

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 17 OF 1998

(Being High Court Civil Cause No. 2107 of 1996)

BETWEEN:

BAUMAN, HINDE AND COMPANY LTD.....APPELLANT

- and -

DAVID WHITEHEAD & SONS (MW) LTD.....RESPONDENT

BEFORE: THE HONOURABLE THE CHIEF JUSTICE

THE HONOURABLE MR JUSTICE UNYOLO, JA

THE HONOURABLE MR JUSTICE KALAILE, JA

Kasambara, Counsel, for the Appellant

Sidik, Counsel, for the Respondent

Selemani, Court Clerk

J U D G M E N T

Unyolo, JA

This is an appeal against the Order of **Mwaungulu, J** made on 7th May 1998, dismissing the appellant's application to set aside the registration of a foreign arbitration award.

The pertinent facts lie in a narrow compass, and are these. On 6th December, 1996 the respondent brought an ex-parte application before the Deputy Registrar for the registration of a foreign arbitration award (hereinafter referred to as “the award”) made in the United Kingdom against the appellant. The Deputy Registrar granted the application and signed an order accordingly. In the order, the Deputy Registrar gave the appellant fourteen days within which to apply to set aside the registration, if the appellant was so minded. On receipt of the Order, the appellant duly filed an application to set aside the registration. The appellant challenged the registration on the ground that the award had no legal basis because there was no contract between the appellant and the respondent. It was also contended that in the absence of the contract, the arbitrators had no jurisdiction to do the arbitration since the arbitrators could only derive their jurisdiction from the contract or an arbitration agreement. It was further contended that the award was not enforceable in Malawi under the relevant laws. In reply, the respondent demurred to these contentions.

After hearing counsel for both parties, the learned Judge opined that the contentions made by the appellant and the issues raised were prematurely brought up and could properly be canvassed at the time when the respondent would be seeking to actually enforce the award. The learned Judge, therefore, declined to set aside the registration. It is on the basis of that decision that the appellant appeals to this Court. Two grounds of appeal were proffered as follows:

- (a) The learned Judge erred in law in holding that the arbitration award dated 6th day of August 1996 be registered as a judgment in the Republic of Malawi; and
- (b) The learned Judge failed to direct himself that the arbitrators had no jurisdiction to arbitrate in the matter and to make the said award.

There is a preliminary matter which we would like to comment on before tackling the substantive submissions made by counsel in the appeal. It is noted that the respondent brought the application for the registration

of the award pursuant to sections 27 and 37 of the Arbitration Act. Section 27 comes under the heading “**Enforcement of Awards**”, and provides:

“An award on an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect and where leave is so given, judgment may be entered in terms of the award.”

On the other hand, section 37, which comes under the heading “**Enforcement of Certain**

Foreign Awards", provides:

“(1) A foreign award shall, subject to this Part, be enforceable in Malawi either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 27.

(2) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Malawi and any references in this Part to enforce a foreign award shall be construed as including references to relying on an award.”

Clearly, the two provisions deal with the issue of enforcement of arbitration awards as opposed to the issue of the registration of the same, which is essentially another matter. Reading the Arbitration Act through, there appears to be no provision in there which specifically deals with the question of registration of foreign arbitration awards.

The learned Judge in the Court below stated that the registration of foreign judgments, including foreign arbitration awards, in so far as the United Kingdom was concerned, is covered by the British and Colonial Judgments Ordinance, Cap 14, Laws of Nyasaland. The learned Judge stated that although this Ordinance has been omitted from the current volumes of the Laws of Malawi, it is still part of the laws of this country by virtue of section 200 of the Constitution. While on this point, it is to be noted that this statute later came to be referred to “**The British and Commonwealth Judgments Act**”. Section 3 of the said Act provides:

“Where a judgment has been obtained in a superior court in the United Kingdom, the judgment creditor may apply to the High Court at any time within twelve months after the date of the judgment or such longer period as may be allowed by the High Court, to have the judgment registered in the High Court and on any such application, the High Court may, if in all the circumstances of the case, it is just and convenient that the judgment should be enforced in the Protectorate and subject to the provisions of this section order the judgment to be registered accordingly.

We have indicated that a foreign judgment includes a foreign arbitration award. This comes out from section 2 of the Act, which provides:

“Judgment means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act whereby any sum of money is made payable and includes an award in proceedings on an arbitration if the award has, in

pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.” (The underlining is supplied).

In short then, a foreign judgment or a foreign arbitration award made in the United Kingdom has to be registered in the High Court. It is registered under the provisions of the British and Commonwealth Judgments Act. The effect of such registration is to confer on the judgment or award the same force and effect, and to render it subject to the same control, as if it had originally been given in the registering court. Observably, section 4 of the Act does spell out the circumstances under which the court should decline to order registration of a foreign judgment or arbitration award.

This brings us to the question of how a foreign arbitration award may be enforced. The answer to this question is to be found in sections 27 and 37 of the Arbitration Act which we have just alluded to above. To put it briefly, the two sections provide that a foreign arbitration award may be enforced either by an action or with the leave of the court in the same manner as a local judgment to the same effect, and that where leave is so given, judgment may be entered in terms of the award. Execution of the judgment would then follow the usual processes. It is perhaps pertinent to point out here that whichever procedure the foreign judgment creditor takes, whether by action or simply by leave of the court, section 38 is crucial. That section does set out the conditions for enforcement for foreign awards.

We now turn to the core issues argued in the appeal. Like in the Court below, the appellant in this Court submitted that no contract was concluded between the parties in this matter. It was submitted that the parties were still in the process of discussing the contract, but had not gone beyond that stage when the respondent sent a formal contract document, Exhibit MT4, for execution, which the appellant refused to sign. It was argued that in the absence of an agreement between the parties, there was also no agreement for arbitration and that the arbitrators did not have jurisdiction to conduct the arbitration proceedings, since their jurisdiction could only emanate from the agreement between the parties. It was urged that the registration of the award could not be sustained in the circumstances.

On the other hand, counsel for the respondent submitted that although the appellant did not execute the said contract document by signing it, an agreement had somehow been concluded by the parties. He submitted that the arbitrators derived jurisdiction from that agreement. Counsel also pointed out that the appellant was requested to appoint its own arbitrator, but voluntarily decided not to appoint one or participate in the arbitration proceedings. He submitted that the appellant cannot, therefore, be heard to complain against the award.

We have carefully considered the arguments. The question of whether or not the arbitrators acted without jurisdiction, is a crucial one. Section 4 of the British and Commonwealth Judgments Act mentioned above stipulates that no foreign judgment or foreign arbitration award shall be ordered to be registered if the original court or arbitrators acted without jurisdiction.

It is noted that the arbitrators in the instant case did consider the question whether they had jurisdiction to determine the dispute between the parties. They came to the conclusion that they had, and proceeded to determine the dispute accordingly.

We have looked at the various faxes and telexes, Exhibits MT1 - MT10, that passed between the appellant and the respondent during the months of July, August and September 1995, relative to the disputed agreement. The notes that are scribbled on these documents are particularly illuminating. Having regard to the information contained in the said documents and considering the total facts of the case, we are of the view that the conclusion reached by the arbitrators that the parties reached an agreement in this matter is inescapable. It is also to be noted that the respondent sent the formal contract document to the appellant in July 1995, and it was only two months later, in September, when the appellant wrote denying the existence of the agreement. Surely, if no agreement had been reached, one would expect the appellant to have indicated its denial much earlier on, indeed, immediately the document was received. Actually, it appears that the appellant's problem was funds really. All in all, we do not think that the arbitrators' finding that the parties reached an agreement can be assailed.

This brings us next to the question of the arbitrators' jurisdiction. The first observation to be made is that the contract document expressly provided for the settlement of any disputes arising out of the agreement by arbitration. It is also beyond controversy that the arbitrators were appointed on the basis and by virtue of the said contract. In the result, their authority and jurisdiction to determine the dispute cannot successfully be impugned.

For the foregoing reasons, the registration of the award cannot be faulted and the appeal must therefore fail, and it is dismissed with costs.

DELIVERED in open Court this 17th day of April 2000, at Blantyre.

Sgd

R A BANDA, CJ

Sgd

L E UNYOLO, JA

Sgd

J B KALAILE, JA