IN THE HIGH COURT OF ZAMBIA **2008/HPC/0299**
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

YOUGO LIMITED **PLAINTIFF**

AND

PEGASUS ENERGY (ZAMBIA) LIMITED **DEFENDANT**

BEFORE THE HON. MR. JUSTICE C. KAJIMANGA IN CHAMBERS THIS 6TH DAY OF SEPTEMBER 2011

FOR THE PLAINTIFF: Mr. S. L. Chisulo, Messrs Sam Chisulo & Company
FOR THE DEFENDANT: Mr. G. Locha, Messrs Mweemba & Company

R U L I N G

Case referred to:

Perkins (HG) Ltd v Best-Shaw [1973] 2 ALL ER 924

This is an appeal by the Defendant against the ruling of the learned Deputy Registrar dated 6th June, 2011 in which he held that the High Court was the Taxing Master in respect of a bill of costs originating from arbitration proceedings.

Before the learned Deputy Registrar, the Defendant raised the following preliminary objections:

(i) There is no judgment or order of this Court that awarded the Plaintiff the

costs being claimed in the taxation proceedings or any such prior proceedings before this Court.

(ii) Although the Defendant is aware of arbitration proceedings in which an award in favour of the Plaintiff was made with costs against the Respondent, the High court has no jurisdiction to tax the costs of such arbitration proceedings under the Arbitration Act No. 19 of 2000 (“the Act”) or the Arbitration (Court Proceedings) Rules 2001.

The learned Deputy Registrar dismissed the Defendants preliminary objections, hence his appeal.

The Defendant’s notice of appeal comprised three grounds of appeal as hereunder:

1. That the learned Deputy Registrar erred when he held that the court in this case was the Taxing Master and had jurisdiction to tax a bill of costs when there was no order for costs which was made by the Court.

2. That the learned Deputy Registrar erred when he held that the Court was competent to tax a bill of costs arising from arbitration proceedings and yet the said costs are supposed to be fixed and allocated by the arbitral tribunal which made the award for costs.

3. That the learned Deputy Registrar erred when he held that the law provides for the invoking of the Court’s jurisdiction to settle matters arising out of the arbitration process such as taxation of costs, yet the taxation of costs arising from the arbitration proceedings is adequately covered by provisions of the Arbitration Act.

When this appeal came up for hearing, both counsel informed the Court that they were adopting the arguments and authorities relied on in the application before the learned Deputy Registrar.

On behalf of the Defendant, Mr. Mweemba contended before the learned Deputy Registrar that on 11th August, 2004 the Plaintiff issued a writ of summons claiming the sum of US$80,663.48 arising from unpaid invoices on certain construction works that were undertaken by the Plaintiff on behalf of the Defendant at Andrews Motel Filling Station. The Defendant filed an application to stay the proceedings on the ground that the contract between the parties had an arbitration clause. The Court granted the application and referred the matter to arbitration, with costs being awarded to the Defendant.

Mr. Mweemba contended that the arbitration was conducted and the arbitrator awarded costs to the Plaintiff, to be taxed in default of agreement. He also submitted that an application was made by the Defendant to set aside the award and in its decision the Court did not make any order as to costs. The Plaintiff appealed against the judgment to the Supreme Court and in its judgment, the Court ordered each party to bear its own costs.

It was Mr. Mweemba's submission that there is therefore no judgment, ruling or order of any Court to tax costs in favour of the Plaintiff. According to counsel the only costs due to the Plaintiff are in respect of the arbitration proceedings which this Court has no jurisdiction to tax. Counsel relied on Section 16(5) of the Act which reads:

> ***"Unless otherwise agreed by the parties, the costs and expenses of an arbitration, including the legal and other expenses relating to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award. Where the award does not specify otherwise each party shall be***

responsible for their own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration."

Mr. Mweemba argued that the arbitral tribunal which allocated the costs to the Plaintiff and not the Court, should tax the same. He contended that if the Plaintiff was not satisfied with the award on the aspect of costs, it should have invoked Section 17(1) of the Act which reads:

"Recourse to a Court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3)."

Counsel accordingly prayed that the taxation proceedings be dismissed with costs to the Defendant.

In opposing the first preliminary objection before the learned Deputy Registrar, Mr. Chisulo, SC submitted on behalf of the Plaintiff that it was improper to take preliminary objections to the hearing of a taxation of costs simply because it was felt that certain amounts had been included in the bill of costs that were not supported by an appropriate order. The learned State Counsel contended that such issues can and are dealt with at taxation. According to Mr. Chisulo, SC arguing about which costs were awarded when and before which tribunal or authority is not something that properly falls within the purview of preliminary matters.

On the second preliminary objection, the State Counsel submitted that Rule 38 of the Arbitration (Court Proceedings) Rules provides among other things that parties shall be entitled to make ancillary and incidental applications and to invoke other necessary court processes available under the High Court Rules adding that, that is how the application for taxation

came before the Court. Mr. Chisulo, SC also submitted that while the Defendant argued that the arbitrator did not award costs, Order 40, r.2 of the High Court Rules is instructive in that all questions relating to the amount of costs shall be referred to a taxing officer whose role is to ascertain the same.

The State Counsel also referred the Court to the case of ***Perkins (HG) Ltd v Best-Shaw*** where it was stated that a taxing master is merely the delegate of the arbitrator for purposes of settling or taxing the amount of the costs awarded by the arbitrator. Mr. Chisulo, SC also relied on Order 62, r. 19 of the Supreme Court Rules (White Book) 1999 edition which provides that a taxing master or registrar has power to tax costs awarded on a reference to arbitration under any Act, which he opined covers the Arbitration Act No. 19 of 2000. The State Counsel accordingly urged the Court to dismiss the Defendant's application because the preliminary objections had no basis at law.

I have read the judgment of the learned Deputy Registrar which is the subject of this appeal and the parties' submissions before him.

I have difficulties comprehending the basis of the first ground of appeal. The taxation of costs that gave rise to the preliminary objections by the Defendant has its genesis in the costs awarded by the arbitral tribunal. That taxation has nothing to do with costs awarded by this Court. Indeed, and as correctly stated in the first ground of appeal, no order for costs has ever been awarded by this Court. The first ground of appeal can definitely not succeed.

Regarding the second ground of appeal, I wish to state from the outset that in my judgment, the learned Deputy Registrar was on firm ground in his decision. Costs awarded in arbitration proceedings can be taxed either by an

arbitral tribunal or the Taxing Master. They are taxed by an arbitral tribunal if there is prior agreement between the parties to that effect or if an application in that regard has been made to the arbitral tribunal. Absent such agreement or application, the Taxing Master, which is the Court, has the jurisdiction and power to tax costs arising from arbitration proceedings once an application for taxation is made before it. I am fortified in my judgment by Order 62, r.19 of the White Book and the case of ***Perkins (H G) v Best-Shaw*** cited by the learned State Counsel.

The Defendant has relied on Section 16(5) of the Act. This section only applies in circumstances where the arbitral tribunal has been requested to tax the costs of an award. There is no evidence on record to suggest that the arbitral tribunal was ever requested to tax the costs by the Plaintiff (Claimant in the arbitral proceedings). I agree with the learned Deputy Registrar that this Court has jurisdiction to tax costs arising from arbitration proceedings.

Regarding Section 17 of the Act, I agree with the learned Deputy Registrar that this section concerns itself with recourse against an award, when a party seeks to have it set aside on the grounds stated in sub-section 2(a) and (b). It is totally inapplicable to the issue of costs. The second ground of appeal equally fails.

In relation to the third ground of appeal, I cannot fault the learned Deputy Registrar in concluding that the law provides for invoking of the Court's jurisdiction to settle matters arising out of the arbitration process such as taxation of costs. Other circumstances include applications for the recognition and enforcement of awards under Section 18 of the Act and interim measures of protection under Article 9 of the FIRST SCHEDULE to the act. The third ground of appeal is also unsuccessful.

In the final analysis, I have come to the ineluctable conclusion that this appeal has no merit and it is accordingly dismissed with costs.

DELIVERED THIS 6TH DAY OF SEPTEMBER 2011

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C. KAJIMANGA
JUDGE