IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
LILONGWE DISTRICT REGISTRY
COMMERCIAL CASE NO. 10 OF 2022

BETWEEN:

SMART DRIVE CAR HIRE..... CLAIMANT

-AND-

WORLD VISION INTERNATIONAL.....DEFENDANT

CORAM: HON. JUSTICE DR. C.J. KACHALE, *Judge*
Phombeya, of Counsel for the Claimant
Soko, of Counsel for the Defendant
Nanga, Court Clerk

RULING ON APPLICATION FOR APPOINTMENT OF AN ARBITRATOR

(Under section 12(a) of the Arbitration Act, cap 6:03)

1. By notice issued on 3rd November 2022, Smart Drive Car Hire (the Claimant) has applied for this court to appoint an arbitrator in respect of a dispute involving itself and World Vision International (the Defendant). The said notice is supported by a sworn statement of counsel for the Claimant in which he generally indicates that the parties have an arbitration agreement; but that they have failed to agree on the appointment of an arbitrator hence the decision to request the court to make the appointment. The notice includes names of three proposed arbitrators from which the court has been invited to select.

2. In response to the notice the Defendant has pointed out that the present application is not competently before the Court. It has been pointed out that according to Order 5 rule of the Courts (High Court) (Civil Procedure)

Rules 2017 (hereinafter CPR) the mode of commencement has been prescribed in the following manner *'Unless otherwise provided under these Rules or any other written law, a proceeding shall be commenced by filing a summons in Form 1".*

3. It is thus the Defendant's position that whereas Section 12 (a) of the Arbitration Act provides the substantive power to appoint an arbitrator, it does not articulate any procedure for such a process; therefore, by necessary implication, Order 5 r1 CPR comes into play. By failing to file a summons in the prescribed manner the present application must accordingly be dismissed.

4. Above and beyond that, the Defendant alleges various breaches of the CPR in so far as there is no signature of the application by Counsel, the sworn statement is not properly paginated as required. More substantively, there has been a glaring omission on the part of the Claimant to file the relevant arbitration agreement; this failure displays serious inadequacies in the pursuit of the desired remedy. Additionally, that there has been inordinate delay on the Claimant's part to seek judicial intervention which is meant to be invoked upon the expiry of seven days from the failure to agree an arbitrator.

5. In reply, the Claimant acknowledged that section 12(a) of the Arbitration Act creates no procedure for seeking the Court's intervention (in the event parties to a dispute cannot agree on choice of an arbitrator). However, it has been argued that since they are not commencing any action in this Court, their non-compliance with Order 5 Rule 1 CPR can be cured by Order 2 Rule 3 CPR alongside Order 2 Rule 2 which stipulates that an irregularity shall not render the entire proceedings a nullity. In any case, the spirit of Order 1 Rule 5 (e) CPR which enjoins the Court to encourage use of ADR where appropriate, the Court has been urged to proceed and determine the application on merits.

6. It does no harm at this stage to remind oneself of the provisions of section 12(a) of the Arbitration Act which reads as follows:

In any of the following cases

(a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

any party may serve the other parties....with a written notice to appoint or...concur in appointing an arbitrator...and if the appointment is not made within seven clear days after the service of the notice, the Court may, **on application by the party who gave notice,** appoint an arbitrator....who shall have like powers to act in the reference and make an award as if he had been appointed by consent of all parties. (**Emphasis supplied**)

7. Thus, in disposing of the preliminary objection raised by the Defendant as regards the correct mode of commencement, this Court has taken cognizance of the clear stipulations of the above provision which clearly mandates the party seeking judicial intervention in the appointment of an arbitrator to do so through an application. According to this Court, it is therefore rather misleading to suggest that there is no procedural guidance in the law regarding how this mandate should be invoked.

8. As contemplated under Order 5 Rule 1 CPR, this is a classic case where the written law takes the relevant proceedings outside the ambit of that procedural rule in so far as the mode of commencement is concerned; one is entitled to simply file an application for the purpose of seeking the court to appoint an arbitrator due to lack of concurrence between the disputing parties. Accordingly, that objection has been disallowed for being a clear misinterpretation of otherwise unambiguous legal provisions. In this regard, the Court finds that under section 12(a) of the Arbitration Act it is enough to file an application in the form presented by the Claimant.

9. The next pertinent question becomes whether the irregularities highlighted by the Defendant would disqualify the present application. As regards the issue whether failure to comply with the stipulations of Order 10 CPR 2017, the following is the determination of the Court: having determined that the Court can competently be moved on the basis of an application filed exclusively for purposes of exercising the mandate under section 12 (a) of the Arbitration Act, it must follow that Order 10 CPR 2017

is not binding in such a situation. Quite clearly Order 10 rule 1 CPR contemplates the existence of a substantive proceeding (even if it is yet to be commenced as rule 3 makes it clear). As we have concluded earlier, there is no need for such a proceeding before a party can lodge an application under section 12(a) of the Arbitration Act. Accordingly, any alleged default with regard to the present application would not void the same.

10. The next irregularity cited in opposition to the present application related to the form of the sworn statement filed in support of the same: according to this line of argument the failure to comply can render such sworn statement fatally defective. In this instance it has been pointed out that the prescriptions of Order 18 rule 7 CPR have been held to be mandatory in this court, for example in **Phazi Industries Ltd-v-Nedbank Ltd, Commercial Cause No. 82 of 2019** (unreported) which was applied in the subsequent decision of **Senior Group Village Headman Chatata and Others-v-Malawi Housing Corporation [Civil Cause No. 582 of 2017]** . With regard to the relevant sworn statement, it has been argued for the defendant that not only is there a failure to paginate the document as required under O. 18 rule 7 (2) CPR, but further that there is a clear breach of rule 7 (5) (c) acknowledging that the person making the statement understands that it shall be used in a proceeding. On the basis of the jurisprudence cited in support of that line of argument which this Court finds persuasive, this combined default is incurable, especially in the circumstances of the present case.

11. Besides the default in the form and execution of the sworn statement, there is the glaring omission to attach any supporting skeleton arguments in the present application. In the case of **Kainja-v-Director General of ACB and Others, Judicial Review Case No. 48 of 2022 (unreported)** the Court found the failure to file skeleton arguments (or to cite any caselaw or otherwise) to offend against the provisions of Order 20, rule 1 of the CPR and was one of the reasons for dismissing the application for recusal of the judge. It was explained that the need for such filing is to ensure that there are no surprises when the matters are argued before the Judge; a

failure to file such arguments was deemed a fatal irregularity which could not be cured under the relevant rules of procedure.

12. In that vein, this Court would add that besides removing such surprises, the skeleton arguments do actually provide the legal basis upon which a case is being argued and, in that sense, offer the Court an opportunity to engage with the relevant statutes or caselaw in order to examine the legal validity of any remedy being sought. As a result, such an omission on the part of the applicant would be equally fatal to the present applicant.

13. Even more critical to the decision to dismiss the present application besides the entire litany of irregularities outlined this far, is the failure on the part of the applicant to attach the Contract or Arbitration Agreement on the basis of which the Court has been moved to make the appointment of an arbitrator. The court examined our local Law Reports and came across several cases pertaining to the issue of arbitration: such as **In re Patel 1 ALR (M) 311, In re Sabbatini 1 ALR(M) 296, In re Five Arbitrators 1 ALR (M) 435, Chanthunya-v-Ngwira 2 ALR (M) 133, Bhagat-v-Mudaliar 6 MLR 435 and Chikosa-v-AG 11 MLR454**.

14. Not all those cases are necessarily concerned with the question of appointment of arbitrators: however, the common point of relevance here is the fact that the litigation (whatever the issue might have been) proceeded on the basis of a document which the court had access to. As has been proposed in defence, this Court agrees that there appears to be a rather disturbing level of professional laxity which pervades the manner in which the entire process has been filed and pursued in these proceedings. Without access to the document upon which the Court is being invited by the applicant to invoke its authority under section 12 (a) of the Arbitration Act, the present application lacks any limb upon which to stand at all.

15. The Court has further noted that the names of proposed arbitrators is identical with the one which the defendant rejected in the correspondence exchanged for that purpose prior to these proceedings.

For future applications, it might be appropriate to provide some factual basis upon which the court can make an appointment if the same is to command the confidence of all the affected parties: to simply require the Court to effectively impose an arbitrator whom the other side does not find acceptable might undermine the purpose behind this remedy of judicial appointment of arbitrators; namely to diminish the dispute about their suitability. The omission to furnish such information further reflects poorly on the preparation and thought applied towards this application.

16. Such lack of professional diligence is further evidenced by the length of time it has taken to seek the remedy in court after the alleged failure of the parties to agree on the proposed arbitrator: according to section 12 (a) of the Arbitration Act, once a notice has been issued to appoint (or concur in the appoint of) arbitrator the party issuing that notice may proceed to seek judicial intervention (in the manner contemplated in the present application).

17. However, in the present application, what has transpired is that when failure to reach concurrence occurred on 24th February 2022, the applicant only filed the relevant court process on 3rd November 2022: that is more than eight (8) months after the right arose. Given that such arbitration is one form of alternative dispute resolution mechanisms which the framework for resolving disputes, especially of a commercial nature, contemplates, such delay is rather inordinate.

18. Quite clearly, such delay runs counter to the spirit of commercial efficiency which it is intended to arbitration (as a form of ADR) is designed to facilitate; nevertheless, this court does not believe such delay alone would extinguish the right to seek an appointment under section 12 (a) of the Arbitration Act as contended for the defendant; such a position would be very inimical to the right to seek an effective remedy which every disputant enjoys under our legal system, even in commercial relationships.

19. In closing, therefore, the Court has dismissed the present application for being irregular and fatally defective in the manner outlined in the preceding paragraphs. Costs are for the Defendant.

Made in Chambers this 28th day of November 2022 at Lilongwe.

C.J. Kachale, PhD
JUDGE