



REPUBLIC OF MALAWI

IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CAUSE NO 23 OF 2017

BETWEEN:

BAXTER CHITIMBE

1st CLAIMANT

DAVID NANGOMA

2nd CLAIMANT

IREEN KAPYEPYE (As Administrator of the Estate of

OMAR NOORDIN FRAIDY KAPYEPYE

3rd CLAIMANT

-and-

WYSON CHALIMBA

DEFENDANT

CORAM: HON. JUSTICE J. ALIDE

Mr. C. Chidothe of Counsel for the Claimant

Dr. S. Madise of Counsel for the Defendant

Ms. M. Kachimanga, Court Clerk

JUDGEMENT

1. The parties herein entered into a Partnership Agreement to run a business in the name and style of Mawila Private Secondary School located at Liwonde Township in Machinga District. By their agreement, the defendant herein was designated as the Managing Director of the school.
2. It is the claimants' contention that during the subsistence of the partnership, the defendant willfully, and persistently, violated the partnership agreement, and his legal duty as a partner. Among other things, they claimed that the defendant did not allow them to take part in the affairs of the business; were not allowed access to the partnership property; and were not provided with true financial statements and information relating to the business. Due to the foregoing, coupled with the financial problems that eventually hit the business, the claimants brought up an action in the Senior Resident's Magistrates Court for the dissolution of the partnership. The court, however, did not proceed with the hearing of the matter because clause

18 of the Partnership Agreement provided for the resolution of all the disputes by way of arbitration under the Arbitration Act (Cap 6:03 of the Laws of Malawi) ("the Act").

3. In pursuance of the foregoing, the parties appointed an arbitrator. On 19 October 2016, the arbitrator issued his interim determination on the matter in which he gave directions to the parties on how they were to proceed pending his final award. On 27 July 2017, the arbitrator made his final award based on the information that had been submitted by the valuers, and the financial statements that had been submitted to him by auditors as per his interim directions. Both parties were not happy with the arbitrator's determination and "did not accept" it. Accordingly, the arbitrator referred back the matter to the Senior Resident's Magistrate Court for further adjudication. However, the court apparently referred the matter to this court.
4. In that regard, the claimants proceeded and commenced the matter in this court by way of summons which were issued on 16 January 2016. Under the summons, the claimants have asked this court for a number of reliefs as follows:
 - a) A declaration that:
 - (i) the defendant had breached his legal duties as a partner, and further breached the Partnership Agreement that was signed by the parties herein; and
 - (ii) the partnership herein stands dissolved, and in the alternative, an order dissolving the partnership;
 - b) An order that:
 - (i) the partnership property be realized, sold and distributed in accordance with the law;
 - (ii) Mawila Private Primary School and its assets constitute part of the property subject to the Partnership Agreement herein;
 - (iii) the defendant does provide a true account of the partnership transactions and/or finances from the time he became the Managing Director or such other time as the court may deem fit;
 - (iv) the defendant does account to the partnership and/or the claimants the income generated from the primary school business;
 - (v) a liquidator or such other independent person as the court shall deem fit to be appointed to be responsible for the winding up process of the partnership business including the realization of the assets and distribution thereof;
 - (vi) the defendant should stop managing the partnership business herein and/or business of Mawila Private Primary School;
 - (vii) the partnership, and/or the defendant, do pay the claimants the said total sum of K34,984,000 being outstanding allowances and salaries as at 30th September 2017;
 - (viii) the partnership and/or the defendant do pay the claimants outstanding allowances and salaries from 1 October 2017 to the date when distribution of the assets of the partnership herein shall take place or such date as the court shall deem fit;

- c) Any other order as the court deems fit; and
- d) Costs of the action.

5. In response to the claimants, the defendant filed his defence in which he, among other things, pleaded that the claimants' action was an abuse of the process of the court as the claimants had already commenced proceedings against the defendant in the subordinate court in Zomba under Civil Cause 86 of 2016, and Civil Cause No. 385 of 2016 (In the Senior Resident Magistrates Court, Zomba).
6. The defendant further denied the claimants' allegations that he had breached the partnership agreement and his legal duty towards them. He submitted that all the partners were allowed to take part in the affairs of the business; were allowed access to the partnership property; and were provided with true financial statements and information relating to the business. The defendant further submitted that the issues regarding the piece of land, that the claimants were claiming to be part of the partnership property, had been previously resolved, and there was no issue at all. In a nutshell, the defendant denied all the claims presented forth by the claimants.
7. During the hearing of the matter, both the claimants testified in support of their claims. The defendant also testified in support of his position. Both parties filed skeleton arguments, as well as submissions at the conclusion of the trial. I will not belabour to go into the details of the evidence presented before this court but to indicate that all the parties confirmed that this matter came before an arbitrator previously, and a determination was made accordingly.
8. Looking at the submissions and the evidence that was presented before this court, the issues that are in contention in this matter are; whether or not during the subsistence of the partnership, the defendant willfully and persistently violated the partnership agreement between the parties; whether or not the defendant is liable to account for any income he had generated from the primary school business that he was operating; whether or not the defendant and/or the partnership business is liable to pay the claimant's allowances and salaries as accrued to them in accordance with partnership, and overall, whether or not the claimants had proved, on a balance of probabilities, that they are entitled to the reliefs set in the statement of case.
9. I must say that despite the above issues coming out prominently in the evidence and the submissions, one other issue that really exercised my mind is the fact that this matter had been referred to an arbitrator prior to it being filed in this court, and an award was duly made. The facts and the evidence are very clear on that position. However, despite the arbitrator's award, this matter found its way back in the subordinate court, and then into this court as a fresh action. There are several questions that come to my mind: Was the matter properly brought into this court? What is the fate of the arbitrator's award? Is it still valid, or was impeached by the parties' rejection of the same, or by the subsequent claim lodged in this court? It is important

that this court should address this issue first because it has very wide implications in respect of the fate of this present matter.

10. The Act provides the general framework of the law relating to arbitration in Malawi. Section 17 provides for the finality of the awards made by an arbitrator. It states as follows:

“Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or the umpire shall be final and binding on the parties and the persons claiming under them respectively.”

11. Section 24 of the Act provides for the removal of an arbitrator and further provides that an award made by an arbitrator can only be set aside on two grounds namely; where the arbitrator has misconducted himself or the proceedings; and where an arbitration or award has been improperly procured. In this case a party seeking to have the same set aside must make an application to this court, the High Court, asking it to set aside an award made by an arbitrator.
12. Section 27 of the Act provides that an arbitrator’s award may, by the leave of this court, be enforced in the same manner as a judgement or order to the same effect, and where such leave has been given, judgement may be entered in the terms of the award.
13. In *Airtel Malawi Ltd v Kamwaza Design Partnership* Commercial Case No. 127 of 2015 Lilongwe (unreported), this court did clarify as to what misconduct in the context of section 24 of the Act meant. In the case, Justice Mtalimanja stated as follows:

“In my view, misconduct as used in s.24 of the Act is used in the technical sense as denoting an irregularity and not any moral turpitude. The term also covers cases where there is a breach of any principle of natural justice...The rules require an arbitrator to act fairly and in good faith, without bias and in a judicial temper. There must be nothing done which is contrary to the essence of justice.”

14. An award by an arbitrator is not to be set aside simply because he has misconceived or misstated the arguments addressed to him. See *MacPherson Train & Co. Ltd. v V.J. Milhen & Sons* [1952] 2 Lloyd’s Rep. 59 at page 66.
15. In *Chikosa v Attorney General* 11 MLR 454 it was held that section 24 and 25 of the Arbitration Act gave no right of appeal from the decision of the arbitrator to this court. It only gives chance for the case to be heard as an application to set aside the arbitrator’s award. In this case, Banda, J., (as he then was) stated as follows on page 457:

“In my judgement, this court must not be over-anxious to set aside an arbitrator’s award where the parties have agreed to abide by the decision of a tribunal of their own choice,

unless the court is satisfied that there has been something radically wrong and vicious in the proceedings. The test is whether the irregularity may have caused a substantial miscarriage of justice.”

16. In *Apex Operations Limited v. World Food Programme* MSCA Civil Appeal No. 15 of 2001, the court refused to set aside an arbitrator’s award because it was satisfied that there was nothing radically and viciously wrong in the arbitration proceedings that warranted its intervention.
17. It is very clear from the law that where parties have chosen arbitration as a means of resolving their disputes, they are bound to accept the arbitrator’s decisions as final except where the arbitrator has misconducted himself or the proceedings; and where an arbitration or award has been improperly procured. It is very clear that the Act has not given any right of appeal to the parties from the decision of the arbitrator. It only gives chance for the case to be heard as an application to set aside the arbitrator’s award. Accordingly, any party aggrieved with the decision of the arbitrator must make an application to this court and seek to have the same set aside.
18. It is indeed very clear from the record that after the arbitrator issued his final award in the matter, both parties were not happy with the same. Accordingly, the arbitrator referred the matter back to the Senior Resident Magistrate’s Court. In his report dated 30th August 2017, titled “Referral of the Matter Back to the Senior Resident Magistrate’s Court” the arbitrator writes on paragraph 4 on page of 2 as follows:
 - “4.1 However after the valuation of the business was completed and submitted to both parties and the final award was made and given to both parties, both parties raised issues with the final award and the valuation exercise including the issue that the value of the business was exaggerated and so they could not accept the said valuation.
 - 4.2 To the arbitrator, this seems both parties have not fully accepted the awards made by the arbitrator.
 - 4.3 Because of this failure to accept the award by the arbitrator, the arbitrator is of the view that the matter should be referred back to court for determination of the issues on the ground that as arbitrator I may not have the authority to enforce the award on an unwilling party to the arbitration.
 - 4.4 Therefore the matter is referred back to court for continued proceedings or any other course of action which the court or the parties may take.”
19. Counsel for the claimants have submitted that they were well aware that an arbitrator’s award is final and cannot easily be set aside. They acknowledge that it can only be set aside where the court believes that there had been an affront to justice. The claimant has however submitted that the present matter had not been brought to this court as an application to set aside that the arbitrator’s award. They argue that the matter found its way into this court as a result of an

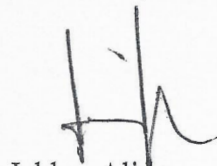
order by the Zomba Magistrate's Court after the arbitrator had issued his award, and both parties were not happy with it.

20. Counsel argued that in the light of the background, the present matter should not be determined by this court based on the law relating to the effect of the arbitrator's award but on the substantive perspective, that is, *"whether, based on the evidence presented before the arbitrator and this court the arbitrator's findings and award were correct and should be sustained"*.
21. On the other hand, counsel for defendant was very economical in his submissions on the issue. Counsel did not come out very clearly on the law governing arbitration and how the commencement of the present matter in this court fitted in that framework. The defendant simply argued that having rejected the arbitrator's award, the claimants were estopped from bringing the issue of the award before this court since they wanted to benefit from both worlds. To my mind, the defendant exactly knew the perilous waters that they would have gone into, if they pursued the issue in detail, and conveniently avoided the same.
22. I must say, nonetheless, that the approach taken by both parties in this matter is very surprising. However, reading between the lines, it is clear that both parties understood that the manner in which this matter was brought before this court begged some questions.
23. Having acknowledged the legal position in as far as arbitrator's awards are concerned i.e., they are final and can only be brought to this court by way of an application to set the same aside, the claimant still went ahead and tried to cajole this court into proceeding with the matter, based on the evidence presented before the arbitrator and this court, and then determine whether the arbitrator's findings and award were correct and should be sustained.
24. I can say without doubt, that it was very clear that both the claimant and defendant were bent on forgetting about the arbitration process that they had gone through, including the arbitrator's award, and wanted this matter to be adjudicated and decided upon by this court. They simply wanted to move on. While it is indeed important that litigation must come to an end, and parties must move on, that should not be procured at the expense of the law. The law must always be followed, and things must always be done the right way.
25. This court does not have power to reconsider the evidence presented before the arbitrator, and then, the evidence presented before it, and then proceed to determine whether the arbitrator's findings, and the award were correct. This is not the position of the law as doing that would definitely be subjecting the arbitrator's award to an appeal. It is very clear that section 24 and 25 of the Act does not give parties to an arbitration agreement any right of appeal to this court from the decision of the arbitrator. The Act only gives chance for an application to be made to this court where a party seeks to set aside the arbitrator's award. It is not correct for a party to

bring up a new and substantive matter to this court founded upon the very same facts, and seeking the very same reliefs, that were before the arbitrator.

26. Bearing in mind that the arbitrator issued his award in this matter, and the parties were not happy with it, the only recourse that either party had was to proceed and file an application before this court to set aside the arbitrator's award. To do that, the aggrieved party need to show that the arbitrator had misconducted himself or the proceedings; or that the arbitration or award had been improperly procured. I must say that, from the record, I have not seen any instance of that.
27. Further, I must state that since it is settled that the arbitrator's award is final, it was wrong at law for the parties to go back to the arbitrator to procure the so-called referral back to the Senior Resident Magistrate's Court. In my view, the moment the arbitrator rendered his final decision, he lacked any power to re-examine or revisit the same, regardless of the position taken by both parties. In this regard, the doctrine of *functus officio* kicked in. Accordingly, the referral of the matter back to the Senior Resident Magistrate's Court was *void ab initio*. The only two options that either party had after the arbitrator's award were to either to proceed and make an application to set aside the arbitrator's award; or to proceed and seek leave that the award be entered and enforced as the judgement of this court. None of the parties did that.
28. In respect of my summation above, therefore, it is my finding that the commencement of the present matter in this court was an abuse of the process of the court since the matter was already duly disposed of by the arbitrator in line with the parties' Partnership Agreement and the Act. Further, the manner in which the matter was brought before this court was erroneous and not in accordance with the Act. It is my further finding that the arbitrator's determination remains intact having not been set aside by this court. Accordingly, I dismiss this action in its entirety.
29. In terms of costs, I am mindful that these are awarded at the court's discretion. However, it is an established principle that they usually follow the event. Accordingly, I award the same to the defendant.

Made in Open Court this 12th day of May 2023.



Jabbar Alide
JUDGE