

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO.26 OF 2023

**IN THE MATTER OF THE ARBITRATION ACT [CAP 15 RE 2020] (THE
ARBITRATION ACT) AND THE ARBITRATION (RULES OF PROCEDURE)
REGULATIONS, 2021 (THE ARBITRATION REGULATIONS)**

AND

**IN THE MATTER OF AN ARBITRATION CONDUCTED AT AN/ UNDER THE
CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION
COMMISSION (CIETAC) IN BEIJING THE PEOPLES' REPUBLIC OF CHINA
BETWEEN LIANYUNGANG ZHONGFU COMPOSITES GROUP CO.LTD AND
ZHONGFU LIANZHONG TECHNOLOGY CO. LTD (THE PETITIONERS)
VERSUS MTIBWA SUGAR ESTATES LIMITED (THE RESPONDENT)**

AND

**IN THE MATTER OF AN APPLICATION FOR FILING, REGISTRATION AND
ENFORCEMENT OF THE AWARD GIVEN BY THE CIATEC ON AUGUST 14,
2022 IN BEIJING.**

BETWEEN

LIANYUNGANG ZHONGFU LIANZHONG COMPOSITES

GROUP CO. LTD..... 1ST PETITIONER

ZHONGFU LIANZHONG TECHNOLOGY CO.LTD..... 2ND PETITIONER

AND

MTIBWA SUGAR ESTATES LIMITED..... RESPONDENT

RULING

Date of Last Order: 30/01/2024

Date of Ruling 15/03/2024

GONZI, J.

On 12th July 2023, the Petitioners filed in this court a Petition under section 83(1) of the Arbitration Act [Cap 15 R.E 2020] and Regulations 51(5), 63(1) of the Arbitration (Rules of Procedure) Regulations, 2021. In the petition, the Petitioners prayed for orders that:

- (a) The Court be pleased to register the Award and extract a decree therefrom.**
- (b) Any other relief the court may deem fit and just to grant.**
- (c) Costs of this Petition.**

From the Petition it is stated that the 1st Petitioner and the Respondent had a sale agreement dated 15th May 2013 for the 1st petitioner to supply the 1st Respondent with raw materials used in the production of FRP pipes, PVC pipes and FRP pipe production line. This agreement was amended on 4th December 2013 to increase its scope and include the second petitioner in the same contract. It was stated in the petition that after the Petitioners had supplied the Respondent with the raw materials as per the contract which by July 2014 were worth USD 6,580,681.54 as an overdue amount of the principal sum, and USD 3,820,877.72 as an overdue interest thereon, the respondent failed to pay the accrued amounts. Hence, the petitioners referred the dispute to arbitration pursuant to their

agreement with the respondent. It was stated further that the arbitration was conducted by China International Economic and Trade Arbitration Commission (CIETAC) where a panel of 3 arbitrators Zhu Yuefang, Liu Ruiqi, and Sun Youhai acted as the arbitrators who ultimately rendered their award on 14th August 2022 in favor of the petitioners. The petitioners attached to the petition a copy of the arbitral award and proceedings together with the translated version of the award and proceedings certified by China Council for the Promotion of International Trade China Chamber of International Commerce (CCPIT) and BAKITA, as annexure LZ 2 to the petition.

The petitioners further stated that on 7th December 2022, they duly filed their award in this court for recognition and enforcement as Misc Commercial Cause No.52 of 2022. However, according to the petitioners, the filed award lacked some vital documentation due to embassy of Tanzania in China declining to notarize some of the key documents for registration of the award, the Petitioners prayed to withdraw the award with leave to refile it and that this court granted the prayer on 25th May 2023.

The petitioners concluded that the award has not been challenged in any court or quasi-judicial body and as such it remains binding, final and conclusive. Hence, they have brought the present matter in court in order to file, register and enforce the award in Tanzania against the Respondent.

When the Respondent was served with the petition, she responded by filing an answer to the petition in court resisting the recognition and enforcement of the foreign arbitral award. The Respondent's answer to petition was premised with 6 preliminary points of objection as follows:

- 1. The Petition for registration of the award filed before this Honourable Court has been improperly filed contrary to the law;**
- 2. The petition filed before this Honourable Court is time-barred.**
- 3. The purported arbitral award has been improperly and unlawfully brought before the Honourable Court by a wrong person, who is neither the claimant(s), nor the CIETAC contrary to Regulation 51(4) and (5) of the Arbitration Regulations.**

- 4. The purported arbitration award is legally inept for lack of signature and the date on which it was procured contrary to Regulation 48(1),(2) and Regulation 51(4) and Regulation 51(5) of the Arbitration Regulations.**
- 5. The purported arbitral award is legally defective for lack of certified and signed copy of the proceedings contrary to Regulations 51(4), 63(1)(c), and (d) of the Arbitration Regulations.**
- 6. The purported arbitral award is legally defective for failure to meet the requirement of the law as to certification and translation contrary to Regulation 63(1),(c) and (d) and Regulation 66(5) of the Arbitration Regulations.**

The Respondent therefore prayed that the petition for registration of the Award be summarily refused and dismissed with costs.

The court on 4th October 2023 (as per Hon. Nangela, J.) directed the parties to argue the preliminary objections by way of written submissions. Mr. Emmanuel Saghan, learned advocate represented the Respondent while Mr. Rico Adolf Mzeru, learned advocate, represented the Petitioners. Following the transfer of Hon. Judge Nangela from this station, the case was assigned to me as the successor Judge. I thank the learned counsel for both sides for complying with the given schedule. I will reproduce the arguments of the learned counsel in relevant places as I go along determining the preliminary objections.

In the second preliminary objection, the Respondent's counsel argued that the petition filed before this Honourable Court is time-barred. The Respondent's counsel submitted that the petition is time-barred because Item 18 of Part III in the First column of the Schedule to the Law of Limitation Act Cap 89, R.E 2019 limits the filing of an arbitration award for registration to 6 months from the date of its issuance. He argued that the award sought to be registered was issued by CIETAC on 14th August 2022 and was filed in Court on 12th July 2023 which is a period of more than 11 months. He argued that although the Petitioners had earlier on withdrawn the petition with leave to refile it, Order XXIII Rule 2 of the Civil Procedure Code Cap 33 of the Laws of Tanzania provides that the

leave for re-filing shall be subject to the law of limitation. Hence, they argued that much as the present petition was withdrawn with leave to re-institute, but the time for filing the same has already expired and thus the petitioners were supposed to firstly apply for extension of time under Section 14 of the Law of Limitation Act, Cap 89 before re-filing the application. The Respondent's counsel relied on the decisions of **Siemens Limited and another versus Mtibwa Sugar Estates**, Misc. Commercial Cause No. 247/2015 at pages 6 to 9 thereof as well as the case of **Barclays Bank Tanzania Limited versus Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016**, decided by the Court of Appeal of Tanzania at Dar es Salaam.

The Respondent's counsel submitted further that Regulation 51(4) requires an award to be registered subject to the Law of Limitation Act. They argued that as the present petition has been brought contrary to the Law of Limitation Act, the same should be dismissed with costs.

In response to the objection based on the law of limitation, the learned counsel for the Petitioners submitted that the Respondent's counsel has not taken into account section 21(2) of the Law of Limitation Act Cap 89 in computing the time for the filing the award. He argued that under

section 21(2) of the Law of Limitation Act, in computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which , from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

The petitioner's counsel argued further that the award was issued on 14th August 2022 and filed in court on 7th December 2022 being merely within 4 months. He argued further that the award was withdrawn by the Petitioners on 25th May 2023 with leave to refile it. Therefore, he argued that all the time that the petition was pending in court from 7th December 2022 to 25th May 2023 when it was withdrawn with leave to re-file it is excluded under Section 21(2) of the Law of Limitation Act, Cap 89. He submitted that as the present petition was re-filed in court on 12th July 2023, it was therefore filed only within 1 month and 2 weeks from the date the award was withdrawn with leave of the court to refile the same. He concluded that as the Petitioners had initially filed their petition after 4 months and 6 days from its issuance, and as all the duration that the matter was pending in Court up to 25th May 2025 is automatically

excluded by the Law of Limitation Act under section 21(2), then the Petitioners still had a balance of over 2 months to register the award from the date of its withdrawal with leave to refile and that the Petitioners duly re-filed the award within only 1 month and 2 weeks from the date the award was withdrawn with leave of the court to refile the same. The Petitioners' counsel argued that the Petition to register the award was filed within the prescribed time limitation. To buttress his argument, the learned counsel for the Petitioners relied on the authority in **Geita Gold Mining Limited versus Anthony Karangwa**, civil Appeal No. 42 of 2020 decided by the Court of Appeal of Tanzania at Mwanza where it was stated at page 9 thereof that:

"It goes without saying therefore that section 21(2) of the LLA does not require a party who intends to rely on it to move the court by way of application for extension of time before he can have the time spent in prosecuting another proceeding against the same party excluded when computing the period of limitation. That is the law which, though not fixed is well settled."

The petitioner's counsel therefore submitted that the petition was filed within the prescribed time when the time is calculated properly.

In rejoinder, the Respondents' counsel submitted that the case of Geita Gold (supra) relied by the Respondents' counsel is irrelevant and not

applicable in the present case. He distinguished them by arguing that in the Geita Gold case, the application was struck out for being filed in the wrong court whereas in the present petition the case was withdrawn by the petitioners themselves. He submitted that the order of the court granting withdrawal with leave to re-file it did not give an extension of time to the Petitioners and therefore Paragraph 18 of Part III of the Law of Limitation Act is applicable.

It is not disputed in the present application that the foreign arbitral award sought to be recognized and enforced by this Court was issued on 14th August 2022. It was firstly filed in this court on 7th December 2022 within 4 months and 6 days from its issuance. However, the application to enforce the award was withdrawn by the Petitioners on 25th May 2023 with leave to refile which leave was granted by the Court. The present application was re-filed in court on 12th July 2023. If we count the time from issuance of the award on 14th August 2022 to the time of re-filing it in court on 12th July 2023, there is a lapse of at least 11 months. The Arbitration Act adopts the period of limitation as prescribed by the Law of Limitation Act. Regulation 51(4) requires an award to be registered subject to the Law of Limitation Act. The Law of Limitation Act, Cap 89 of the Laws of Tanzania provides under Item 18 of part III of the First Schedule

that an application under the Civil Procedure Code for the filing in court of an award in a suit made in any matter referred to arbitration by order of the court, or of an award made in any matter referred to arbitration without the intervention of a court shall be filed within six months. The above provision has been interpreted by the Court in the case of **Siemens Limited and another versus Mtibwa Sugar Estates**, Misc. Commercial Cause No.247/2015. At page 7 thereof the Court held that:

"Item 18 of the first Column of the First Schedule on part III of the Law of limitation Act provides for two scenarios under which it is applicable: Under the Civil Procedure Code for the filing in court of an award or a suit made in any matter referred to arbitration by order of the court or of an award made in any matter referred to arbitration without the intervention of the court. The case at hand falls in the second limb because it emanates from an award which was referred to the court(sic) without the intervention of the court."

At page 9 of the case, Hon. Mwambegele, J., (as he then was) concluded that:

"the instant award was issued on 13.02.2015 and the arbitrator forwarded the same to the Deputy Registrar of this court vide a letter dated 03.09.2015.... the present application was filed on 23.10.2015. all these endeavours were being made when it was already out of time as time

within which the Final Award could legally be filed had expired on 12.08.2015; six months after the Final award was made. Time started to click against the petitioners right on 13.02.2015 when the Final Award was pronounced. The present application having been filed out of time is incompetently before me and thus deserves the wrath of being dismissed in terms of section 3 of the Law of limitation Act”.

Therefore, there is no doubt that the six months' time limit prescribed under Item 18 of the first Column in part III of the first schedule to Law of limitation Act applies to the present case. Both counsel are in agreement on this. The only issue is whether the period of limitation stopped to run from 7th December 2022 to 25th May 2023 during the time when the Petitioner was in court prosecuting the firstly instituted application which was withdrawn with liberty to reinstitute it? Does time stop to run where a matter is withdrawn with liberty to reinstitute? My answer is in the negative. Order XXIII Rules (1) and (2) of the Civil Procedure Code are relevant here:

1-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim. (2) Where the court is satisfied- (a) that a suit must fail by reason of some formal defect;

or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.

2. In any fresh suit instituted on permission granted under rule 1, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

I find that as the Petitioners withdrew their earlier petition on 25th May 2023 with leave to refile the same, the period of limitation of six months continued to run against them in the same manner as if the first application had not been instituted in court on 7th December 2022. When the Petitioners ultimately refiled the present petition on 12th July 2023, in the law of limitation, they are deemed to have for the first time filed their petition on 12th July 2023 in respect of an award issued on 14th August 2022. The present application therefore was filed in court after a lapse of 6 months without a prior extension of time being sought and obtained. It is hopelessly time-barred.

The respondent has argued that the period should be automatically excluded by virtue of Section 21(2) and (3) of the Law of Limitation Act.

Section 21(2) and (3) provides that:

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) For the purposes of this section-

(a) A plaintiff or applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(b) references to a plaintiff, defendant or other party to a proceeding include references to any person through or under whom such plaintiff defendant or party claims;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with the defect of jurisdiction.

The petitioner's counsel sought to salvage the situation at hand by relying on the above provision and argued that it helped to exclude all the period that the Petitioners were in court up to the time of withdrawing their earlier application with liberty to re-institute. The Respondent's counsel has argued that the section does not apply to the case at hand where the application was withdrawn rather than being struck out due to being defective. I agree with the Respondent's learned counsel. The Petitioners' application was withdrawn on 25th July 2023 with liberty to re-institute. The relevant provision of the law for that procedure is Order XXIII rules 1 and 2 of the Civil Procedure Code and not Section 21(2) of the Law of Limitation Act. Section 21(2) of the Law of Limitation Act was not the provision under which the earlier filed application was dealt with when it was withdrawn from the court with liberty to re-institute it. In addition, it should be noted that section 21(2) of the Law of Limitation Act deals with situations where the proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. This court did not face jurisdictional defect or defect of a like nature in respect of the earlier filed Misc. Commercial Cause No.52 of 2022 which was filed on 7th December 2022, as to be unable to entertain the said case which was otherwise timely filed in this court for recognition

and enforcement of the arbitral award. Misc. Commercial Cause No.52 of 2022 was withdrawn at the instance of the petitioners themselves with liberty to reinstitute. The provision of the law governing withdrawal of cases with liberty to reinstitute is Order XXIII Rules 1 and 2 of the Civil procedure Code which states categorically that when a matter is withdrawn with liberty to reinstitute under the law of limitation the same shall be treated as if it were being filed for the first time in court and that the earlier filed and withdrawn case shall be deemed as if it had never been instituted.

To be certain as to whether the Misc. Commercial Cause No.52 of 2022 was withdrawn under section 21(2) of the Law of Limitation Act or Order XXIII of the CPC, one needs only to look at the Order of this Court dated 25th May 2023 allowing withdrawal with liberty to re-institute it. The Order was attached to the present petition as Annexure L Z 6 and it reads:

"Given the circumstances as explained by Mr. Rico, the Counsel for the claimant, this court does hereby grant the prayer to have Misc Commercial Cause No.52 of 2022 withdrawn from the court with leave to refile it. I have heard the submission of Ms. Mansour who, though not objected to the

prayers, has pressed for costs. Costs are given at the discretion of the Court. Taking into account the circumstance of the matter and the fact being that, withdrawal is necessitated by technical difficulties of receiving the notarial services from the High Commission in Beijing, I see no reason why I should grant costs to the Respondent as prayed.”(underlining supplied)

It is clear therefore that the withdrawal of the earlier timely filed Misc. Commercial Cause No. 52 of 2022 with leave to refile it, was necessitated by **technical difficulties of receiving the notarial services from the High Commission in Beijing.** It was not due to defect of jurisdiction or other cause of a like nature, making the court unable to entertain it. And I should hasten to say that if indeed **the** earlier timely filed Misc. Commercial Cause No. 52 of 2022, had **defect of jurisdiction or other cause of a like nature, making the court unable to entertain it,** the court would have either dismissed or struck out that case. The court would not have allowed withdrawal of a defective case with liberty to refile it if the defect was one of jurisdiction or other cause of a like nature, making the court unable to entertain it. If the court was unable to entertain the case for want of jurisdiction, the case could not be refiled in the same court. Therefore, the argument

advanced by the learned counsel for the Petitioner that the earlier timely filed Misc. Commercial Cause No. 52 of 2022 which was withdrawn with liberty to refile it, falls under section 21(2) of the Law of Limitation Act, Cap 89 of the Laws of Tanzania, is untenable and unpracticable in real time. It is my finding that the present application seeking to register a foreign arbitral award for enforcement, which application was filed in this court after 11 months from the issuance of the arbitral award, is hopelessly time barred under Item 18 of the First Column in Part III of the Schedule to the Law of Limitation Act read together with Regulation 51(4) of the Arbitration Regulations GN 146/2021. The Siemes case (supra) cited above at page 3 thereof makes reference to the decision in **Mathew Martin versus Managing Director Kahama Mining Corporation**, Civil Case No.79 of 2006 where the court held that:

"however unfortunate it may be for the petitioners, the Law of Limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into those who get caught in its web."

The present case faces a similar doomed fate. Section 3(1) of the Law of Limitation Act provides that:

"Every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence".

As the present application for recognition and enforcement of the foreign arbitral award was filed after the lapse of the 6 months' period of limitation prescribed under Item 18 of Part III of the 1st Schedule to the Law of Limitation Act, Cap 89 of the Laws of Tanzania, I do hereby dismiss the same with costs. It is so ordered.

Since the effect of sustaining the second preliminary objection on the case being time-barred is dismissal of the case, I find no reason to waste the precious time and energy to consider and determine the other five preliminary points of objection raised by the Respondent's Counsel in this case.

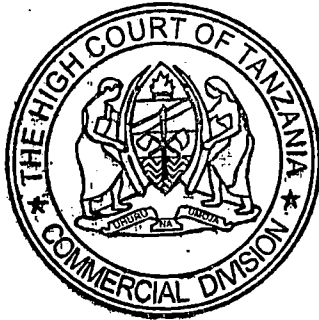


A. H. GONZI

JUDGE

15/03/2024

Ruling is delivered in court this 15th day of March 2024 in the presence of Mr. Rico Adolf, learned Advocate for the Petitioners and Mr. Gilbert Masaga and Ms. Ashura Masoud Learned Advocate for the Respondent.



A handwritten signature in black ink, appearing to be "A. H. Gonzi", written over a horizontal line.

A. H. GONZI

JUDGE

15/03/2024