

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 78 OF 2013

TOL GASES LIMITED.....PLAINTIFF

VERSUS

CHANG QING INTERNATIONAL

INVESTMENT LIMITED.....DEFENDANT

JUDGMENT

Mansoor, J:

Date of JUDGEMENT- 31ST JULY 2015

The plaintiff is a company dealing with distribution and sale of gas. The defendant company is also dealing with the same business of distribution and sale of gas. The plaintiff alleges that on 8th October 2008, TOL Gases Limited “TOL”, and Chang Qing International Investments Limited “Chang”,

entered into a Memorandum of Understanding, "MOU". Clause 2 of the sub heading "WHEREAS" of the MOU reads as follows:

"MS Chang Qing International Investment Limited are retaining TOL Gases Limited cylinders as security against their cylinders to enable them to trade with TOL Gases Limited clients thus depriving TOL to use its cylinders hence occasioning loss in terms of sales revenue. This has been established and proved beyond reasonable doubt from 31 oxygen cylinders found in the factory of Chang International Investment Limited on 25th of September 2008."

Clause 1, 2 and 3 of the sub heading "CONCLUSION", of the MOU read as follows:

- 1. "All the 31 Industrial Oxygen cylinders held by Chang Qing International Limited shall be returned to TOL Gases Limited under duly signed documents."*

2. *“Customers who deposited the cylinders to Chang Qing International Investments Limited shall be directed to report to TOL Gases Limited for discussions and release of the cylinders to the well proved TOL Gases Limited Clients”*

3. *“International Investments Limited shall not at any particular time fill TOL Gases Limited cylinders.”*

This MOU was signed on behalf of TOL by one Mr. A.M Khatibu, the General Manager of TOL, and on behalf of Chang by one David who signed the MOU as the G.M.

It is clear that this MOU was entered after a dispute had arisen between TOL and Chang. From Clause 2 of the MOU reproduced herein above, it is suggested that 31 Cylinders were found at Chang premises. The 31 gas cylinders found at Chang premises were identified to be the property of TOL. The MOU signifies that Chang had acknowledge this, and hence agreed to enter into an MOU to resolve the dispute.

Despite the MOU, TOL alleges that Chang continued to deal with TOL cylinders, by selling their gases using TOL cylinders

thus not only causing loss to TOL but also deceiving customers into believing that they are buying TOL gases. TOL alleges in paragraph 4 of their plaint as follows:

“That on several occasions the defendant has wrongful and intentionally been in the practise of filling and selling its gas products using gas cylinders property of the plaintiff without consent, authorisation or permits that the said action amounts to cheating consumers to think that they are consuming high standard gas from the plaintiff The said actions have further been denying the plaintiff use of its gas cylinders for its business thus occasioning great financial and reputational loss in the market.”

The plaintiff alleges that on 12 May 2010, several filled gas cylinders belonging to TOL were found in truck of Chang, and this was admitted by Chang through a letter written by Muganda Kamugisha & Bwana Advocate on behalf of Chang. This letter is dated 22 February 2012. The matter was reported to police, and one Sky Xue was charged for a criminal case.

Following this, the plaintiff filed this suit seeking for a permanent restrain order, restraining Chang from repeating the breach of using the TOL gas cylinders for selling their own gas, an order of payment of special damages of THz

150,000,000, and an order of payment of general damages, interests and costs of the suit.

In their written statement of defence, Chang denied everything pleaded by TOL in their plaint. They specifically pleaded that the MOU is not operative for being illegal. They said the objectives of the MOU is against the law and policies of this country as they are geared at destroying competition in the business and restraint of trade. Despite the denial of the existence of the MOU, the defendant pleaded in paragraph 4 of their written statement of defence that at all material times the defendant has been struggling to mitigate the problem by keeping the list of the cylinders properties of the plaintiff that come its way with view of handling them to the plaintiff. As per Annexure FB-1 annexed to the defendant written statement of defence, the defendant pleaded that they used to collect the plaintiff cylinders and keep them in the course of their trading, but had the intention of handing them back to TOL. The defendant admitted in paragraph 5 of their written statement of defence that they were found with empty cylinder that belonged to TOL, and that the incident was reported to the police for investigation. They averred that the gas cylinders found at Chang premises were deposited by clients.

The Court recorded the following issues in determining the dispute:

1. Whether the agreement giving rise to the suit is lawful;
2. If yes, whether the defendant has breached the agreement;
3. If yes, whether the plaintiff has suffered any damages;
4. To what reliefs are the parties entitled.

1. Whether the MOU was lawful

The defendant denies to have ever executed the MOU. They deny to have known Mr David who signed the MOU on their behalf, and that they never had anyone working for them as the General Manager known as David. They said, that Section 39 of the Companies Act, Cap 212 R: E 2002 requires that a document is executed by a company by affixing the company's common seal, and must be signed by a director and the secretary or by two directors of the company. They averred that David is unknown to the defendant company, he was neither a director nor the secretary of the defendant's company, and no company seal was affixed to the MOU. PW1, Mr Carville Sekamaganga had said that Mr David who signed for and on behalf of the defendant company as the General Manager had authority to do so on behalf of the defendant's company but such authority was never produced by the plaintiff in the court. Mr David was also not called before the Court to give evidence as to whether he was an employee of

Chang at the time of the signing of the MOU, and whether he had authority to do so.

The defendant has also elaborated the other sequence of events and pleaded several grounds in their attempt to demonstrate that the so-called MOU was incapable of being acted upon at all. As stated herein above, the defendant had pleaded in paragraph 5 of its defense that the MOU was illegal as its objectives were contrary to law and policies and had the intention of defeating business competition in creating monopoly by the plaintiff in the business of distribution and sell of gas.

In his witness examination of DW1, the defendant has simply stated that they did not sign the MOU nor did they authorize David, the defendant's General Manager, to sign the MOU on the defendant's company's behalf. In fact, they denied to have ever known David being their General Manager.

The first issue herein is a matter of proof. There is a serious dispute as to execution of the MOU, the burden is upon the plaintiff to prove that the MOU was actually executed by the defendant. The defendant dispute the very execution of the MOU or the circumstances under which it came into existence, the plaintiff has discharged the burden, in this behalf that there existed the MOU, and that it was signed by Mr. David as the General Manager of the defendant, the burden of proving

that David was not the General Manager of the Defendant's company, and that he was not authorized by the Defendant to sign the MOU lies on the defendant. Apart from general denial, the defendant could not bring any evidence to prove that in fact Mr. David was not their employee at the time the MOU was entered and signed.

In fact the plaintiff was able to prove that it is the practice of the defendant that all company's documents are signed by the General Manager or other staff of the defendant on behalf of the General Manager, and that no documents of the defendants were ever signed by a director and the Secretary or by two directors, as required by Section 39 of the Companies Act. Besides, the defendant never produced in Court its Articles of Association which shows the mode of running its day to day activities of the company. The practice has shown that the management of the company were run by the management under the supervision of the General Manager.

In the instant case, if one applies the ordinary principle of proof of execution of a document, the defendant would certainly trail behind. The reasons are that the MOU provides for signature of witnesses, the said David signed in one name and he signed as the General Manager, the representative of the defendant. The law says the execution of documents by the company has to be by a director and the secretary or by two directors, and a company seal be affixed, none of these were

done, and not a single witness has been examined to speak about the execution of the MOU. However, the disadvantage, which the plaintiff has to suffer on account of these factors, is neutralized to a larger extent, by the admission on the part of the defendant in its written statement of defense, at paragraph 2, the defendant did not dispute the existence of the MOU but disputes its validity, it has this to say:

“.....specifically to the alleged Memorandum of understanding (MOU), it is stated that the same is not operative for being illegal.....”

It is pleaded that Mr. David signed the MOU as the General Manager of the defendant, the defendant does not recognize Mr. David. However there is a recital in the MOU, under the sub heading “NOW THEREFORE” to the effect that the defendant is represented by David as its General Manager. The recital reads:

“Representatives of TOL Gases Limited and Chang Qing International Investments Limited met in the office of TOL General Manager on 26th September 2008 and discussed the issue of filling TOL cylinders by Chang Qing International Investments Limited.

As observed earlier, the defendant flatly denied, his association with the MOU. Added to that, as submitted by the Counsel for the defendant that there is no evidence, oral or

documentary, on behalf of the plaintiff to suggest that the said Mr. David represented to the plaintiff that he is representing the defendant's company.

On the contrary, there is proof made by the plaintiff to prove that Mr. David was representing the defendant and was authorized by the company to transact on its behalf. I say so, since DW1, Mr. Chang Qing Lei the Director and the Managing Director of the defendant company through his statements during cross examination, denied everything else that was transacted by his staff or even his lawyers. He denied to have ever authorized his staff to write the letters admitted in evidence as exh P2 which is an apology letter written on behalf of the defendant's company on 14th May 2010 by one Emma who signed the letter on behalf of the Managing Director of Chang Qing International Investment Co. Limited. Despite the fact that this letter was printed in the defendant letter head and signed in Chinese by one Emma, DW1 denies the existence of this letter and also denied to have known Emma. DW1 also denied to have ever instructed his lawyers i.e. Muganda Kamugisha and Bwana to write Exh P3 on his behalf. When cross examined he admitted that he used to retain this law firm but denied to have ever instructed the law firm to write Exh P3 on behalf of his company. This is absurd. The Partners of this Law Firm were never brought in court to testify whether they were instructed to write the letter (Exh P3) on behalf of the defendant's company. It is absurd for a lawyer

to write a letter without the instruction of the client. Since DW1 denied this, he ought to have adduced evidence to further deny to have ever instructed these lawyers to write Exh P3 on his company's behalf. To this end, I found the testimony of DW1 to be shaky, and not credible. This made me to believe the testimony and proof adduced by the plaintiff that indeed the MOU signed by David on behalf of the plaintiff existed, and hence binding to the plaintiff and the defendant.

In the MOU there is the stamp of the defendant's company, and no witness was called to prove that the stamp affixed in the MOU was not that of the defendant's company.

Thus, the MOU existed, it was properly executed by the defendant, and the terms therein binds the defendant's company.

2. Whether the defendant has breached the MOU:

The plaintiff pleaded that on 17th September 2011 the defendant was found with 31 gas cylinders, the property of the plaintiff. A police was involved, hence Mr Sky Que was taken to court and a criminal case No. 57 of 2014 was instituted at the District Court of Temeke, but the Director of Public Prosecution "DPP" had entered nolle prosequi. The defendant's counsel submitted that there is no proof whatsoever adduced by the plaintiff proving that the defendant has breached the

MOU. The Counsel submitted that since the DPP had entered nolle prosequi, this means that there was no proof at all that the defendant had done any wrong. That Sky Que was an independent person from the defendant's company. The Counsel also submitted that the plaintiff failed to prove that they owned the cylinders, let alone losing them.

As correctly submitted by the Counsel for the defendant that the Criminal Case at Temeke District Court did not involve the Defendant's company but one Sky Que. Sky que was not impleaded to this suit, thus whether or not the DPP had entered a nolle prosequi in the Criminal Case, this cannot make an issue for proving breach of MOU in this suit. The plaintiff have established the existence and the validity of the MOU, in which the defendant admits to have been found in possession of 31 cylinders the property of the plaintiff. Although there is an admission, but the issue was resolved by entering into an MOU. The plaintiff is now duty bound to prove that the defendant breached the MOU, that the defendant did not return to TOL the 31 cylinders found its possession as admitted in the MOU, that the defendant company did not direct the customers to report to TOL for discussion and release of the cylinders to TOL as agreed in the MOU, and that the defendant's company did not stop dealing with TOL cylinders after the execution of the MOU. The plaintiff relied heavily on Exh. P2, P3 and P4. These