

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO.15 OF 2010

SEIFI IMPEX LTD PLAINTIFF

VERSUS

ARPADIS CHEMICALS NV DEFENDANT

Date of final order: 08/07/2011

Date of final submissions: 02/08/2011

Date of ruling: 20/09/2011

RULING

MAKARAMBA, J.:

This is a ruling on a preliminary objection on a point of law the Defendant's Counsel raised by way of Notice lodged in this Court on the 11th day of November 2010 that, in the absence of exceptional circumstances upon which this Honourable Court can assume jurisdiction in disregard of the forum selection clause in the contract between the parties to the suit, this Honourable Court, has no jurisdiction to entertain this suit in disregard of the agreement by the parties that the forum for dispute settlement is courts of Antwerpen in Belgium.

The preliminary objection by consent of the learned Counsel for the parties was disposed of by way of written submissions as per the scheduling order of this Court dated 8th July 2011 to which they duly complied with. For the Defendant, the firm of LAWCASTLES (ADVOCATES) appeared and for the Plaintiff, LEBBA & COMPANY (ADVOCATES).

The gist of the preliminary objection by the Defendant is that for this Court to assume jurisdiction in this suit, the Plaintiff has to show strong grounds or **exceptional circumstances** why the exclusive jurisdiction clause agreed to by the parties as per the Terms and Conditions of sale should not be enforced. The Defendant's Counsel contends that the parties to the Contract agreed to an exclusive jurisdiction, specifying that any dispute arising out of the contract would be dealt with in a foreign country, namely Belgium and using Belgian laws.

The Defendant's Counsel contends that the terms of the trading agreement between ARPADIS CHEMICALS N.V., the Defendant herein, and SEIFI IMPEX LIMITED, the Plaintiff herein, the "Parties" to the ***Supply Agreement***, are contained in the Terms and Conditions of Sale attached hereto and marked as JM-1, the "Contract". The Defendant's Counsel submits further that the Terms and Conditions of Sale contained were incorporated by reference by the ***Commercial Invoice*** which is attached to the Plaint as annexure SEAR-3, which for easy of reference, has also been attached to the submissions by the Defendant's Counsel and marked as JM-2. The Defendant's Counsel submits further that the specific incorporating words in the said Commercial Invoice read as follows:

"This invoice is subject to our general sales conditions revised on 17 February 2009, a copy of which is available overleaf and also available on our internet site www.arpadis.com and which you have expressly confirmed having read and accepted. "

As regards the applicable law and jurisdiction, which is at the centre of the controversy in the preliminary objection under consideration, the Defendant's Counsel submits that Clause 11 of the Terms and Conditions of Sale provided, among other things, as follows:

"The order and/or the agreement are governed by Belgian law, exclusion made of the Vienna Convention of April 11, 1980 on contracts for international sale of goods. In case of dispute, the courts of Antwerpen shall have sole jurisdiction."

The above mentioned Clause is the basis for the contention by the Defendant's Counsel that this Court has no jurisdiction to apply foreign law, which in this case will be Belgian laws, in determining this dispute. The reason being that the parties to the contract had agreed to an exclusive jurisdiction by specifying that "***in case of dispute, the courts of Antwerpen shall have sole jurisdiction.***" The Defendant's argues that the burden is therefore on the plaintiff to show strong grounds or exceptional circumstances why the exclusive jurisdiction clause should not be enforced.

The nature of the preliminary objection is that a brief background to it is quite apposite. As per the Amended Plaint the Plaintiff filed in this Court 16th day of June 2010, the claim of the Plaintiff against the Defendant is for a declaration that the Defendant is in fundamental breach

of the terms and conditions of the **Supply Agreement** between the Plaintiff and the Defendant dated 15/10/2009, and for a further declaration that consequent upon the said breach, the **Letter of Credit** opened by the Plaintiff with CRDB Bank PLC is void **ab-initio**. The Plaintiff further claims against the Defendant is for the sum of USD 120,000.00 being the value of materials – caustic soda flakes, quality 99% sodium hydroxide, already paid for in full which materials, the Plaintiff claims that the Defendant has failed to supply without lawful cause.

The facts leading to the dispute briefly as could be gathered from the pleadings is that on the 15/10/2009 the Plaintiff ordered from the Defendant, and the Defendant agreed to supply to the Plaintiff through its Chinese agent M/S TIANJIN UNICHEM INTERNATIONAL TRADE CO. LTD, 300 metric tons of solid sodium hydroxide (caustic soda) flakes minimum quality 99% purity, country of origin China, for a purchase price of USD 120,000.00 at the sale price of USD 400.00 per metric ton CFR Dar es Salaam port, to be shipped from China periodically in three consignments of 100 metric tons each. In consideration of the undertaking by the Defendant to supply the caustic soda, the Plaintiff agreed to, and opened an irrevocable Letter of Credit Ref. No.CRDB09-ILC309 with CRDB Bank PLC in favour of the Defendant in respect of the sale price of the suit materials, payable through Citibank N.A. New York USA within 90-days from the date of bill of lading for each consignment shipped and delivered to the Plaintiff. The Plaintiff claims further that it obtained the necessary permits from the Government Chemist Laboratory Agency for importation

of the suit materials. The Plaintiff claims that the suit material supplied by the Defendant is of substandard, inferior quality, not conforming to the quality criteria required and ordered by the Plaintiff. The Plaintiff claims further that the suit material has been chemically analyzed by the Government Chemist Laboratory Agency and found to contain only 13.60% sodium hydroxide, and by the Tanzania Bureau of Standards (TBS) and found to contain only 12.11% caustic purity, drastically falling short of the ***Supply Agreement***, which was for the supply by the Defendant to the Plaintiff of 99.1% minimum purity caustic soda flakes. The Plaintiff claims further that not being aware of the non-complying nature of the suit material to the Supply Agreement between the Plaintiff and the Defendant, the Plaintiff cleared the same from the port paying a total sum of TZS 73,041,512/= being port and other charges and moved the suit goods into the Plaintiff's own warehouses, and that the Plaintiff finally has had its bank account debited the sum of USD 120,000.00, which has been credited into the Defendant's account, being the purchase price of the suit goods. The Plaintiff claims further that the Defendant is in breach of the terms of the Supply Agreement between the Plaintiff and the Defendant, to wit, that the Defendant supplied and delivered to the Plaintiff the entire order of the suit material as a single consignment consigned to CRDB Bank PLC, the Plaintiff being the notifying party; and that the suit material itself is substandard and of inferior quality not conforming to the quality criteria required and ordered by the Plaintiff from the Defendant.

The Defendant's Counsel has raised a preliminary objection against the Plaintiff's suit contending that the Plaintiff has not complied with Clause 11 of the *Terms and Conditions of Sale*, the Contract, between the Parties which specified that the forum for dispute settlement is courts of Antwerpen in Belgium and the applicable law is Belgian law. The Defendant contends further that in the absence of exceptional circumstances, this Honourable Court has no power to assume jurisdiction in disregard of the forum selection clause in the contract between the parties to the suit as per Clause 11 of the Terms and Conditions of Sale which failure to comply by the Plaintiff the Defendant contends that is a violation of known principles of private international law upheld by Tanzanian courts.

I have traversed the submissions by Counsel for the parties both in support and rival and found that they raise a number of interesting legal issues. It seems that the learned Counsel for the parties are not in agreement as to whether there was a contract which the Defendant's Counsel claims that it contained a dispute settlement clause ousting the jurisdiction of this Court.

In his reply submissions, the Plaintiff's Counsel argues that the Defendant's preliminary objection is wholly misconceived, for the obvious and clear reason, that there is absolutely no agreement between the Plaintiff and the Defendant giving the Courts of Antwerpen, Belgium exclusive jurisdiction to entertain and resolve suits and disputes arising between the Plaintiff and the Defendant in relation to the contract between

the parties for the sale, supply and delivery of caustic soda flakes by the Defendant to the Plaintiff.

In his rejoinder submissions the Defendant's Counsel avers that the Defendant has pleaded in paragraph 14 of the Written Statement of Defence that:

"The Defendant states that in so far as this Honourable Courts finds that this suit relates to Supplier's liability founded under a local statute or tort, the Defendant has no objection to the jurisdiction of the High Court of Tanzania (Commercial Division) and in so far as this Honourable Courts finds that this matter relates to contract of trading between the Plaintiff and the Defendant (on which the existence of this contract is vehemently denied by the Defendant), the Defendant reserves the right to make an objection on the point of law that the High Court of Tanzania (Commercial Division) is not a right forum because the Terms and Conditions of Sale were governed by Belgian law and required the proceedings to be commenced in courts of Antwerpen."

The Defendant's Counsel argues further that the supplier is described in paragraph 3 of the Written Statement of Defence as HEBEI GUOGANG IMP & EXP CO. and NOT the Defendant. The Defendant's Counsel then argues logically as follows: (i) since this suit is founded on contract and not otherwise; (ii) since the Plaintiff and the Defendant were brought together by only one document, which is ***Commercial Invoice*** attached in the Plaintiff as annexure SEAR-3; and (iii) since the Terms and Conditions of Sale contained were incorporated by reference by the ***Commercial Invoice*** attached in the Plaintiff as annexure SEAR-3, the preliminary objection is

based on assumption that the court may determine that the Terms and Conditions of Sale contained which were incorporated by reference by the ***Commercial Invoice*** attached in the Plaint as annexure SEAR-3 are indeed terms of the ***contract*** between the Plaintiff and the Defendant.

The Plaintiff's Counsel argues that the Courts of Antwerpen, Belgium have absolutely no jurisdiction to entertain the suit since, since the 'terms and conditions of sale' relied upon by the Defendant's Counsel in support of the preliminary objection, do not constitute part of the Agreement, the same having been incorporated into a ***Commercial Invoice*** long after the conclusion of the Agreement and sent and received not by the Plaintiff but by CRDB Bank PLC where then Plaintiff opened the Letter of Credit in favour of the Defendant to finance the transaction and was received by the Plaintiff after the suit goods had arrived at the port of delivery, Dar es Salaam.

The position taken by the Defendant's Counsel is that the Plaintiff and the Defendant were brought together only one document - a ***Commercial Invoice*** attached in the Plaint as annexure SEAR-3. In his reply submissions, the Plaintiff's Counsel took the position that there was no contract between the Plaintiff and the Defendant and that the Defendant was merely a beneficiary under a contract between the Plaintiff and one company known as TIANJIN UNICHEM INTERNATIONAL TRADE CO. LTD. This approach made the Defendant's Counsel in his rejoinder submissions to conclude rather quickly that if this is the case then it means that the Plaintiff has **no cause of action** against the Defendant which is

founded on contract. The Defendant's Counsel submits further in rejoinder that in other words, the Plaintiff is admitting the position laid down by the Defendant in paragraph 3 of the Written Statement of Defence, which the Defendant's Counsel pointed out and proceeded to quote in full as follows:

"The Defendant was subcontracted as an independent trader by the company known as Tianjin Unichem International Trade Co. Ltd ("Unichem") to find a company capable of supplying caustic soda flakes ('Chemicals'), to source the Chemicals, to ship the Chemicals to Tanzania and to receive payment from the purchaser on its behalf. At the time Unichem subcontracted the Defendant, Unichem had already agreed with the Plaintiff that Unichem would sell Chemicals to the Plaintiff. After being subcontracted by Unichem, the Defendant requested an Indian based chemical trading company known as MG Trade Services (India) Pvt Ltd to recommend a company capable supplying Chemicals. MG Trade Services (India) Pvt Ltd recommended a Chinese company known as Hebei Guogang Imp & Exp Co ("Supplier")"

In rejoinder, the Defendant's Counsel hints that a preliminary objection is normally determined by the Court on the assumption that the issues before the court will be determined by court on the other side's favour. The Defendant's Counsel argues further in rejoinder that the issue of existence of a contract relates to the merits of the case. Further, that the Plaintiff's position laid down in the Plaint is that there was a contract between the Plaintiff and the Defendant. Further, that the Defendant's position laid down in the Written Statement of Defence is that there was no contract between the Plaintiff and the Defendant. The Defendant's Counsel submits further in rejoinder that the preliminary objection in this case is

based on the assumption that the issue whether there was an agreement between the Plaintiff and the Defendant will be proved affirmatively by the Plaintiff.

The Defendant's Counsel argues further in rejoinder that the position taken by the Plaintiff denying the validity of the ***Commercial Invoice*** from the Defendant and consequently the Terms and Conditions of Sale contained in the ***Commercial Invoice*** simply means that the Plaintiff has no cause of action against the Defendant founded on contract. The Defendant's Counsel then wondered: if there is no contract between the Plaintiff and the Defendant why the Plaintiff is suing the Defendant? What is the legal basis for this case? I would add also here that if there is no contract between the Plaintiff and the Defendant why did the Defendant raise a preliminary objection based on the very contract being disputed? It should be noted here that the Defendant's Counsel raised the preliminary objection after the parties had gone into mediation which failed and the matter was set for trial for which the parties framed and agreed on four issues for the determination of the suit two of which revolve around the existence of Supply Agreement between the parties for the supply, sale and delivery of specified goods; and the alleged failure by the Defendant to comply with the terms and conditions of that Agreement. The Defendant's Counsel cap it succinctly by what he presumes to be the truth that the Proforma Invoice referred by the Plaintiff is from TIANJIN UNICHEM INTERNATIONAL TRADE COMPANY LIMITED and not from the Defendant. The Defendant's Counsel suggests that as there is no signature of the

Defendant embossed on this invoice, the Defendant therefore appears in the Proforma Invoice between the Plaintiffs and TIANJIN UNICHEM INTERNATIONAL TRADE COMPANY LIMITED as a mere beneficiary for payment purposes and is not a party to that Contract.

Clearly, the parties have elected to embark on arguing the merits of the case prematurely instead of addressing their mind to the preliminary objection which as the Defendant's Counsel rightly submitted is argued on assumption that all the facts pleaded are correct and that if determined it will conclusively dispose of the matter. In my considered opinion, in view of the dispute over the nature of the contract itself and whether there was one, it will be highly unsafe for this Court to divest itself of its jurisdiction as argued by the Defendant's Counsel. The issue whether this Court has jurisdiction to determine this suit in my view hinges squarely upon determination of the issue whether there was a contract between the parties in the first place, which as I have indicated above is one of the issues framed, agreed and recorded by this Court upon evidence will be led. It is for these reasons I have elected not to traverse the Counsel arguments on the preliminary objection, which as I have indicated here and as the Defendant's Counsel rightly argued in rejoinder albeit shooting himself in his foot that the preliminary objection in this case is based on the assumption that the issue whether there was an agreement between the Plaintiff and the Defendant will be proved affirmatively by the Plaintiff. This cannot be done at this stage since this Court does not have the benefit of evidence and argument to resolve the issue whether there was a

contract between the parties. This therefore suffices to dispose of the preliminary objection and this Court does not find it useful to traverse the breadth and length of arguments of Counsel in support and rival to the preliminary objection, which in my view can find place in the judgment in the main suit where appropriate.

There is one other controversy which revolves around the non-joinder of the Chinese firm which the Defendant claims that it was the supplier of the fake suit materials. The Plaintiff's Counsel remarking on the submission by the Defendant's Counsel in his written submissions under paragraph 6.3 expressing uncertainty concerning how the Defendant may join the Chinese firm in the suit, which the Defendant alleges was the source of the fake suit goods, allegedly because the Plaintiff has commenced the proceedings in a wrong forum argues that this should not be a problem since, the Plaintiff has properly instituted the suit in the Court having competent jurisdiction against the Defendant, and if the Defendant so wishes, can safely and lawfully apply for leave under relevant provisions of the Civil Procedure Code, Cap 33 RE 2002 to join the Chinese firm as a Third Party and transfer its liability to the Third Party after satisfying the Court Decree. Alternatively the Defendant is at liberty to separately sue the Chinese firm, the Plaintiff's Counsel surmised.

I wish to point out here that the third party procedure essentially is based on principle of indemnification. The issue is whether there is any claim for which the Defendant seeks to be indemnified against by the intended third party. I wish to point out here also that the present suit is

not founded on tort, a fact which might have the Defendant thinking when contemplating which course of action to take against the intended third party.

What I gather from paragraph 3 of the Written Statement of Defence is that the Defendant was subcontracted as an independent trader by the company known as Tianjin Unichem International Trade Co. Ltd ("Unichem") to find a company capable of supplying caustic soda flakes ('Chemicals'), to source the Chemicals, to ship the Chemicals to Tanzania and to receive payment from the purchaser on its behalf.

I gather further from the defendant's defence that at the time Unichem subcontracted the Defendant, Unichem had already agreed with the Plaintiff that Unichem would sell Chemicals to the Plaintiff.

I also gather further that after being subcontracted by Unichem, the Defendant requested an Indian based chemical trading company known as MG Trade Services (India) Pvt Ltd to recommend a company capable supplying Chemicals. MG Trade Services (India) Pvt Ltd recommended a Chinese company known as Hebei Guogang Imp & Exp Co ("Supplier").

Clearly it seems that there is a web of legal relationship in this suit giving rise to a number of contractual relationship including that of principal and agency relationship. The general principle in civil litigation is that it is entirely upon a party to a suit to decide who to sue and that he who alleges must prove. The Plaintiff has elected not to join the Chinese firm which the Defendant claims that it supplied the fake chemicals. This

Court however, in appropriate cases, has discretion to order a party to be joined in a suit for purposes of ensuring that the justice of the case is had and for enabling it to effectually determined the rights of the parties in the suit, which I am afraid is not the case presently. This Court cannot compel the Plaintiff to sue a person it did not have desire to sue.

In fine, the preliminary objection fails and accordingly is hereby dismissed with costs which costs shall be in the cause. The hearing of the main suit is to proceed as earlier scheduled. Order accordingly.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

20/09/2011

Ruling delivered this 20th day of September, 2011 in the presence of Mr. Leba, Advocate for the Plaintiff and in the absence of the Defendant.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

20/09/2011

Words count: 3,522