



**IN THE HIGH COURT OF MALAWI**

**COMMERCIAL DIVISION**

**BLANTYRE REGISTRY**

**Commercial Cause No. 396 of 2022**

**BETWEEN**

ELECTRICITY SUPPLY COMMISSION OF MALAWI LIMITED.....CLAIMANT

**AND**

AGGREKO INTERNATIONAL PROJECTS LIMITED..... DEFENDANT

Coram: **Manda, J**

Majamanda for the Claimant

Sauti Phiri for the Defendant

M. Kachimanga Court Clerk/Interpreter

**RULING**

Having heard the application on a preliminary objection in this matter, we had thought that we had rendered our Ruling as we did recall drafting the same. However, it would seem that after drafting the Ruling our attempt to email the same to the Clerk failed, a fact which we did not notice at the time. A few months down the line we were sent a polite reminder by the parties that the Ruling was still pending which took us by surprise. When we checked our sent emails we did indeed notice that the email had not been sent. The reason for this was apparently that the file containing the draft email had been corrupted. This then also rendered recovery of the draft Ruling impossible.

The above notwithstanding, we endeavored to come up with another draft from scratch. The same was almost done, when this time around we experienced a crash of a newly procured gadget. The same was sent for repairs but it seems that there will be nothing to hope for, apart from asking for a replacement, which will likely take time. With this in mind, we felt that there is no need to delay

the matter further and also that perhaps we should not really be that elaborate in our Ruling. This is of course also noting that the application before us was one of a preliminary objection.

The brief fact of this case are that the parties into this instance entered into a power purchasing agreement whereby the defendant was awarded a contract to provide power through the use of diesel powered generators. The initial agreement was for two years but was subsequently extended by an addendum. As part of the conditions precedent of the agreement, the claimant had to provide two bank guarantees totaling USD2, 616, 029. 00. The main reason for the claimant's cause of action apparently stemmed from anomalies in the defendant's handling of fuel delivered to it by the claimant. There is an assertion that there was a discrepancy with regards 1, 283, 683 litres of fuel.

The parties having failed to resolve their issues, the claimant commenced this action against the defendant by way of summons on the 9<sup>th</sup> of November 2022, claiming the following

- a) A declaration that the defendant is liable for fraud
- b) A permanent freezing injunction that the defendant should not cash the bank guarantee
- c) Damages for fraud
- d) A declaration that the defendant should pay the sum of USD40, 639. 51 for performance liquidated damages
- e) A declaration that the claimant should set off what the court will order the defendant to pay the claimant under (c), (d) and (e) against what it owes the defendant, being the sum of USD4, 250, 785. 00.

Also by way of background,

The preliminary objection in this instance was raised on the defendant's application to discharge the freezing order and stay or discharge the proceedings. The grounds on which the defendant based his application were articulated as follows:

- a) The evidence and arguments presented by the claimant in support of the freezing injunction was, taken as whole, misleading and fairly one sided. i.e., that the claimant failed to make full and frank disclosure
- b) The claimant has failed to show a real risk, judged objectively, that the defendant would fail to satisfy a future judgment because of an unjustified dissipation of assets;




- c) The claimant and defendant, by an arbitration agreement, agreed to submit disputes to arbitration in Mauritius

From the sworn statement of Sally Mtambo, the claimant's Director of Legal Affairs and Company Secretary, they objected to the defendant's application. The basis of the objection is mainly that the defendant does not have clean hands. According to the claimant, the defendant. "in a clear and blatant disregard of the freezing order of injunction", the defendant caused the bank guarantee to be encashed in or about the month of December, 2022. To this end the claimant exhibited a letter from FDH Bank (SM1). The claimant thus proceeded to state that basing on this, it was their intention for file contempt of court proceedings.

As indicated above, I would like for us to make progress on this matter and for that purpose, let me observe that an allegation of contempt of court is a very serious allegation. Disobedience of court orders is something that we as courts strictly guard against. Such that where such allegation is made, in my view, the same must be investigated fully before a matter can proceed. In the context of this matter, I must state that I did find the assertion doubly serious since it is being stated that the defendant has actually cashed the money which was the subject of the freezing order. If such is indeed the case, that would amount to disobedience of the highest order. On this note, I will sustain the preliminary objection and direct that the claimant should file the contempt of court proceedings within 14 days

Costs will be in the cause.

Made in Chambers this .....13<sup>th</sup> .....day of.....October.....2023

A handwritten signature in dark ink, appearing to be 'K.T. Manda', with a large loop at the end.

**K.T. MANDA**

**JUDGE**