

IN THE SUPREME COURT OF ZAMBIA      SCZ JUDGMENT NO. 25 OF 2004  
HOLDEN AT LUSAKA      APPEAL NO 129/2002  
(CIVIL JURISDICTION)

BETWEEN:

MOBIL OIL (Z) LTD      Appellant

And

MALAWI PETROLEUM      Respondent  
CONTROL COMMISSION

Coram:      Chirwa, Chitengi and Silomba JJs on 20<sup>th</sup> March, 2003 and 17<sup>th</sup>  
November 2004.

For the Appellant:      Mr F Chishimba; Frasher Associates

For the Respondent:      Prof M P Mvunga; Mvunga Associates

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## J U D G E M E N T

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*Chirwa, JS delivered the judgment of the Court:-*

This is an appeal against the High Court decision in which the award made by the Arbitrator were confirmed. This matter has peculiar history. An award by the arbitrator was made on 13<sup>th</sup> September, 1999 by the late Edward Shamwana. He awarded the respondent 248,924 litres of diesel, 35,744 litres of petrol. He also awarded the respondent a further 220,976 litres but this was not specified whether it was diesel or petrol. He further awarded interest for the parties to agree, in default the parties were to make submissions to the arbitrator. The parties, by consent Notice of Motion issued on 30<sup>th</sup> September 1999 sought for verification and clarification of the award in respect of the 220,976 litres said to have been confirmed by Zambia Railways. The parties wanted this figure to be calculated and also to specify what products this was; whether it was diesel or petrol. This motion was heard on 5<sup>th</sup> October, 1999

and a ruling was reserved. Unfortunately, before the ruling could be delivered, Mr Shamwana died. On the death of Mr Shamwana, the parties did not agree on a new arbitrator, nor did they go to court to ask for one. However, this award was registered in the High Court sometime in March 2000. Letters of demand were written to the appellant to honour the award but the appellant did not respond favourably. Having registered the award in the High Court judgment book, the respondent issued a writ of fieri facias to try and enforce the judgment. A stay of execution was obtained by the appellant from the Deputy Registrar on an ex-parte application but however this stay of execution was discharged at inter-party hearing by the Deputy Registrar, holding the view that he had no jurisdiction to issue an order to stay execution of the judgment, holding that only a High Court judge could do so.

The High Court became seized of the matter by Originating Summons in which the court was asked to determine the following:-

- (1) That an Arbitrator's findings of fact in an award cannot be altered by either party by way of Notice of Motion.
- (2) That an award once delivered and registered in the judgment book of the High Court is of binding force upon the parties in accordance with Section 16 (1) and Rule 8 of the Arbitration Act, Cap 40.
- (3) That the respondent (now the appellant) not having appealed against the award dated 13<sup>th</sup> September 1999, the claimant, (now the respondent) was entitled to enforce and enjoy the fruits of the award without further hinderance.

- (4) That the award having provided for either replacement of the products or payment in United States dollars as will be sufficient to buy those quantities and that the claimant (respondent now) was at liberty to demand payments in USA dollars.

After considering submissions by counsel, the learned judge made it clear in his ruling that as there was no appeal against the award, he was not sitting as an appellate court and he gave the following answers:-

1. On question one, an Arbitrator's findings of facts in an award are binding on the parties and cannot be altered by either party without the consent of the other.
2. An award of the Arbitrator once delivered and registered in the High Court is as good as a judgment of the High Court and can be enforced in the same manner as a judgment of the High Court.
3. That under Section 16(2) of Arbitration Act, Cap 40, the Arbitrator was at liberty to make an award in the alternative and therefore the applicant (respondent here) can choose which one to enforce.

It is against this ruling that the appellant has appealed. There are three grounds of appeal and these are that the court below erred in law and fact when it failed to take into account judicial Notice of the proceedings in Cause No. 2000/HP/0398 in which the Arbitration award was originally registered. The court below ought in the circumstances have regarded as an abuse of court process, the commencement of fresh proceedings by Originating Summons in Cause No. 2001/HP/0059 when all issues could have been amply dealt with in the original Cause.

The second ground of appeal was that the court below erred in law by making a finding that it could not deal with the issues arising out of the Arbitration in the absence of an appeal in view of the provisions of Sections 7(1) (b); 14(1); and 16(1) of the Arbitration Act, Cap. 40.

The final ground of appeal was that the enforcement of the arbitral award in Cause No. 2000/HP/0398 was premature in that issues had not been exhaustively dealt with following the death of the Arbitrator.

The parties filed written heads of arguments and they also made oral submissions to support their cases. But before we go into slight detail of these arguments, it is worthwhile to make the following observations in this case.

1. The award was made on 13<sup>th</sup> September 1999.
2. By consent, the parties applied to the Arbitrator, by way of Notice of Motion, on 30<sup>th</sup> September 1999 for the varying of the award and clarification of the 220,976 litres said to have been confirmed by Zambia Railways. The parties asked for the figure recalculated and also to determine and specify the type of product, whether diesel or petrol.
3. This motion was heard by the Arbitrator on 5<sup>th</sup> October 1999 and a ruling was reserved but the Arbitrator died before he delivered his ruling.
4. This award is purported to have been registered in the High Court on 30<sup>th</sup> March 2000. We say purported because the Arbitrator had by that time died before he made a ruling on the consent notice of motion and it appears Section 11 (2) of the Arbitration Act, Cap. 40 was not followed.

5. Following the purported registration of the award and upon the appellant herein failing upon demand, to pay the award, the respondent issued a writ of fieri facias. However, execution was stayed ex-parte but upon inter-parties hearing, the stay was discharged on the grounds that the Deputy Registrar had no jurisdiction.
6. The appellant being dissatisfied with the ruling of the Deputy Registrar, appealed to a judge at Chambers. There is nothing on the record to show what transpired before the judge in Chambers but there is a Notice of intention to raise a preliminary issue by the appellant himself. The preliminary issue to be raised was that the matter be transferred to the Commercial List of the High Court. Here again, there is no record of the proceedings but there is an order dated 9<sup>th</sup> January 2001 which transferred the matter to the Commercial List.
7. It seems no action was taken by either party after the matter was transferred to the Commercial List until 13<sup>th</sup> February 2001 when the respondent issued Originating Summons in which 4 points or issues were posed for the determination by the court and it is from that determination that the appeal arises.

In considering this appeal, we will take into account the observations we have noted together with the written and oral submissions by Counsel.

We will deal, first with the 3<sup>rd</sup> ground of appeal, which is that the enforcement of the arbitral award was premature in that issues had not been

exhaustively dealt with following the death of the Arbitrator. We have no hesitation in agreeing that the issues in the arbitration had not been exhaustively dealt with. The parties themselves are very much aware of this as they had made a joint or consent application to the Arbitrator for him to recalculate the finding of 220,976 litres which were said to have been confirmed by Zambia Railways. The Arbitrator was further asked to determine what sort of product this was. The parties made their submissions before the Arbitrator and the Arbitrator had to make a ruling on the matter but unfortunately he died. The parties having agreed that the Arbitrator had not completely resolved their dispute, it cannot be said that the award was complete. If it is not complete, it cannot be registered. In fact, from the circumstances of this case, it is impossible that the Arbitrator could have complied with Section 11(2) of the Arbitration Act as at the time the award was purported to be registered, the Arbitrator had died. Under Arbitration Act, Cap 40, which the parties said were bound by, it is the Arbitrator that files the award and gives notice to the parties and not the parties filing the award. The registration or filing of this award is therefore null and void on two grounds: (a) the award was not complete as the Arbitrator had yet to determine the 220,976 litres and the type of the product and (b) the registration or filing was not done by the Arbitrator but by a party to the arbitration which is contrary to Section 11(2) of the Arbitration Act, Cap. 40. It necessarily follows that any attempt to execute or enforce an incomplete award is null and void. On this ground alone we would allow the appeal and we need not consider and discuss other grounds of appeal. The parties are free to go back to the court below to pray for it to exercise its powers under Section 7(1) (b) of the Arbitration Act, Cap. 40 if the Arbitrator was appointed

by the court or the parties themselves may agree on a new Arbitrator who will start anew the whole process.

Order: Appeal allowed with costs to the appellant to be agreed in default to be taxed.

D K Chirwa  
**JUDGE OF THE SUPREME COURT**

P C Chitengi  
**JUDGE OF THE SUPREME COURT**

SSS Silomba  
**JUDGE OF THE SUPREME COURT**