IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

Miscellaneous Commercial Cause No 311 of 2017

[Original Commercial Case No. 105 of 2017]

In the Matter of Arbitration

And

In the matter of the Arbitration Act [Cap 15 R.E. 2002]

And

In the matter of Staying Commercial Case No. 105 of 2017 Pending Arbitration

Between

TECHLONG PACKAGING MACHINERY LTD..... 1st PETITIONER

HONG KONG HUA YUN INDUSTRIAL LIMITED..... 2nd PETITIONER

Versus

A-ONE PRODUCTS AND BOTTLERS LIMITED..... RESPONDENT

RULING

MRUMA, J:

The Respondent in this petition **A-One Products and Bottlers Limited** commenced a suit against the present petitioners **Tech-long Packaging Machinery Limited** and **Hong Kong Hua Yun Industrial Limited.** The suit was registered as Commercial Case No. 105 of 2017.

Upon being served with the plaint together with its annexes the Petitioners have filed this petition applying for a stay of the suit (i.e. Commercial Case No 105 of 2017) pending reference to arbitration.

This application is brought pursuant to **section 6 of the Arbitration Act Cap 15 R.E. 2002 (the Act)** and **Rules 5, 6, 7 and 8 of the Arbitration Rules, 1957** on the ground that there was a binding arbitration agreement between the parties to the dispute.

Though it is in dispute as to what is exactly the kernel of this particular cry, but generally the dispute arose from a number of transactions relating to a sale contract entered by the parties on 7th July, 2011. Under the terms of that contract the Petitioner had agreed to supply to the Respondent 3 sets of complete units **24000BPH CSD filing line** and all machinery, equipment and specifications as per pro-forma Invoice No. **HY1126-1** dated 31st August 2011.

It is stated by the petitioners that the Sales Contract is governed by the laws of the Peoples Republic of China and the parties had agreed to refer any dispute arising from or in connection with this contract to the **China International Economic and Trade Arbitration Commission (CIETAC).**

It is further contention of the Petitioners that after the Sales Contract was signed, the Respondent discussed with the first Petitioner and requested for additional and changes to the three filing lines under the Sales Contract including an additional conveyor, a 250 ml mould changeable parts for the bottle labeller etc.

On her part the Respondent admits that there was a sale contract entered between the parties as asserted by the Petitioner and that the said contract can be relevant in the suit it has instituted. The Respondent asserts however that it was a term of that Sales Contract that any additions or amendments to it had to be in writing and signed by the parties. It is therefore further contention of the Respondent that though it is true that she negotiated with the Petitioners for additional supplies but the negotiation was done in a separate contract arrangement contained in the communications and it didn't modify the Sales Contract (Annex TL1), in accordance with clause 13 of that Sales Contract as required.

The Respondent states further that annexes TL2 (i.e. invoices) do not conform to the said clause (i.e. Clause 13). According to the Respondent the said invoices comprise of a different and independent contract which is not subject to the arbitration clause in annexture TL1. That is contrary to what the Petitioners insist which is to the effect that all the transactions they had with the Respondent in respect of the sale transactions are governed by a Sales Contract agreement containing an arbitration clause.

Following the commencement of proceedings in the main suit, the Petitioner through their advocate appeared in acknowledgement of service after which they made a series of prayers ranging from adjournment to enable counsel to communicate with clients in China to extension of time within which the Defendants could file their written statement of Defence to the plaint all of which culminated into Petitioners filing the present Petition pursuant to Section 6 of the Act. The Respondent's first challenge

to the Application for stay of the suit is that Commercial Case No. 105 of 2017 does not arise out of Sales contract.

It has been submitted that Clause 1 of the Sales Contract (Annexture TL1) lists all items which were to be supplied under the contract and they relate to all machinery, equipments and specifications as per pro-forma invoice No. HY1126-1 dated 31st August 2011. According to the counsel for the Respondent the goods which were to be supplied under the contract appeared as annexture to the contract in the form of a pro-forma invoice. He said that in the arbitration there was reference to moulds and change over parts, bowls or filling/capping machines but they were specifically mentioned from item 1 to 10 of the pro-forma invoice the subject of this discussion.

Section 6 of the Arbitration Act under which this application is pegged provides as follows:-

> "Where a party to a submission to which this part applies or a person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may, at any time after appearance and before filing a written statement of defence or taking any other steps in the proceedings apply to the court to stay the proceedings, and the court if satisfied that there is not sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the case was commenced and

still remains, ready and willing to do all the things necessary for the proper conduct of the arbitration, may make an order staying the proceedings"

From the above quoted provisions of the law for the court to exercise its discretion and order stay of proceedings the following must be exhibited to its satisfaction:-

i. That a party to the submissions has commenced legal proceedings against another party to the proceedings in respect of a matter agreed to be referred to arbitration;
ii. That the party wishing to apply for stay of proceedings has made appearance but has not filed written statement of defence or taken any other steps for further progress of the proceedings;
iii. That there is no sufficient reason why the matter should not be referred in accordance with submission and;
iv. That at the time the case was commenced the applicant was and still remains ready and willing to do all things necessary for proper conduct of the arbitration.

Now the question I have to ask myself is whether the applicants has been able to demonstrate the above prerequisites which are necessary to enable the court to exercise its discretion and order stay of the suit.

The first prerequisite is the most contested in these proceedings. The Respondent contends that the dispute the subject of Commercial Case No. 105 of 2017 does not arise out of the contract under which parties agreed to the submission.

According to Dr. Lamwai, the contract which the Petitioners are relying on is different from the contract which the Respondent is suing in Commercial Case No. 105 of 2017. The learned counsel said that though it is true that the Respondent negotiated with the Petitioners for supply of additional items but those items were supplied separately and the negotiation constituted a fresh contract which was by way of conduct and exchange of documents.

Admittedly parties in this case had entered into a Sales Contract No.T1110703 which was revised on 31st August 2011. Clause 13 of that Sales Contract provides for arbitration. The clause reads:-

> "This Sales Contract shall be governed by the Laws of peoples Republic of China, any dispute arising from or in connection with this contract shall be settled through friendly negotiation. In case no settlement can be reached, the dispute shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration in accordance with its Rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties"

The commodities (items), the subject of the contract were specified under clause 1 as:-

1. 3 sets of complete unit of 24000BPH CSD filling line.
2. All machinery, equipment and specifications as per profoma invoice No. HY 1126-1 dated 31st August, 2011 issued as per the Seller's

directions by M/s Hong Kong Hua Yun Industries Limited of Hong Kong China.

The proforma invoice No. HY 1126-1 of 2011 referred to in 2 above is attached to the petition. It has 33 items. It is agreeable that there was request for supply of additional items which items were supplied accordingly.

It has been submitted for the petitioner that the additional items supplied to the Respondent which are contained in Profoma Invoice No. CTI-2012-0918 dated 18th September 2012 and Profoma Invoice No CTI -20141113 dated 13th November 2014 which contain five (5) items each were amendment or additional to the original profoma invoice (i.e. Profoma Invoice No. HY1126 dated 31st August 2011), and therefore part of the sales contract. This is strongly disputed by the Respondent.

I have carefully scrutinized the impugned proforma invoices, I have also gone through and internalized the proceedings in this matter and perused the plaint in commercial case No.105 of 2017 and I tend to agree with Dr. Lamwai for the Respondent that there are two independent contracts in parties' dealings which are closely related.

As correctly submitted by Dr. Lamwai the profoma invoices which are attached to the petition as annexes TL2, TL3 and TL4 do not make any reference to the original contract (i.e. Sales Contract) which is annexed as TL1 to the petition. They do not show that they were intended to be an addendum or amendment to the original contact i.e. TL1. Moreover Clause 13 of the Sales Contract (which is annexed as TL1) states clearly that:-

"Both sides undertake to execute strictly all the articles of this contract. Any amendments or additions to this contract shall be made in writing and signed by the authoritative representative of both sides"

It was submitted by Mr. Nyika for the petitioner that there is no difference between the items listed as item 1-9 in the profoma invoice dated 31st August 2011 and the items listed in profoma invoices annexed as TL2, TL3 and TL4 which are equipment which form quest for arbitration the reason being that they are connected to the contract (i.e. annexture TL1). In other words the learned counsel concedes to the argument that annextures TL2, TL3 and TL4 do not make any reference to the original contract but his argument is that they are connected.

I agree with Mr. Nyika that the items in the invoices may be closely related or even similar. However, it is my considered view that the issue here is not about being related or similar to the items ordered in the original contract. The issue here is whether the items ordered under profoma invoices annexed as TL2, TL3, and TL4 are addition, addendum or amendment to the list itemized under a profoma invoice attached to annexture TL1 (i.e. the Sales Contract) so as to form part of that sales contract. It is my finding that they are neither additions nor amendments to the items in the profoma invoice annexed to the original contract therefore not subject to arbitration as they are not the matters agreed to be referred within the ambit of Section 6 of the Arbitration Act. If parties had intended to make the additional supply part of the sales contract

(Annexture TL1), they ought to have made it in writing as required by clause 13 of the sales contract. That was not done.

Section 101 of the Evidence Act [Cap 6 R.E. 2002], excludes evidence of oral agreement from a written document's evidence. The law says:-

> "When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted as between the parties to that instrument....."

In the case at hand parties agreed expressly that any additions or amendment must be in writing and duly signed by the parties. Thus, if all orders and/or profoma invoices made subsequent to the signing of the Sales Contract (Annexture TL1), if were intended to be part of the said agreement ought to have been done in writing.

As orders and/or profoma invoices made under annexture TL2, TL3, and TL4 were not in writing they are and were not intended to be part of the Sales Contract (Annex TL1) and they constitute separate contracts and therefore not subject to submission.

Section 6 of the Arbitration Act provides that a party to an arbitration agreement may apply to the court for a stay of proceedings commenced in respect of a dispute covered by that agreement. Such an application must be made after the party has acknowledged service but before it takes "any step in those proceedings to answer the substantive claim". The dispute in Commercial Case No. 105 of 2017 is not covered by the Sales Contract.

Accordingly the petition is dismissed with costs.

Order accordingly,

A.R. Mruma

Judge

Dated at Dar Es Salaam, this 14th day of February, 2018.