was bad in law on the face of it in that the arbitrator exceeded his jurisdiction in awarding costs to the respondent (plaintiff) when the contract stipulated that costs and expenses to the contract were to be borne equally by the parties. Mr. Msisha also contended that by failing to give reasons for his decision the arbitrator showed bias against the applicant (defendant) and showed eight examples as indication of bias against the applicant. As already stated at the beginning of the ruling, the applicant also applied for an enlargement of the time in which to file the application.

Order 75, rule 5 of the Rules of the Supreme Court provides that an application to set aside an arbitration award, or to remit the award or for the court to direct that the arbitrator should give reasons for the award must be made, and the summons or notice must be served within 21 days after the award has been made and published to the parties. The award in this case was made on the 24th August 1993 and must be deemed to have been published to the parties, and certainly to the applicant (defendant) by the 26th August 1993 since it was on that date, the 26th August 1993, that he wrote to the arbitrator asking for reasons for his decision. The 21 days required for making the application would appear to have expired on the 19th September 1993. No application had been made by that date. The arbitrator had indicated his refusal to give reasons by the 1st September 1993. The applicant's letter of the 20th September 1990 was written while the period for appeal had already expired. In considering his application for an enlargement of time to appeal I must consider the application in the same manner as I would consider an application for setting aside a judgement. An application for an enlargement of time to set aside judgement requires that, for the application to succeed, good and substantial reasons must be given. For the enlargement of time, the applicant relies on the affidavit of Mahomed Hanif Kassam which simply states that he was not available at the time the request for reasons was made. The deponent of the affidavit does not state from what date he was not available and from what date he began to be available. In a normal application I would refuse an application for an enlargement of time for this reason which, in my view, is not a cogent reason. I have, however, taken into consideration the fact that one of the factors which influence a court to refuse or grant an application for enlargement of time is the substance of the appeal proper. If the court considers that there are matters of legal importance in the appeal proper, which, if not considered by the appeal court would result in a denial of justice to the appellant, it may exercise its discretion to enlarge the time notwithstanding the fact that the real grounds for enlargement of time are not cogent or substantial. I shall therefore exercise my discretion and grant the application to enlarge the time for filing the application in order to hear and consider the substantive motion which I consider to contain matters of legal importance.

There are two main grounds in support of the application to set aside or remit the award. The first ground is that the arbitrator gave himself costs of the arbitration and also awarded costs to the respondent when the agreement provided that costs shall be borne by both parties equally. The second ground is that the arbitrator did not give reasons for the award.

It is observed that there was no direct referral placed by the parties before the arbitrator. It appears that both parties agreed that the referral shall include the agreement which was entered into between the parties; the statement of claim which was made by the respondent (plaintiff), the defence which was entered by the applicant (defendant); the reply to the defence

and counterclaim and the reply to the counterclaim and the further and better particulars supplied by the respondent (plaintiff) as per the request made by the applicant (defendant) in their letter of the 3rd December 1992. It is however observed further that on the 1st February 1993, apparently for the purpose of strengthening the reference, the arbitrator wrote two letters to each of the parties asking for certain confirmation and particulars of certain facts which appeared in the documents which were already in his possession. The answers from the parties to his letters of the 1st February 1993 and the documents which have already been mentioned above together constituted a bunch of his reference. It was from the information contained in these documents that the arbitrator made the award.

It will be observed from the amended statement of claim that the plaintiff (respondent in this matter) claimed a total sum of K87,793.00 from the defendant (applicant in this matter) after denying the various claims made by the plaintiff, the defendant made a counterclaim. It was at this stage of the case that the matter was referred to an arbitrator. Before the arbitrator considered the plaintiff's claim, the defence and counterclaim he asked for some information from both parties.

From the plaintiff the arbitrator asked for documentation to substantiate the claims in the following points:-

1. Variation of contract price to K552,000.00.

2. Which contractor carried out the site works at Plot No. CC 1005.

3. Confirmation on the delay in handing over part of the site where House 2 was to be sited.

4. Confirmation of delay due to resiting of House 1 due to the presence of a sewer line.

5. Variation agreed on House No.1 which extended the contract period.

6. Confirmation of erratic and delayed payment by the client.

7. Substantiation of any actual loss and expense incurred by yourselves.

8. Confirmation that the contract was extended to 31st January 1992 (House 1) and to 30th April 1992 (House 2).

9. Confirmation of the points stated under Clause 9 of your Defence to Counterclaim.

10. A breakdown of the original tender sum.

From the defendant, the arbitrator asked for the following information:

1. That the site was level and ready for construction works to commence on October 10 1990 and which contractor carried out these works.

2. What were the variations requested by your Client to House No.1.

3. Confirmation of when your Client made payment to the contractor and what were the payment requirements according to the terms of the contract.

4. Confirmation that the plasterwork was of poor quality.

5. A copy of Fitzsimons Northcroft Associates last valued assessment of completed works.

6. A copy of drawings Nos. 90-02-01 to 5.

It is clear to me that the arbitrator considered the matters contained in the amended statement of claim and the matters contained in the defence and counterclaim and also the matters in the reply to the defence and counterclaim. He also considered the matters in the further and better particulars supplied by the plaintiff at the request of the defendant. In addition to these matters he considered the answers given by the parties to the information which he requested. After considering all these matters he made his award. In the award, the plaintiff's original claim of K87,793.00 was reduced to K41,258.00.

It should further be observed that unless the agreement of reference prescribes in what form the award is to be made, it may be made in such form as the arbitrator thinks fit. (See Halsbury's Laws of England, 4th Edition, Vol.2 at Para.609).

With regard to the matters which the arbitrator had to decide, the nature of the reference shows that he had to decide only two matters, the plaintiff's statement of claim on one hand and the defence and counterclaim on the other. The matters were capable of having only one arithmetical answer. By reducing the plaintiff's claim from K88,000.00 to only K41,000.00 it becomes obvious that the arbitrator found certain matters in favour of the defendant and those matters reduced the plaintiff's claim.

The position of an arbitrator is one of complete trust. The parties put their trust in him and must be expected to accept his decision unless there is something in the decision which is obviously wrong. In David Taylor Ltd. v. Barnett (1953) 2 A.E.R. 843, Singleton L.J. quoted with approval a passage from the judgement of Williams J. in Hodgkinson v. Fernie (11) 3 C.B.N.S. 202 which states:-

> "The law has for many years been settled, and remains so at this day, that where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact". (See also King and Duveen and Others (1913) 2 K.B. 32)

The applicant has not pointed out what particular matter the arbitrator failed to decide. All what he asks for are reasons for his decision. As already stated above, the arbitrator's award does not require to be made in a prescribed form. He had to decide whether, on the facts given to him, the claim by the plaintiff could be justified. He made his award after considering both the defence and the counterclaim. In fact the form of his award was as near as could possibly be, the form which is provided in the appendix to the Arbitration Act (Cap.6:03) at page 18. It cannot be said that he failed to decide matters that were in dispute and that he misconducted himself.

The next point on which the applicant relies in his contention that the arbitrator misconducted himself is that the arbitrator awarded costs to the plaintiff when the contract stipulated that costs and expenses relating to the contract shall be borne equally by both parties.

The general rule with regard to costs is that a successful party is, prima facie, entitled to his costs. It is only in cases where the conduct of the successful party made it impossible for the parties to agree on a point that was so obvious and therefore necessitated the appointment of an arbitrator that costs may be awarded to the losing party. In Smeaton Hanscomb & Co. v. Sasson I. Setting & Son (1953) 1 W.L.R. 1481:

> "An arbitrator made an award in favour of buyers in the form of a special case setting out questions of law for the opinion of the court and in respect of costs he made an award to the effect that "however the court answers the question each party shall bear their own costs of the arbitration and the sellers shall bear the costs of this my award". The court decided the question of law which was conclusive in favour of the sellers.
>
> It was held that the arbitrator's discretion as to costs must be exercised judicially ..... Since a successful party was prima facie entitled to his costs the phraseology of the award in the present case showed that the arbitrator had not applied his mind judicially to the question of costs because it showed that he had excluded from

his mind the result of the case which was one of the most important elements which ought to affect his discretion".

In Lewis v. Haverfordwest Rural District Council (1953) 1 W.L.R. 186:

"The defendants entered the plaintiff's land for the purpose of constructing a sewer. They did not pay any compensation to the plaintiff as they ought to do. The question of compensation was referred to an arbitrator in pursuance of the provisions of section 278 of the Public Health Act, 1936. The arbitrator awarded compensation to the plaintiff and with regard to costs, the arbitrator awarded that each party should pay its own costs incidental to the arbitration.

The plaintiff moved for an order that the award in so far as it related to costs be set aside and that the Council should pay the applicant's costs.

It was held that in the absence of special circumstances the successful party to an arbitration is entitled to receive its costs.

At page 1487, Lord Goddard C.J. had this to say:-

"In the present case the arbitrator when asked why he made this order as to costs answered, "I had several reasons for awarding that each party should bear its own costs, and one of those was that I had no evidence that during the long time between the event and the date of the arbitration any serious effort had been made by either party to settle the question". The question had to be settled at some time. Why, therefore, if the Council did not take steps to settle or to make a tender are they to be in a better position than they might otherwise have been? They made no effort to settle and the applicant, having now brought proceedings is entitled to recover the compensation which the statute gives him the right to receive and which the Council had apparently made no effort to pay. ..... I cannot find that (there is any) special circumstances, and therefore, I think the arbitrator was wrong in not awarding the successful applicant his costs".

These cases are authorities for the proposition that except where special circumstances exist, a successful party is entitled to his costs.

Halsbury's Laws of England, 4th Edition Vol.2 Para.606 deals with agreements between parties on question of costs. It states:-

> "Agreement between the parties: Generally speaking the parties may make such agreement with regard to the costs of the arbitration as they think fit. But any provision in the arbitration agreement, except where the agreement is to refer a dispute which has already arisen, to the effect that the parties or any party to it shall pay their or his own costs of the reference or award or any part thereof in any event is void, and the agreement is to be read as if the provision were not contained in it".

It is clear that the above provision is intended to ensure that the general principle that a successful party is entitled to his costs is maintained. It therefore annuls any provision that would have a contrary effect.

I now come back to the provision contained in Clause 11 of the Contract which reads "The costs and expenses relating to this contract shall be borne by both parties equally". Section 19(1) of the Arbitration Act (Cap.6:03) gives a discretion to the arbitrator to award costs. Section 19(3) is similar to the above quotation from Halsbury's Laws of England. It makes void any provision to the effect that any party in any event shall pay their or his own costs. This provision is intended to ensure that the general principle that a successful party shall be entitled to his costs is maintained. If the provision in the agreement to which my attention has been drawn was intended to have that effect, then it is void and the agreement must be read as if the provision was not there.

I therefore do not find any irregularity when the arbitrator exercised his discretion in awarding costs to the respondent and in awarding his own costs against the applicant.

The motion to remit or set aside the award fails and costs of this motion are awarded to the respondent.

MADE in Chambers this 5th day of August, 1994 at Blantyre.

L.A. Chatsika
JUDGE