IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2107 OF 1996

BETWEEN

BAUMAN, HINDE & CO. LTD. PLAINTIFF

AND

DAVID WHITEHEAD & SONS LTD. DEFENDANT

CORAM: MWAUNGULU, J.

Kasambala, Legal Practitioner, for the plaintiff

Sidik, Legal Practitioner, for the defendant

Selemani, Clerk to the Court

MWAUNGULU, J.

ORDER

This is an application by the judgment debtor, David Whitehead & Sons Ltd., to set aside registration of an arbitration award. This award was registered under an order ex parte that I made on the 13th of December 1996. That order stated, as it should, that within the stipulated time, fourteen days in this matter, the judgment debtor could apply for setting aside the registration. The order also indicated that the judgment creditor, Bauman, Hinde & Co. Ltd., should not issue execution until the application to set aside the registration is disposed of. There is, as we have seen, an application to set aside the registration. The judgment creditor has not therefore taken any proceedings to execute the award.

THE APPLICATION EX PARTE TO REGISTER THE AWARD

The application to register the award as a foreign judgment was based on the affidavits of Violet Jumbe, Legal Practitioner for the judgment creditor, and William James Newton, the General Manager for the Liverpool Cotton Association, Ltd. Ms Jumbe deponed to the existence of the award of 6th August, 1996 made by the Liverpool Cotton Association Ltd. under which the judgment debtor was adjudged to pay to the judgement creditor the sum of US$ 240,840.37 and costs. The background and the award itself are contained in the affidavit of Mr. Newton.

Mr. Newton deposes that he is the General Manager of the Liverpool Cotton Association

since May 1996. He further deposes that the Association is authorised by its constitution to decide/arbitrate disputes between the above Bauman, Hinde &Co. Ltd. and David Whitehead & Sons Ltd. arising out of a contract for the sale of cotton. He deposes that by a contract of 31st July, 1995 numbered S01505 the sellers, Bauman, Hinde & Co. Ltd., sold to the buyer, David Whitehead & Sons Ltd., about 1,000 metric tonnes of raw cotton. The said contract, he deposes, was made subject to arbitration following the By-Laws and Rules of the Association. According to the affidavit, the sellers are members of the association. The buyers are not.

According to Mr. Newton's affidavit, by By-Law 200, every contract made subject to the By-Laws of the Association or subject to Liverpool arbitration or containing words to a similar effect is to be construed and take effect as a contract made in England and according to the laws of England and the parties thereto are considered as having admitted to the jurisdiction of the High Court of Justice in England for giving effect to the provisions of the said By-Laws and Rules. The General Manager deposes that the contract and the agreement to arbitrate therein are valid and enforceable under the laws of England.

The General Manager deposes that in respect of the contract between the buyer and seller, a dispute was referred to arbitration in Liverpool according to the By-Laws and Rules of the Association. Mr. Aldcroft, a member of the association, was appointed by the seller to be an arbitrator. On 25th October, 1995 following failure by the buyers to appoint an arbitrator, the seller requested the President of the Association, according to Rule 240 (4) (b) of the By-Laws of the Association, for compulsory appointment of an arbitrator for the buyer. On the same day the buyer was informed by fax of the application. The buyer was given up to 8th November to make its own appointment.

Mr. Newton further deposes that on 6th November the buyer sent a fax to the General Manager of the Association denying that they reached contract number S01505 or any contract with the seller. The buyer further refused to recognise the jurisdiction of the Association. On 14th November the buyers were advised that the President had exercised his power under Rule 340 (4) (b) of the By-Laws and Rules of the Association and had appointed Mr. Southworth to represent the buyer. The arbitrator appointed sought written submissions from the buyer. The written submissions were to be received by 27th March, 1996 failing which the arbitrator appointed was to proceed on the written submissions of the other party. No submissions were received by Mr. Southworth.

Mr. Newton further deposes that the two arbitrators considered all the evidence from the seller and the buyer. They made a finding of fact based on the documentary evidence before them that a binding contractual commitment was reached on the 31st of July 1995. Mr. Newton also deponed that Rule 314 of the By-Law and Rules of the Association provides that an Award shall be "final and binding upon all disputing parties, including all persons claiming under them respectively, both as to all matters in difference decided by such award and as to the amount of these and other costs and expenses(if any) charged or incurred in connection with reference to an award" so long as the provisions of Rule 313 (8) of the By-Laws and Rules of the Association are met. Rule 313 (8) states that no Award shall be effective or binding unless and until so stamped by the Association, and every award so stamped shall be deemed to have been made and perfected and to become effective and binding in Liverpool at the date on which it is so stamped. Mr. Newton

confirms that the award of the 6th of August 1996 was duly stamped by the Association.

The General Manager of the Association further deposes that the time for the Notice of Appeal against this award to be lodged with the Secretary to the Association expired on the 3rd of September. The record of the Association show that no notice of appeal has been lodged with the Association. Mr. Newton deposes that there is no other avenue open to the buyer for appeal against the award. He also deposes that an appeal to the Court of Appeal in England exists but only after the buyer exhausts all the avenues under the By-Laws of the Association. These having not been pursued by the buyer, Mr. Newton deposes that the award is effective and binding. Mr. Newton finally deposes that the time of appeal having expired, the seller delivered an invoice note to the buyer for payment. The buyer has not paid.

THE AWARD

In making the award, the Arbitrators considered the two objections put in by the buyer. There were two aspects really. The first aspect was that the buyer was not a member of the Association and had not been furnished with the By-Laws of the Association. Secondly the buyer contended that there was no agreement with the seller in the first place. The arbitrators had no jurisdiction, it was contended, because the arbitrators could only derive their jurisdiction from the contract or an arbitration agreement. As we have seen, the arbitrators considered the question of the existence of the agreement and other issues raised in thee arbitration. They concluded that there was an agreement between the buyer and the seller. They, therefore, decided that they had jurisdiction to consider the matter. They based their conclusion on a clause in the contract which run as follows:

"Rules

Applicable : (1) This Contract incorporates the By-Laws and Rules of the Liverpool Cotton Association, Ltd. in force at the date when this Contract was entered into and:

(I) all Quality disputes are defined by such By-Laws and Rules, and

(ii) all disputes other than Quality disputes touching or arising out of this Contract, shall be referred to Arbitration in accordance with such By-Laws and Rules and shall be resolved by the application of English Law

(2) The obtaining of an Arbitration Award shall be a condition precedent to the right of either party to start legal proceedings in respect of any arbitration dispute."

THE SUMMONS TO SET ASIDE THE REGISTRATION

The application to set aside the registration is supported by an affidavit of Mr. Tsingano, legal practitioner for the buyer. The gist of the affidavit is that there was no contract between the seller and the buyer. The parties had not gone beyond the negotiation stage. The buyer contends that the seller proceeded to send a contract which the plaintiff had executed for execution by the buyer. The buyer has not executed the contract. It is said for the buyer that the arbitrators got their jurisdiction from a contract that is nonexistent, and did not have jurisdiction. Further it is said that the Arbitration Award is not enforceable in Malawi under Part III of the Arbitration Act, 1967 in that:

(a) it was made in pursuance of an agreement for arbitration which was not valid under the law by which it was governed contrary to section 38 (1) (a) of the Arbitration Act,

1967, and

(b) it was made by a tribunal constituted in a manner which was not agreed upon by the parties contrary to section 38 (1) (b) of the Arbitration Act, 1967.

THE ARGUMENTS

I have avoided in the background information necessary to determine the matter any reference to the body of evidence surrounding the agreement that was before the Arbitrators. This is the evidence on which the Arbitrators concluded that there was an agreement between the buyer and the seller. Much of that evidence has been repeated in the hearing of this application. For reasons which will soon be apparent it is not necessary to lay all that evidence for the purpose of the application. It is only necessary to consider the legal arguments as have been presented by the protagonists.

The judgment debtor pursued two lines of argument. First, as has been the contention all along, it is urged that there was no agreement between the buyer and the seller. Absent such agreement, it is said, there was no agreement for arbitration. The arbitrators' jurisdiction could only emanate from an agreement between the parties. Mr. Sidik, appearing for the judgment debtor, relied on a statement of Devlin, J., in Christopher Brown, Ltd. v. Genossenschaft Osterrchischer Walldibesitzer Holzwirtschaftsbertriebe registrierte Genossenschaft Mit Beschrankter Haftung, [1953] 2 All ER 1039, 1040.He submitted that an agreement by the parties to submit a dispute between them is the foundation stone of the arbitrator's authority. The agreement between the parties is the basic power of the arbitration tribunal. When there is no agreement to submit to arbitration, arbitrators have no authority to hold the arbitration. Their award cannot therefore be enforced. The Liverpool Association, it is said, had no jurisdiction to arbitrate since there was no agreement for arbitration.

The second line of thought is based on the Arbitration Act, 1967. Mr. Sidik submits that for a foreign award to be enforced in Malawi, under section 38 (1) of our Act, it must have been made in pursuance of an agreement for arbitration which was valid under the law in which it is covered. The question, Mr. Sidik asked is, was the contract valid by the law with which it was governed? Mr. Sidik submitted that the contract was not valid by the law under which it was made. He submits that the contract had only been signed by the judgment creditor after the judgment creditor had executed it. The judgment debtor, who received the copy executed by the judgment creditor has not executed it. It was not signed by the judgment debtor. It remains unsigned to this date. The contract is, therefore, it is urged, not valid by the law in which it was made.

There is a further argument under section 38 of the Arbitration Act. Mr. Sidik submits that for the award to be enforced it must be made by the tribunal provided in the agreement or constituted in a manner agreed by the parties. He submits that in this matter there was no agreement at all in the first place. He submits that the award was arrived at under the By-Laws and Rules of The Liverpool Cotton Association to which the judgment creditor was a member. The judgment debtor was not a member. The arbitration tribunal, it is said was not constituted in a manner in accordance with the agreement between the parties.

Mr. Sidik further submits that the judgment creditor should first have registered the award in the United Kingdom. In other words the judgment creditor should have first enforced the award in the United Kingdom before rushing to Malawi.

Mr. Kasambala, legal practitioner for the judgment creditor, has pursued one thought in this court. Primarily, he contends that there was an agreement between the parties though the judgment debtor did not execute the contract by signing it. He contends therefore that the tribunal had jurisdiction to determine the dispute between the buyer and the seller. He further contends that the question whether there was an agreement between the buyer and the seller was considered by the arbitrators. They concluded that there was such an agreement. They therefore decided that they had jurisdiction to determine the dispute between the parties.

RESOLUTION OF THE MATTER

To resolve this matter a distinction must be made between registration of the award and its enforcement. The law applicable is the Arbitration Act itself and the British and Colonial Judgments Ordinance, 1922. The Arbitration Act does not have rules of procedure laid under it. The applicable rules would be Order 73 of the Rules of the Supreme Court. Registration in the High Court of foreign awards is provided in Order 73, rule 8:

"Where an award is made in proceedings on an arbitration in any part of Her Majesty's dominions or other territory to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 extends, being a part to which Part II of the Administration of Justice Act, 1920 extended immediately before the said Part I was extended thereto, then, 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, Order 71 shall apply in relation to the award as it applies in relation to a judgment given by that court, subject, however, to the following modifications:

(a) for references to the place where the award was made; and

(b) the affidavit required by rule 3 of the said Order must state (in addition to the other matters required by that rule) that to the best of the information or belief of the deponent 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 Foreign Judgments (Reciprocal Enforcement) Act 1933 and The Administration of Justice Act, 1920 are not part of our law. Immediately after the Administration of Justice Act was passed in England in 1922 there was passed for Nyasaland the British and Colonial Judgments Ordinance (Laws of Nyasaland, 1957, cap. 14). In section 3 of the Ordinance was provided the reciprocal enforcement of judgments of the Superior Courts of the United Kingdom by His Majesty's High Court of Nyasaland. This Ordinance and the Judgments Extension Ordinance (Laws of Nyasaland, 1957, cap. 15), that provided for reciprocal enforcement of judgments to present day Kenya, Uganda and Tanzania,

have been omitted from the current volume of the laws by virtue of section 9 of the Revision of the Laws Act. They are part of our law by virtue of section 200 of the 1994 Constitution and sections 2 and 3 of the Republic of Malawi (Constitution) Act, 1966. In relation to the United Kingdom, therefore, the relevant Act for enforcement of foreign judgments is the British and Colonial Judgments Ordinance, 1922.

Registration of judgments from the United Kingdom is provided under section 3 of the British and Colonial Judgments Ordinance, 1922:

"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 thinks 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."

"Judgment" includes an award in proceedings on an arbitration award. Section 2 of the Ordinance 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 Ordinance, 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."

An arbitration award from the United kingdom, has, therefore, to be registered under the British and Colonial Judgments Ordinance.

Order 73, rule 8 of the Rules of the Supreme Court refers to Order 71 because Order 71 is based on the Foreign Judgments (Reciprocal Enforcement) Act, 1933 and the Administration of Justice Act, 1920 in the United Kingdom. The application of Order 71 of the Rules of the Supreme Court is limited by section 29 of the Courts Act:

"Save as otherwise provided in this Act, the practice and procedure of the High Court shall, so far as local circumstances admit, be the practice and procedure (including the practice and procedure relating to execution) provided in the Rules of the Supreme Court:

Provided that -

(a) the Rules of the Supreme Court may at any time be varied, supplemented, revoked or replaced by rules of court made under this Act;

(b) any of the Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament other than statutes of general application in force in England on the eleventh day of August 1902, and any such Acts as have been applied to or are from time to time in force in Malawi shall not have any application in Malawi;

(c) If any provision of the Rules of the Supreme Court is inconsistent with any provision of any rules of court, the latter shall prevail and the Rules of the Supreme Court shall, to the extent of such inconsistency, be void."

Not only is the order based on a statute after 1902, the British and Colonial Judgments Ordinance created its own rules which, in my judgment, have to be read alongside Order 71 of the Rules of the Supreme Court. Reference to Order 71 in Order 73, rule 8 must mean reference to the British and Colonial Judgments Rules. Registration of an award from the United Kingdom has to be in accordance with these rules and the Rules of the Supreme Court subject to what section 29 of the Courts Act provides.

Let me first deal with the submission that the judgment creditor should first have been in the courts in the United Kingdom before seeking to enforce the award here. This argument is premised on the last bit of section 2 of the Ordinance. The last bit of this definition has concerned me some. This is in view of Mr. Sidik's strong submission that the judgment creditor must first have tried to enforce the award in the place where the award was made before registering the award here. It becomes necessary to construe the words " 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."An arbitration award in the United Kingdom, much like here, can be enforced, with the leave of the Court, like a judgment of the Court. An arbitration award can also be enforced by action.

In this context the section could have two meanings. The first, the one suggested by Mr. Sidik's submission, is that an award would be registered under the Ordinance only after it has become enforceable as a judgment of the court in the United Kingdom, in other words, after the courts in the United Kingdom have either granted leave to enforce the award or the judgment creditor has succeeded in the action on the award and the court has granted a judgment on which the judgment creditor can act. In that scenario, a foreign award would not be registered under the Ordinance until after the order of the Court. The other meaning would be that the award only is such that it should be final in that there are no appeals or applications by either party to the award. In other words the award must be such that the parties can have it enforced in the courts in the United Kingdom. Still better expressed, it is enough if the award has reached the stage where it can be enforced by the courts. Then it is not necessary for registration that the judgment creditor should have the leave of the court in the United Kingdom to enforce the judgment or obtain a judgment in an action for that purpose in the place where the award is made to register the award for purposes of the Ordinance. In the latter case the question for the court on registration of the judgment is simply, was the award final in the place where the award was made?

The latter interpretation commends itself to this court. The latter interpretation conforms with the provisions of the Arbitration Act itself. Section 37 provides:"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." The words in the section refer to the foreign award itself as being enforceable in the same manner as the award of an arbitrator is enforceable by virtue of section 27. There is no requirement in the section that the award be a judgment of the court or indeed that it must be such as it

should be such as it is enforceable as a judgment of the Court in the place in which it is made. What the section says is that once a foreign award has been made, it can be enforced in Malawi by action on the award or in the same manner as an award of an arbitrator is enforceable by section 27 of the Act. Section 27 of the Act says "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, the judgment may be entered in terms of the award." If the construction of the section is that an award would be registered only if there is leave of the court in the place in which the award was made, the judgment creditor would have to go through the same process here even if he has gotten leave of the court to enforce the judgment in the United Kingdom or he has obtained a judgment in an action in the United kingdom. I agree with the judgment of Lord Evershed, M.R., in Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall & Co. Ltd., [1959] 2 Q.B. 44, 50, that the effect of section 37 of the Arbitration Act is to put a foreign award to be enforced in the same way in Malawi as arbitration awards made in Malawi. There an award from the United Kingdom has the same status as a Malawian arbitration award. It can be enforced by leave of this Court or by an action in this court without the judgment creditor having to obtain leave of the court or commencing an action on the award in the place where the award was made. Lord Evershed said:

"Section 36 (1)[our section 37 (1) of the Arbitration Act] to my mind is of importance, for it provides: "A foreign award shall, subject to the provisions of this Part of the Act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of this Act." Expressing it in less precise language, the effect, I apprehend, of that subsection is that a foreign award, subject to the provisions of this part of the Act and particularly to the provisions of the next section, is put in the same position quoad enforcement as an award of an English arbitrator . . . I venture again to refer to the vital fact, as I think, that Part II, and the conditions to be complied with, is intending to put a foreign award in the same condition as an English award."

In Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall & Co. Ltd. the judgment creditor obtained an award from a Danish tribunal. In Denmark, much like here and the United Kingdom, the award could not be enforced without the order of a Danish Court. It is significant to note that our definition of 'judgment' in section 2 of the Ordinance is word for word the definition of 'judgment' in section 12 of the Administration of Justice Act, 1922, England, under which registration of foreign judgments is made. That provision was not considered in Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall & Co. Ltd. This is precisely because foreign arbitration awards are treated in pari materia with awards in England.

In Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall & Co. Ltd it was argued for the judgment debtor that the award could not be enforced in England because in Denmark an award could not be enforced without the order of the court. The judgment creditor had not obtained the leave of the Danish Court. The Court of Appeal rejected the argument and decided that in so far as the award was final and complied with the requirements in section 36 of the Arbitration Act, 1950, the equivalent of our section 38 of the Arbitration Act, 1967, the award could be enforced in England,

without the order of Danish courts. The Master of Rolls derided the suggestion that to enforce a foreign award, there must be an order of the Court where the award was made. Said he:

"At first sight, of course, it might appear that Mr. Heyman is saying that, according to the law of the country in which this award was made, viz., Denmark, the award is not final as that word is used in section 37 (1) (d). But I confess I have come myself to the clear conclusion that is not right. If it were so (as I think it must follow, and there is much force in this point which Mr. Grieve made) it would mean that you could never in fact enforce an award, as such, in such cases as this; you would have to wait until you got the judgment of the court of the county where the award was made, and then you would not be enforcing the award but the judgment. I venture again to refer to the vital fact, as I think, that Part II, and the conditions to be complied with, is intending to put a foreign award in the same condition as an English award."

The Master of Rolls went on to say:

"Now the question of enforcement here is a matter of English law. Can it now be enforced by the terms of the Arbitration Act? It seems to me, with all respect to Mr. Milmo's argument, that it is reasonably clear that it can. This award is, to my way of thinking, a final according to the bargain made and according to the law of Denmark, so far as it is concerned with the problem with which we are concerned. It is no doubt not enforceable directly in Denmark or anywhere else; but it is, I think, within the contemplation of the section. . . . I have come to a clear conclusion in my own mind, in conformity with that of the judge, that for the purposes of section 37 (1) (d) this award must be treated as having become "final" according to the relevant law of Denmark, and that being so, the conditions in other respects being satisfied, section 36 (1) applies to it and it is enforceable in the same way as an English award."

Lord Justice Pearce's statement is piquant. He said that if it were necessary that the judgment of the Danish courts should be obtained first before an arbitration award is enforced, such judgments could be enforced apart from the Arbitration Act. In my judgment, the Lord Justice had in mind the Administration of Justice Act 1922 and the Reciprocal Enforcement of Judgments Act, 1933. He pointed out that such an approach would leave the provisions of the Arbitration Act valueless. Said he:

"If it were necessary to recover a Danish judgment before the award becomes final, then that judgment could be enforced, as has been pointed out, quite apart from the provisions of the Arbitration Act, and those provisions would be valueless. It is true that, for the purposes of enforcement, an application has to be made to the Danish courts, but that is not the test here. The test is whether the award is final within the meaning of section 37 (1) (d)?"

Section 2 of the Ordinance has to be read alongside the Arbitration Act. I have come to the clear judgment that in section 2 of the Ordinance all that is meant is that the award must be such as it can be enforced by the courts of the place where the award was made. It is not necessary that a judgment of the courts in the United Kingdom be obtained to

register an arbitration award for enforcement in Malawi. If the judgment of the court has to be obtained, it is unnecessary to include an ‘arbitration award’ in the definition of a ‘judgment’ because then the court will already have made the award a judgment of the court. The question for the court when there is an application to register an award from the United Kingdom is: Under the law in the United Kingdom when does the award become enforceable in the same manner as a judgment given by a court in the United Kingdom. In the United Kingdom it is when there is a valid arbitration award. It certainly is not when the court grants leave to enforce or there is a judgment of the Court. This is obvious from reading section 36 (1) of the Arbitration Act, 1950, U.K.:

“A foreign award shall, subject to the provisions of this Part of the Act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of this Act.”

Of course the award is not enforceable directly. Leave of the Court has to be sought or an action has to be taken on the award. Once the award is made, however, at that stage, it has become enforceable in the same manner as a judgment given by a court in the United Kingdom, only that the award cannot be enforced directly and the applicant has to applt to the court.

Moreover our Arbitration Act, makes a foreign award by itself enforceable like an award by a Malawian arbitrator if certain conditions are met. There is no requirement under our Act that a judgment of the Court in the place where it was made be obtained. Under our Act for a foreign award to be enforceable it must comply with section 38. There is no doubt in the affidavits that were before me in support of the application that the award was final in the place where it was made. The award could therefore be registered in Malawi without it being the subject of proceedings in the United Kingdom. Mr. Sidik contends that the award should have been registered first in England. Or at any rate the judgment creditor should have proceeded in England before coming to our Courts. There is no need of registration of the award for enforcing the award in the place where it is made. Our Arbitration Act leaves foreign awards in pari materia with Malawian awards. Foreign awards can be enforced in Malawi like awards by Malawian arbitrators. There is no requirement that to be enforceable the award be the subject of proceedings in the United Kingdom.

An application to set aside registration of a judgment from the superior courts of the United Kingdom is provided in rule 14 of the British and Colonial Judgments Rules:

“The judgment debtor may at any time within the time limited by the order giving leave to register after service on him of the notice of the registration of the judgment apply by summons to a judge to set aside the registration or to suspend execution on the judgment and the judge on such application if satisfied that the case comes within one of the cases in which under section 4 of the Ordinance no judgment can be ordered to be registered or that it is not just or convenient that the judgment should be enforced in the Protectorate or for other sufficient reason may order that the registration be set aside or execution on the judgment suspended either unconditionally or on such terms as he thinks fit and either altogether or until such time as he shall direct:

Provided that the judge may allow the application to be made at any time after the expiration of the time herein mentioned.”

Section 4 of the Ordinance lays some grounds on which the registration can be refused and hence set aside. The power under rule 14 of the British and Colonial Judgments Rules is wider in scope. It covers more considerations than those in section 4 of the Ordinance.

Mr. Sidik, in spite that this is an application to set aside registration of a judgment from the United Kingdom, did not argue the matter from section 4 of the Ordinance or rule 14 of the Rules. He relied instead on the provisions of the Arbitration Act itself, sections 37 and 38, to be specific. Those provisions, as we shall see in a moment, deal with enforcement of foreign awards. They do not deal with registration of judgments. While as registration of a judgment is a means of enforcing a foreign judgment, as we shall see shortly, there are specific ways under the Arbitration Act of enforcing arbitration awards. Mr. Sidik contends however that the arbitrators acted without jurisdiction and the registration cannot be allowed to stand. That argument can only be premised on the provisions of the Ordinance and the Rules made thereunder.

The first of these premises is that the arbitrators acted without jurisdiction. This is based on section 4 (b) of the Ordinance. The judgment debtor's contention is that there was no valid agreement to base the arbitration. The situation here is much like in Christopher Brown, Ltd. v. Genossenschaft Osterrchischer Walldibesitzer Holzwirtschaftsbertriebe registrierte Genossenschaft Mit Beschrankter Haftung, the case cited by Mr. Sidik. A written contract between the parties contained an agreement to submit disputes to arbitration. A dispute under the contract having arisen because of non-delivery of timber, the plaintiff appointed an arbitrator in accordance with the agreement. As the defendants failed to appoint an arbitrator, a second was appointed, as the agreement provided, by the President of the Timber Trades Federation. The Arbitrators awarded the plaintiffs 1,650 pounds British Sterling. The defendants having failed to pay, the plaintiffs issued a specially endorsed writ to enforce the award. By their defence the defendants alleged that the document, which they signed, was not a binding contract as the parties were not ad idem.

Devlin, J., was the first to admit that, if the defendant's contention that there was no contract binding on the parties, the submission contained in the contract would also not be binding on the defendants and the award would, therefore, be valueless. At page 1040 he said:

"The matters that are set out in the defence - and it is not, of course, any part of the duty of the plaintiff's to disprove them - show that the defence consists substantially of an allegation that the contract alleged in the statement of claim was not a binding contract inasmuch as the parties were never ad idem. If that is so, of course, the submission which is contained in the contract would also not be binding on the defendants and the award would, therefore, be valueless."

Devlin, J., found as a fact and was satisfied that the two arbitrators, much like took place here, looked at the correspondence as a whole. The correspondence indicated, much like here, that the defendants were contending that the contract was not valid and not binding on the defendants. Devlin, J., was satisfied that the arbitrators went into the question, so far as they could, whether the contract was valid and binding, and they decided that it was. Having decided that it was, they went on to consider all other matters in the dispute. The arbitrators in this award considered the question of the validity of the contract. They concluded, on the correspondence, that there was a binding contract between the parties although the contract, as the judgment debtor contends, was not signed by the judgment debtor.

The first proposition emanating from Christopher Brown, Ltd. v. Genossenschaft Osterrchischer Walldibesitzer Holzwirtschaftsbertriebe registrierte Genossenschaft Mit Beschrankter Haftung is that if the only question that the arbitrators have to deal with is the dispute whether the contract was validly made, the award would be valueless. The arbitrators cannot determine their jurisdiction. The jurisdiction of the arbitrators can only be determined by a court of law. Here, much like in Christopher Brown, Ltd. v. Genossenschaft Osterrchischer Walldibesitzer Holzwirtschaftsbertriebe registrierte Genossenschaft Mit Beschrankter Haftung, the validity of the contract was not the only consideration. There were other questions. There are bound to be a lot of difficulties that would undermine the efficacy of arbitration if the law were to be that the questioning of the arbitrator's authority should determine the arbitration if there are other matters besides the validity of the agreement. Many a valid arbitration agreements would be pointless at the mere suggestion of a party that no valid agreement existed. Conversely, a relaxation of the rule would allow a plethora of awards based on doubtful authority emanating from no agreement at all. The law, as I understand it, is that if there is an objection at the commencement of the arbitration that there is an arbitration agreement, the arbitrators should consider the question and decide other issues raised in the arbitration if they find that, notwithstanding the objection, there was an arbitration agreement between the parties. The award is valid and final. The arbitrators are functus officio. The burden is on the party relying on the award to satisfy the court that the arbitrators acted on the strength of the agreement to arbitrate, that is to say, with jurisdiction.

This conclusion is based on the principles that govern the acts of arbitrators. At page 1042, Devlin, J., said:

"The arbitrators cannot determine their own jurisdiction. The question which has arisen is: What is the position if the dispute embraced not merely the question whether the contract was validly made or not, which would be in excess of the jurisdiction of the arbitrators to determine, but also other questions which they could properly determine? I think that the answer to that question becomes clear if one bears in mind the fundamental principles which govern the acts of arbitrators in these matters. It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the

arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to cease to act, and to refuse to act, until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and determine the matter in dispute leaving the question of their jurisdiction to be heard over until it is determined by some court which had power to determine it. They might then be merely wasting their time or everybody else's. They are not obliged to take either of those courses. They are entitled to enquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding on the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter, whether they ought to go on with the arbitration or not."

If at the start they conclude that there was no agreement, they will no, doubt, desist from continuing with determination of the matter. Then the aggrieved party may come to the court to challenge that course. The arbitrators could also decide that there was agreement and use that as authority for proceeding with the arbitration. The party against whom that order has been made could still come to court for determination of the matter. Moreover, as we shall see not far from now, the party taking action on the award has to satisfy the court that the arbitrators acted with jurisdiction. Devlin, J., said:

" That is plain, I think, from the burden that is put on a plaintiff who is suing on an award. He is obliged to prove not only the making of the award but that the arbitrators had jurisdiction to make the award. ... It has to be proved by the party who sues on it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively."

This Court can under section 4 of the British and Colonial Judgments Ordinance set aside registration of a judgment, which includes an award under arbitration, if the original court had no jurisdiction. Here the arbitrators could not determine their jurisdiction. Their jurisdiction could only be determined by a court. The fact that they could not determine their jurisdiction does not mean that they had no jurisdiction. The arbitrators proceeded in a manner that is condign with the principles under which arbitrators act. They came to the conclusion that there was a valid agreement which clothed them with authority to determine the matter. The award is therefore valid. It cannot be questioned for want of jurisdiction at the registration stage. When the judgment creditor wants to enforce the award, he has to show that the arbitrators acted with jurisdiction.

The second premise that the registration can be impugned on is section 4 (b) of the Ordinance. That section is in the following words:

"No judgment shall be ordered to be registered under this section if ... the judgment debtor, being a person who was neither carrying on business nor ordinarily resident

within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court ...”

The judgment debtor does not reside or carry on business in the United Kingdom. The wording of the section caused me a bit of anxiety. The judgment creditor never appeared at the proceedings at all. The phrase used is ‘voluntarily appear.’ The section does not deal with a case where the judgment debtor does not appear at all. It deals with a situation where the judgment debtor appears albeit involuntarily. It deals with a situation where the debtor appears under protest. Even if I am erroneous in that regard, the situation here is covered under the other limb of the section. The judgment debtor, if the agreement was valid, had agreed to submit to English law and the jurisdiction of English Courts.The registration of the award cannot be impugned based on section 4 (b) of the Ordinance.

The effect of registration of a judgemnt from superior courts of the United Kingdom is provided in section 5 of the Ordinance:

“Where a judgment is registered under this section -

(a) the judgment shall, as from the date of registration, be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered upon the date of registration in the High Court:

(b) the High Court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as relates to execution under this section; and

(c) the reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) shall be recoverable in like manner as if there were sums payable under the judgment.”

Here we are dealing with an arbitration award the enforcement of which is prescribed by the Arbitration Act, 1967. Section 37 provides:

“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.”

Section 27 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, the judgment may be entered in terms of the award.”

Application for enforcement of an arbitration award under sections 27 and 37 of the

Arbitration Act is under Order 73, rule 10 (1) of the Rules of the Supreme Court:

"An application for leave under section 26 of the Arbitration Act 1950 or under section 3 (1) of the Arbitration Act 1975 to enforce an award on an arbitration agreement in the same manner as a judgment or order may be made ex parte but the court hearing the application may direct a summons to be issued."

As I pointed out at the beginning, because of the application to set aside the registration, execution has been deferred to after determination of the matter. Execution can be either with the leave of the court or by action on the award. The court will not in doubtful cases grant leave to enforce an award summarily. Indeed in doubtful cases the court will insist that the judgment creditor proceed by action on the award (Re Boks & Co and Peters, Rushton & Co. [1919]1 K.B. 491; Union Nationale des Co-operatives de Cereales v, Robert Catterall & Co. Ltd [1959] 2 All E.R. 721; and Duff Development Co. V. Kelantin Government, [1924] A.C. 817-818). In Re Boks & Co and Peters, Rushton & Co. Swinfen, M.R., said:

"It is well settled that the procedure by action upon an award is one that ought to be pursued where the objections raised are such as to render the validity of the award a matter of doubt. Where there is no objection to the award, or where the objections raised are such as can be easily disposed of, the summary procedure is prompt and convenient; but where there are matters which may gravely affect the validity of the award, then it is proper that they should be dealt with by an action in which the facts can be fully ascertained, and no order should be made giving leave to proceed summarily under the award."

As I have tried to show, the arbitrators' decision on their authority to proceed with the arbitration does not bind the parties. Their jurisdiction could only be decided by the court. There is some doubt, therefore, that there is jurisdiction.

On an application for leave to enforce an arbitration award, the judgment debtor may set up the validity of the award (Re Stone and Hastie [1903] 2 K.B 463; Pedley v. Goddard (1796) 7 Term Rep. 73; Randall v. Randall (1805) 7 East 81 Swayne and Bovill v. White and Ponsford (1862) 31 LJQB 260). Equally, it is possible to defend an action based on the arbitration award. To that action the judgment debtor can plead that there was no agreement between the parties and the arbitrators acted without jurisdiction (Christopher Brown, Ltd. v. Genossenschaft Osterrchischer Walldibesitzer Holzwirtschaftsbertriebe registrierte Genossenschaft Mit Beschrankter Haftung).

Here, the registration of the award cannot be impugned on any of the grounds in section 4 of the Ordinance. The arbitrators proceeded in a course which is appropriate in these kinds of proceedings. They concluded that there was an agreement on arbitration which clothed them with authority and they proceeded to consider other aspects of the dispute. They could not determine their jurisdiction. That can only be decided by the court. On an action on the award the court has to be satisfied of the existence of the award and that the arbitrators had jurisdiction. This does not however mean that they had no jurisdiction to

make the award. The award is still valid according to the law in which it was made. The judgment debtor, albeit not ordinarily resident or carrying on business in the United Kingdom did not appear at all. Nonetheless, if the agreement is valid, the judgment debtor had agreed to submit to the jurisdiction of the tribunal and the courts of that jurisdiction. The award could properly be registered in this Court. I cannot set it aside.

The judgment creditor has not taken any step to enforce the award. This is because of the application to set aside the registration. If that application comes before this court, it will be open to the judgment debtor to raise most of the objections raised at this stage. Regardless the law requires the plaintiff, in an action to enforce an award, to prove: the making of the contract which contains the submission, that the dispute arose within the terms of the submission, that the arbitrators were appointed in accordance with the clause which contains the submission, the making of the award and that the amount awarded has not been paid, per Devlin, J., in Christopher Brown, Ltd. v. Genossenschaft Osterrchischer Walldibesitzer Holzwirtschaftsbertriebe registrierte Genossenschaft Mit Beschrankter Haftung. Devlin, J., points out at page 1042:

“They are entitled to enquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding on the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter, whether they ought to go on with the arbitration or not. ... They are entitled, in short, to make their own enquires in order to determine their own course of action, but the result of that enquiry has no effect whatsoever on the rights of the parties. That is plain, I think, from the burden that is put on a plaintiff who is suing on an award. He is obliged to prove not only the making of the award but that the arbitrators had jurisdiction to make the award. ... It has to be proved by the party who sues on it that it was made by the arbitrators within the turns of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively.

If the plaintiff takes on himself the burden of proving the award and fails to prove that the arbitrators had jurisdiction, of course, his action fails and it is irrelevant whether the arbitrators thought or did not think that they had jurisdiction their finding is of no value to him. But if he proves that the arbitrators did have jurisdiction then he succeeds and is success is not destroyed because the administrators themselves went into the matter and came to the same conclusion which, ex hypothesi, was the right one. In short, any view that is expressed by the arbitrators expressly or impliedly in the award, any finding, if it can be called a finding, that they had jurisdiction, does not make the award any better and likewise does not make it any worse.”

Indeed if the judgment creditor fails for any of the grounds in section 38, as Mr. Sidik observed, the court will refuse to enforce the award.

Such powers that this court has on application to set aside registration are contained in section 14 of the Ordinance and Order 71, rule 9 of the Rules of the Supreme Court. Under Order 71, rule 9 (2) of the Rules of the Supreme Court the Court hearing such an application may order any issue between the judgment debtor and the judgment creditor

to be tried in any manner in which an issue in an action may be ordered to be tried. Section 14 of the Ordinance is wider than Order 71, rule 3. Under the rule all that the court can do is to set aside the registration. Under the Ordinance, on the hearing of an application to set aside a registration the court can, besides setting aside the registration, order a stay of execution on conditions or unconditionally. A combination of all these provisions results in a principle that on an application to set aside registration the Court has got very wide powers. It can set aside the award. It can order any issue between the parties to be tried as in an action. The court could very well allow the registration to stand but stay execution. The reasonable thing to do in this matter is to retain the registration of the award. It is further ordered that execution on the award be stayed till the application to enforce the award is determined. This will enable the judgment creditor to apply by action for enforcement of the award to which application the judgment debtor can raise the defenses that he is raising to the registration.

Costs will be in the cause.

Made in Chambers this 7th Day of May 1998

D.F. Mwaungulu

JUDGE