REPUBLIC OF MALAWI
IN THE SUPREME COURT OF APPEAL
SITTING AT BLANTYRE
MSCA CIVIL APPEAL No. 02 OF 2024

(Being High Court, Commercial Division, Principal Registry, Commercial Case No. 274 of 2017)

BETWEEN:

AGRICULTURE RESOURCES LIMITED…………………………………….**APPELLANT**

AND

WINDMILL (PRIVATE) LIMITED……………………………..…………**RESPONDENT**

CORAM: HON. THE CHIEF JUSTICE R.R. MZIKAMANDA SC, JA

HON. DEPUTY CHIEF JUSTICE L.P. CHIKOPA SC, JA

HON. JUSTICE F.E. KAPANDA SC, JA

HON. JUSTICE H.S.B. POTANI SC, JA

HON. JUSTICE I.C. KAMANGA SC, JA

HON. JUSTICE M.C.C. MKANDAWIRE SC, JA

HON. JUSTICE S.A. KALEMBERA SC, JA

HON. JUSTICE R. MBVUNDULA SC, JA

HON. JUSTICE D. nyaKAUNDA KAMANGA SC, JA

I. Mphote, Counsel for the Appellant

D. Mlauzi, Counsel for the Respondents

H/H W. Shaibu/H/H J. Tchukambira, Judicial Research Officers

M. Mthunzi/ K. Chinkono, Court Clerks

C. Mutinti/ B. Pendame, Court Reporters

CASE SUMMARY

1. In this case, the MSCA addresses an appeal arising from an agreement the appellant had with the respondent. The respondent is a Zimbabwean company in the business of supplying fertilizers and chemicals for profit. The appellant is a Malawian shareholder of the respondent's subsidiary Windmill (Malawi) Limited (Windmill M).

2. The appellant is also the respondent's agent for collecting and remitting the respondent's share of profits in Windmill M. Some of the goods sold and delivered to the appellant by the respondent were not paid for. The respondent therefore brought the matter against the appellant in the court below.

3. Details of the claim by the respondent were:

i. The sum of US$544,530.00

ii. Compound interest at 10% (being 5% above the Zimbabwe prescribed interest rate) on the outstanding sums from October 2010 to the date of judgment.

iii. Further interest from the date of judgment to the date of repayment of judgment debt.

iv. Legal Practitioners' collection costs at 15% of US$544, 530.00 (in a reducing scale) in terms of Table 6 of the First Schedule of Scale Charges of the Legal Education and Legal Practitioners' Act. The Defendant now appellant filed a defence and also a counterclaim-see page 3 of judgment.

4. After a full trial, on 18th September 2020, the Court below found in favour of the respondent. The Court below ordered the appellant as follows:

i. To pay the respondent the equivalent of US%544,530.00 for unpaid purchase of fertilizer supplied directly to the appellant.

ii. Appellant to pay the respondent US$742,468.87.00 in respect of fertilizer supplied and transactions with the respondent.

iii. US$37,641.00 being appellant's debts to the respondent plus US%11, 484.86 being the interest accrued on the appellants' debt to respondent from 2017.

iv. Interest at National bank lending rate up to the date of judgment.

5. Dissatisfied with the decision of the Court below, the appellant filed an appeal. There are six grounds of appeal (see pages 4-5) of Court Judgment. During the appeal, the appellant dropped one ground of appeal remaining with 5 grounds.

6. Both appellant and respondent made interesting arguments and submissions which have been captured by the court in paragraphs 12 to 35 (pages 5 to 10) of the judgment.

7. Having gone through the record and having listened to the oral submissions articulated by both sides, we determine as follows:

i. The Court determines that the respondent's claim for the sum of US$544, 530.00 for unpaid purchase of fertilizer supplied directly to the appellant was properly grounded as there is no scintilla of dispute regarding this amount. The decision of the court below is therefore withheld.

ii. On the second head of award of US%742,468.87, the Court determines that there was a management agreement between the appellant and the respondent for the appellant to entirely manage Windmill M Limited on behalf of the respondent.

iii. In the present appeal, the appellant failed to prove that the elements of a contact existed as far as the allegation of minimum 12,000 tons per year are concerned. It is therefore not amazing that the Court below had rejected the defendant's counter claim of US$1, 766,190.95.

iv. The Court found that the management agreement between the appellant and the respondent was not at all challenged or contradicted by the appellant both in the Court below and during appeal. The Court therefore determines that the appellant breached the management contract as follows:

i. Failing to remit the sum of US$418,554.56 being share of profits on fertilizer supplied by respondent to Windmill M. Limited.
ii. Illegally drawing the sum of US$216,574.53 from Windmill M. Limited in 2012/2013 season on account of share profits when there was no such profit that year.
iii. Failure to repay a debt of US$37,641.00 to Windmill M. Limited.

8. On the award of collection costs pegged at 15% the issue here was whether or not the award of collection costs pegged at 15% was contrary to the applicable law. Collection costs are regulated by the Legal Education and Legal Practitioners' Act (No 31 of 2018), Legal Education and Legal Practitioners' (Remuneration) Rules 2025. This raises the issue of statutory interpretation. It also requires consideration of two decisions of this Court that appear at first glance, to point into different directions. These are the cases of **Kankhwangwa vs Liquidator Import and Export & Export (MW) Ltd and Inde Bank Limited vs Harry Gunda.** In the **Kankhwangwa** case, the court undertook a direct and detailed examination of Table 6 including the provision governing the effect of commencement of proceedings. The Court held in very clear and unambiguous terms as put on page 16 of the judgment in the case herein. We are aware that **Inde Bank** is a recent decision of the Court. The judgment contains no analysis of Table 6, no reference to the proviso limiting percentage charges to amounts recoverable prior to the commencement of proceedings. And no engagement with **Kankhwangwa** or other earlier court authorities. In a nutshell, **INDEBANK** only affirmed that collection charges in general are permissible under Table 6. The Court was silent on the timing issue. It did not hold that the 15% Charges continue to accrue during litigation. The decision in **INDEBANK** does not undermine the clarity or authority of the decision in **CHINKHWANGA** case. The case of Inde Bank should be understood as a case in which the award of collection costs was affirmed without the examination of the underlying legal principles and not as authoritative restatement of the law governing collection costs after commencement of proceedings.

The Court below therefore misdirected itself in law in awarding Legal Practitioners' Collection Costs at the rate of 15% after commencement of proceedings. To that extent, the appeal succeeds with costs.

9. The court raised the issue whether it is legal for local residents in Malawi to quote or demand foreign currency for goods or services (Regulation 2 of the Exchange Control Regulations 2006 particulary Regulation 2 and 3 of the Exchange Control (Use of Foreign Currency in Local Transactions) Regulation 2006. The Court noted that since the respondent was not resident in Malawi and the commodities in issue were invoiced by the respondent who was based in Zimbabwe, the said regulations do not apply.

10. At the end of the trial, the Court unanimously determined that there is no merit in this appeal except for what we have found and ordered under paragraph 62 in our judgment.

10. Costs awarded to the respondent to be agreed or assessed by the Registrar.