



REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL
PRINCIPAL REGISTRY
MSCA CIVIL APPEAL NO 03 of 2021
[Being Commercial Cause No. 187 of 2016 in the Commercial
Division, Blantyre Registry]

BETWEEN:

CEMENT PRODUCTS LIMITED

APPELLANT

-AND-

RELIANCE CEMENT TRADING COMPANY

RESPONDENT

CORAM: HON DEPUTY CHIEF JUSTICE LP CHIKOPA SC
HON JUSTICE F. KAPANDA SC JA
HON JUSTICE H. POTANI SC JA
HON JUSTICE J. KATSALA SC JA
HON JUSTICE D. MADISE SC JA
HON JUSTICE R. MBVUNDULA SC JA
HON JUSTICE D. NYAKAUNDA KAMANGA SC JA
Mr. Chalamanda, Mr. Mapemba,
Mr. Mussa, Mr. Dikiya for the appellant.
Mr. Jangale for the Respondent
Mr Shaibu Research officer
Mr. Chinkono, Mrs. Fundani Interpreter
Messrs Muntinti, Namangoya Reporters

JUDGMENT

Kapanda SC JA

1, I fully concur with the judgment rendered by my learned colleagues, particularly in the determination that the Respondent's invocation of the British and Colonial Judgments Act was a procedural misstep, given the Arbitration Act's explicit provisions governing the enforcement of foreign arbitral awards.

Procedural Observations

2, The case underscores the fundamental principle that procedural mechanisms are not mere formalities; they serve as essential conduits to substantive justice. As emphasized in *Ngwira and Chiumia v Ngwira* (MSCA Civil Appeal No. 16 of 2020), procedural requirements must be adhered to with precision. The Respondent's failure to utilize the appropriate enforcement mechanism prescribed under sections 27 and 37 of the Arbitration Act led to a fundamental defect in their application, rendering it *void ab initio*.

The Role of the Arbitration Act

3, Sections 27 and 37 of the Arbitration Act unambiguously outline the procedures for enforcing foreign arbitral awards, distinguishing them from the outdated registration processes under the British and Colonial Judgments Act. This statutory framework reflects Malawi's progressive approach to arbitration and cross-border dispute resolution, aligning with international standards such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Rejection of the Bauman Hinde Precedent.

4, I agree that the reliance on the *Bauman Hinde* case was misplaced. That case, while significant in its time, is incongruous with Malawi's modern arbitration regime. Continuing to follow its precedent risks perpetuating legal errors and undermining the Arbitration Act's legislative intent. The decision to eschew this precedent is a commendable step toward ensuring consistency in the application of current legal standards.

Conclusion

5, The Respondent's misapplication of procedural law invalidated the foundation of their claim, leaving no appealable judgment for this Court to consider. This procedural defect necessitated the dismissal of the

matter, a conclusion that upholds the integrity of both procedural and substantive justice.

Costs

6, I'm in agreement that the Respondent should bear the Appellant's costs in both the court below and the appeal due to initiating the erroneous procedural path.

Final Observation.

7, This case serves as a crucial reminder for practitioners to exercise diligence in aligning procedural actions with the applicable statutory framework. It also reinforces this Court's role in refining legal precedent to ensure alignment with contemporary legal principles.

MADISE SC, JA

Unanimous Decision.

8, Through a contract of sale dated 3 May 2013, the Respondent agreed to sell the Appellant quantities of clinker to be shipped to Malawi via the seaport of Beira located in Mozambique. A dispute arose between the parties culminating in the Respondent asserting a claim for demurrage amounting to the sum of \$484,580.84, in respect of shipping charges together with interest and costs. In accordance with the provision of Article 11 of the aforementioned contract, the parties mutually nominated a sole Arbitrator who was subsequently appointed by the London Court of International Arbitration (LCIA) in compliance with Article 5.4 and 5.5 of the LCIA rules. During the arbitration proceedings, the Respondent was represented by Blass de Lezo Abogados of Barcelona Spain while the Appellant was represented by Knight and Knight of Blantyre Malawi. The parties agreed that the Arbitrator's determination would be decided based on the documentation filed by both parties. It is noteworthy that no formal hearing occurred during this process.

9, On 20th July 2015 the Respondent was awarded the sum of \$414,580.84 with interest accruing at a compounded rate of 15% per annum from the 29 September 2013. Additionally, on the 26th January 2016, the Arbitrator issued a further award to the Respondent encompassing the costs of £15 959.48 accompanied by interest compounded at a rate of 5% per annum from 20th July 2015, calculated quarterly until the date of payment as well as costs of €32,581.43, which are subject to an interest rate of 5% per annum until date of

payment. In light of the aforementioned award, the Respondent commenced these proceedings through an application brought by way of summons for leave to register the aforesaid two English arbitration awards in the High Court of Malawi pursuant to section 3 of the British and Colonial Judgments Ordinance and the British and Colonial Judgments Act 1922 as read with section 200 of the Constitution and sections 37 and 38 of the Arbitration Act.

10, On the 14th of February 2019, the High Court granted the Respondent leave to get the award, registered and enforced as a judgment of the High Court. Cement Products Limited, the Appellant, being dissatisfied with the decision of the High Court rendered by the Honorable Justice Dr. Mtambo, which sanctioned the registration of a foreign arbitral award, subsequently lodged an appeal to the Malawi Supreme Court of Appeal, following the High Court's granting of leave to appeal.

11, Notice and grounds of appeal.

1. The Learned Judge erred in law by holding that the arbitral award need not be registered in the United Kingdom for it to be registered in Malawi;
2. The Learned Judge erred in law in holding that there is no requirement for a foreign judgment to be for a fixed amount for it to be registered in Malawi;
3. The Learned Judge erred in fact by holding that the Arbitrator followed rules of natural justice when making the arbitral award;
4. The Learned Judge erred in law, in holding that the foreign arbitral award be registered in Malawi against the weight of evidence that the Arbitrator and or the Respondent had misconducted themselves by committing fraud;
5. The Learned Judge erred in law in finding and holding that the Appellant's argument that the contract was frustrated by *Force Majeure* was without merit against the weight of evidence;
6. The Learned Judge erred in law and in fact in holding that the variation in the Inco terms 2000 varied slightly from the Inco terms 2010 so as to apply interchangeably;

7. The Learned Judge erred in law and in fact in holding that the Appellant had waived its rights with regard to the application of English law and use of Inco terms;
8. The decision of the Learned Judge is against the weight of evidence on record and against law and rules of procedure and a misdirection in law.

12, Having failed to file a notice of appeal or commence any appeal process since 14 February 2019, the Respondent/Appellant, applied to the Supreme Court for enlargement of time within which to appeal and a stay on the enforcement of the judgment. On the 20th of August 2019, the Supreme Court granted the Appellant leave to appeal out of the prescribed timeframe and further granted a stay order. On the 4th of October 2019, the parties executed a consent order settling the record of appeal, which was subsequently filed with the High Court. Noting the Appellant's lack of interest in prosecuting the appeal, the Respondent on the 6th April 2021 applied to the Supreme Court to vary its stay order to enable the Respondent's enforcement of the Judgment, however this application was dismissed. Thereafter, the Registrar of the Supreme Court notified the parties that Cement Products v Reliance Cement, MSCA Civil Appeal No. 03 of 2021 had been listed for hearing during the Friday Makuta Sitting. Consequently, hearing was conducted, which resulted in the rendering of this judgment.

Law and Procedure.

13, Section 2 of the Arbitration Act provides for the definition of judgment in the following words: 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."

14, In the present matter, the Appellant filed voluminous written arguments that could not be called skeleton at all. Unfortunately, both parties overlooked the fundamental issue before this Court, namely whether there is a valid appeal before us. Additionally, whether there is a judgment from the court below that is a subject of appeal in this

Court? The response to this inquiry is in the negative. The arguments filed by both the Appellant and the Respondent in support of and opposition to the notice of appeal fail to address the preliminary issues that are pertinent to this Court. Both set of written arguments are ill-conceived and out of focus. We will refrain from discussing the arguments and the merits since there is no appeal currently before this Court. To pursue such a discussion would constitute a waste of time and resources. Why do we assert this?

15, The rationale is found in sections 27 and 37 of the Arbitration Act. Section 27, which is categorized under the heading "Enforcement of Awards", provides that: "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." Section 37, categorized under the heading "Effects of 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."

16, It is clear that the two provisions deal with the issue of enforcement of arbitration awards, as opposed to the issue of their registration, which essentially represents a concern not encompassed by our current law, namely the Arbitration Act. An examination of the Arbitration Act reveals an absence of any provision which specifically deals with the issue of registration of foreign arbitration awards. The invocation of the British and Colonial Judgments Ordinance and or Act in the presence of Malawi's domestic statute is considered a misapplication.

17, The learned Judge in the court below stated that the registration of foreign judgments, which includes foreign arbitration awards, as it pertains to the United Kingdom is governed by the British and Colonial Judgments Ordinance, Act // of //, Chapter 14, of the Laws of Nyasaland. The learned Judge further stated that although this Ordinance has been omitted from the current volumes of the Laws of Malawi, it remains an integral component of the laws of Malawi by

virtue of section 200 of the Constitution. It is pertinent to note that this statute was later referred to as The British and Commonwealth Judgments Act. Section 3 of the said Act stipulates:

"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.

18, That a judgment rendered in a foreign jurisdiction or a foreign arbitration award issued in the United Kingdom necessitates registration in the High Court of Malawi, specifically pursuant to the provisions established in the British and Commonwealth Judgments Act. The learned Judge stated that the effect of such registration is to confer upon the judgment or award the same force and effect, thereby subjecting it to the same jurisdictional oversight, as if it had originally been initially adjudicated within the registering court. The Judge cited section 4 of the Act which spells out the specific circumstances under which the court should decline from granting and ordering registration for a foreign judgment or arbitration award.

19, Sections 27 and 37 of the Arbitration Act provide that a foreign arbitration award may be enforced either by an action or with the court's leave in the same manner as a local judgment to the same effect, and that, upon granting such leave, judgment may be entered in accordance with the terms of the award. The execution of the judgment would then follow the conventional procedural norms. It is arguably pertinent to point out at this juncture that regardless of the procedure adopted by the foreign judgment creditor whether by action or simply by leave of the court, section 38 plays a crucial role. This section articulates the prerequisites for the enforcement of foreign awards. Section 38 provides that in order for a foreign award to be enforceable under this part, it must satisfy the following criteria:

- a) Been made in pursuance of an agreement for arbitration which was valid under the law by which it is governed.
- b) Been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties;
- c) Been made in conformity with the law governing the arbitration procedure;
- d) Become final in the country in which it was made;
- e) Been in respect of a matter which may lawfully be referred to arbitration under the law of Malawi,

And the enforcement thereof must not be contrary to the public policy or law of Malawi

20, In citing and relying on the Bauman, Hinde and Co Ltd v David Whitehead & Sons (MW) Ltd [2000–2001] MLR 6 (SCA) (Bauman Hinde Case) the learned Judge invoked a case law that applied then and is an outdated provision of the law which required the Respondent to make an application for registration under the British and Commonwealth Judgments Act rather than pursuing enforcement under the Arbitration Act. This is the statute that is operative in regard to foreign arbitration awards. The Supreme Court of Appeal in the Bauman Hinde Case stated that a party has the option to either register or enforce a foreign award within our courts. The Supreme Court of Appeal stated that registration was allowed under the British and Colonial Judgments Act. It is our finding that the correct and appropriate procedure is encapsulated in the Arbitration Act. What justification exists for citing foreign law, which historically formed part of Malawi's legal framework when the country possesses its own domestic statute?

Determination

21, The Arbitration Act delineates provisions pertaining to enforcement rather than the registration of foreign arbitral awards. The Respondent sought leave in the court below to have the arbitral award registered within the jurisdiction of Malawi. The statute lacks any provision for the registration of foreign arbitral awards. The Respondent initiated an erroneous summons by applying for the registration of the award as a judgment and the court below should have refused to consider the

"application" due to the utilization of the wrong outdated procedural mechanism.

22, As stated in Ngwira and Chiumia vs Ngwira MSCA Civil Appeal no. 16 of 2020, it is wrong to assert that matters of procedure should not stifle substantive justice. Procedural issues are of equal significance as matters of substantive law, as they serve as the means to achieving the intended outcomes. Given the defectiveness of the summons any resultant actions were rendered null and void. In our considered view the Bauman Hinde Case wrongly interpreted the law on arbitral awards from foreign jurisdictions and constitutes poor legal precedent and should not be followed. In conclusion, we ascertain that there exists no judgment from the court below for us to rehear. In these premises, the matter currently before us is hereby dismissed,

Costs.

23, In view of the fact that the error was made at the instance of the Respondent in the court below by using an erroneous procedure we order him to pay costs of the court below and this Court.

We so order

Pronounced and delivered in open Court at the Supreme Court of Appeal, sitting at Blantyre this 17th day of December 2024

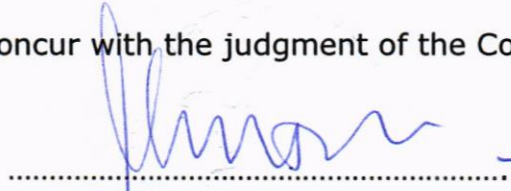
I concur with the judgment of the Court

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Hon Deputy Chief Justice LP Chikopa SC

I concur with the decision of the Court

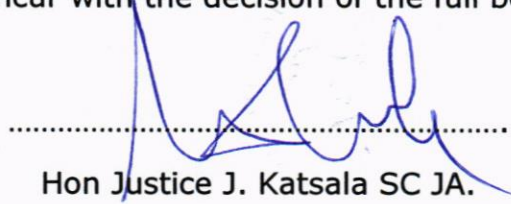
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Hon Justice F. Kapanda SC JA

I concur with the judgment of the Court



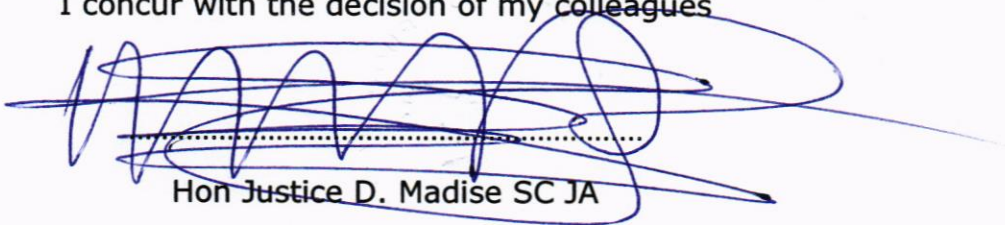
Hon Justice H. Potani SC JA.

I concur with the decision of the full bench




Hon Justice J. Katsala SC JA.

I concur with the decision of my colleagues



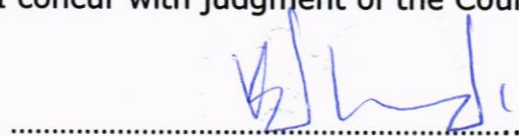
Hon Justice D. Madise SC JA

I concur with the decision of the Court



Hon Justice R Mbvundula SC JA.

I concur with judgment of the Court



Hon Justice D. nyaKaunda Kamanga SC JA