**IN THE MALAWI SUPREME COURT OF APPEAL**

**AT BLANTYRE**

**MSCA CIVIL APPEAL NO. 14 OF 2000**

(Being High Court Civil Cause No. 2418 of 1999)

**BETWEEN:**

INDUSTRIAS METALURGICAS PESCAMONA
SOCIEDAD ANIMANA (IMPSA).....APPELLANTS

- and -

HEAVY ENGINEERING LIMITED.....RESPONDENTS

**BEFORE: THE HONOURABLE MR JUSTICE UNYOLO, JA**
**THE HONOURABLE MR JUSTICE KALAILE, JA**
**THE HONOURABLE JUSTICE MSOSA, JA**
Kainja, Counsel for the Appellants
Katundu, Counsel for the Respondents
Mbekwani (Mrs), Official Interpreter/Recorder

**J U D G M E N T**

**Kalaile, JA**

This is an appeal by Industrias Metalurgicas Pescamona Sociedad Anomina (hereinafter referred to as IMPSA") against the decision of the High Court refusing to grant an order

staying proceedings.

The respondents, who are Heavy Engineering Limited (hereinafter referred to as "Heavy Engineering) commenced these proceedings against IMPSA for breach of contract. Subsequently, IMPSA, the appellants, filed an application for stay of the proceedings pursuant to section 6(1) of the Arbitration Act (Cap. 6:03) of the Laws of Malawi.

Section 6(1) of the Arbitration Act provides that:

"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

The hearing of the application in the court below proceeded purely on affidavit evidence. According to the findings of the trial Judge, each of the parties relied on a different document as providing for the arbitration clause as the basis on which the proceedings were to be stayed.

IMPSA relied on Clause 36 of the IMPSA General Conditions, whereas Heavy Engineering relied on Clause 50 of the ESCOM/IMPSA Conditions of Contract.

Clause 36 of the IMPSA General Conditions stipulated that:

"36.1. All disputes in connection with the present Contract for the execution thereof shall be settled friendly through consultation. In case no settlement can be reached through consultation, such disputes shall be submitted to arbitration.

The arbitration shall take place in Mendoza, Republica Argentina and will be conducted by the Arbitration Institute of the Mendoza Chamber of Commerce in accordance with the statutes of the said Institute.

The arbitration award shall be final and binding on both parties. Neither party shall

seek recourse to a law court or other authorities for revising the decision.

The arbitration fee shall be borne by the losing party unless otherwise decided by the said Institute.

In the course of arbitration the present Contract shall be continuously executed by both parties except the part of the present Contract which is under arbitration.

36.2. This subcontract is to be interpreted in accordance with and its administration and performance governed by the laws of the Republica Argentina."

The IMPSA agreement was entered into between IMPSA and Heavy Engineering and was dated 28th April 1997 as evidenced by the letter issued by Heavy Engineering which was addressed to IMPSA and dated 8th July 1997. This letter is marked **Exhibit SC**.5 and is referred to in the affidavit of Mr Krishna Savjani, SC.

Whereas Clause 50.2 of the ESCOM/IMPSA Conditions of Contract stipulated that:

"50.2. If at any time any question, dispute or difference shall arise between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works either party shall be entitled to refer the matter to be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those Rules, or by arbitration in accordance with such other rules as are specified in Part II.

The arbitrator(s) shall have full power to open up, review and revise:

(a) any decision or instruction of the Engineer referred to arbitration pursuant to Sub-Clause 50.1; and

(b) any certificate of the Engineer related to the dispute."

It should be noted that the parties to this contract are ESCOM and Heavy Engineering. The Engineer is defined as TAMS Consultants Inc, the TAMS Building 655 Third Avenue, NEW YORK, NY 10017, USA in joint venture with Knight Piesold & Partners, Consulting Engineers, Kanthack House, Station Road, Ashford, KENT, TN23 IPP, UK.

Lastly, the Memorandum of Understanding (SC1), which is the connerstone of the numerous agreements cited by both parties to these proceedings, states in part, that:

"**BASIS OF MEMORANDUM OF UNDERSTANDING**

**1. Date:**

14 March 1997

**2. Participants:**

Heavy Engineering Limited of Kenya (HEL) represented by Mr Nayan Patel & Industrias Metalrgicas Pescarmona Sociedad Anonima of Argentina (IMPSA) represented by Mr. Sergio Carobene & Mr. Pedro Palmes

**3. Subject:**

Sub-Contracting of:

- Manufacturing, Transport and Erection Works for the KAP 58 - Gates, Stoplogs & Hoists for the Kapichira Hydro-electic Power Scheme for ESCOM - Malawi

- Erection works for the KAP 51 - Main Generators and Auxiliary Equipment for the Kapichira Hydro-electric Power Scheme for ESCOM - Malawi

**4. General**

It is the intention of this MOU that all conditions of Contract between IMPSA and ESCOM, as applicable, will rule for these subcontracts and therefore copies of Tender Documents for both contracts are handed to HEL.

Following Sub-contracts will be made after Engineer's Approval of this amount of Subcontracting.

..."

Let us begin by following the argument for the appellants. Mr Katundu's argument was premised on the fact that the Memorandum of Understanding (SCI) of 14th March 1997 should be read together with document SC4 (namely, Clause 36 of IMPSA General Conditions) which was dated 28th April 1997 and delivered on 29th April 1997. The Memorandum of Understanding was, in essence, an agreement to agree.

The relevant part of the Memorandum reads: "Following sub-contracts will be made after

the Engineer's approval of this amount of subcontracting." There was only one agreement to agree after the Engineer's approval. After such approval, the parties were totally free to agree whatever terms they desired.

The IMPSA General Conditions (Exhibit SC4) were e-mailed to the respondents on 29th April 1997 as stated in paragraph 5 of the affidavit of G D Kainja, who is Counsel for the respondents, which was to the effect that: "in addition to the said "SC3", the said covering letter of "GDK2" stated as follows:

**"KAPICHIRA PROJECT,**

**PURCHASE ORDER NUMBER 34863**

**ANNEX I OF 28.04.97**

**1. APPLICABLE DOCUMENTS**

THE FOLLOWING DOCUMENTS SHALL GOVERN THE PRESENT SUBCONTRACT AND SHALL APPLY IN THE FOLLOWING ORDER. IN CASE OF DISCREPANCIES THE FIRST ONE IN THE LIST WILL PREVAIL.

1.1 THE PRESENT SUBCONTRACT.

1.2 MEMORANDUM OF UNDERSTANDING SIGNED BETWEEN IMPSA AND HEL ON MARCH 14, 1997 (MOU).

1.3 CONTRACT NUMBER KAP 58. GATES STOPLOGS & HOISTS FOR THE KAPICHIRA HYDROELECTRIC SCHEME FOR ESCOM, MALAWI (KAP 58) AND CONTRACT NUMBER KAP 51. MAIN GENERATORS AND AUXILIARY EQUIPMENT FOR KAPICHIRA.

1.4 IMPSA'S SUBCONTRACT GENERAL CONDITIONS (SGC).

...

**5. PAYMENT TERMS**

PAYMENTS SHALL BE DONE BY WIRE TRANSFER AS DETAILED IN ITEM 10 OF THE MOU WITHIN 10 DAYS OF RECEIVING THE RESPECTIVE PAYMENT FROM THE CLIENT.

**ERECTION WORKS**

WILL BE AS DETAILED IN CLAUSE 6 OF THE MOU. HOWEVER, RESOURCES THERE IN DETAILED ARE ONLY INDICATIVE. HEL SHALL PROVIDE RESOURCES, SUCH AS, MANPOWER, TOOLS, EQUIPMENT, ETC. ENOUGH TO MEET THE SCHEDULE OF THE CONTRACT.

**6. OTHER CONDITIONS**

AS DESCRIBED IN DOCUMENTS DETAILED IN ABOVE CLAUSE 1."

Annex I (which is Exhibit "SC 3"), provides, in part, that:

"KAPICHIRA PROJECT, PURCHASE ORDER NUMBER 34863 ANNEX 1 OF 28.04.97

6. OTHER CONDITIONS

AS DESCRIBED IN DOCUMENTS DETAILED IN ABOVE CLAUSE I.

Counsel for the respondents further argued that, in full knowledge of Exhibit SC 3 cited above and Exhibit SC 4 (the IMPSA Subcontract General Conditions), the respondents did not make any representations or protests to the appellants denying the validity or applicability of the terms offered in Exhibits SC 2, SC 3 or, for that matter, SC 4 of the Agreement.

Instead, the respondents proceeded to write Exhibits SC 5 and SC 7. Exhibit SC 7 was signed with Appolo Insurance describing the contract with the appellants as having been entered into on 28th April 1997, which was in compliance with Clause 15 of the Memorandum of Understanding. Exhibit SC 5 has as its heading "**Your Purchase Order Number 34863, Contract for Kapichira Hydroelectric Project**", which was in accordance with Exhibit SC.3. The same source also caused Standard Chartered Bank to write Exhibit SC 6 describing SC 3 as being the Contract Letter between the respondents and the appellants.

Furthermore, it was stated for the appellants that even if one accepts as true what the respondent was claiming, that all terms had been agreed upon by the time the Memorandum of Understanding was signed, the alleged subsequent introduction of new terms in Exhibits SC 2, SC 3 and SC 4 can be deemed to be a variation of the terms which, in full knowledge thereof, the respondents, without protest, proceeded to impliedly accept by their conduct in commencing the performance of the Contract.

Although in paragraph 7(a) of the affidavit of Counsel for the respondents, it could be implied that because Exhibit SC 4 was not signed by the appellants, then its terms are not part of the Contract terms, and were not therefore accepted by the respondents, that argument is not correct at law, as acceptance of terms can also be inferred from conduct. These were the arguments by Counsel for the appellants.

However, Counsel for the respondents countered by saying that there was a Memorandum of Understanding dated 14th March 1997 which was subject to approval and pricing and that took place on 28th April 1997. Therefore the document which was received on the 29th April 1997 cannot be part of the Contract.

In Counsel for the respondents' opinion, this would exclude SC 4, namely, Clause 36 of IMPSA General Conditions. This argument cannot hold when one follows the well-reasoned presentation by the appellants on this point. We find as a fact that Clause 36 of the IMPSA General Conditions is indeed part and parcel of the Contract between the appellants and the respondents. We see no point in pontificating on this particular ground of appeal, especially since Heavy Engineering were not a party to the ESCOM/IMPSA Conditions of Contract.

Again, Counsel for the respondents tried to argue that according to Counsel for the appellants' submissions, the application of the Memorandum of Understanding was limited to Clauses such as 9, 10, 12, 13 and 15. Counsel for the appellants easily demolished this argument by demonstrating that the Memorandum of Understanding did not harbour any such limitations, since it catered for all the limitations listed by Counsel for the respondents.

In short, we are satisfied that Clause 36 of the IMPSA General Conditions is the clause that is applicable in this matter.

Accordingly, the appeal is allowed. The decision of the Court below is consequently set aside. We order that the action herein be stayed and that the matter be referred to arbitration in accordance with the said Clause 36 of the IMPSA General Conditions.

The appellants shall have the costs of this appeal.

DELIVERED in Open Court this 29th day of May 2002, at Blantyre.

Sgd .....

**L E UNYOLO, JA**

Sgd .....

**J B KALAILE, JA**

Sgd .....

**A S E MSOSA, JA**