GUEST & CHRIMES LIMITED

v.

NATIONAL URBAN WATER AUTHORITY

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Omar, Mnzavas and Lubuva, JJ.A.)

CIVIL APPEAL No. 15 OF 1995

(From the decision of the High Court of Tanzania at Dar es Salaam (Mackanja, J.) dated 8th July 1994, in Civil Case No. 221 of 1993)

Civil Practice and Procedure – Arbitration – Reference to arbitration – Claim for money admitted but the party admitting refuses to pay – Whether there is a dispute to refer to arbitration

Civil Practice and Procedure – Reference to arbitration – High Court dismisses suit and refers parties to arbitration without establishing that the party opting for arbitration is ready and willing to arbitrate – Whether proper – Section 6 of the Arbitration Ordinance, Cap 15

A contract of sale of goods between the appellant and the respondent contained a clause binding the parties to refer disputes to international arbitration. The appellant filed a suit claiming a sum of money under the contract. The respondent admitted being indebted but refused to pay on account of the appellant presenting defective documents to the paying bank that failed to effect payment in time. But those defects were then rectified. The High Court dismissed the suit and referred the parties to arbitration. The appellant appealed to the Court of Appeal.

Held:

(i) It was not proper for the High Court to refer the parties to arbitration without satisfying itself, as required by s.6 of the Arbitration Ordinance, that the

party opting for arbitration was "ready and willing to do all things necessary" to arbitrate;

(ii) Admission in the written statement of defence that the errors for which the respondent had refused to pay the amount claimed were rectified put an end to the dispute between the parties that would have necessitated recourse to arbitration and dismissal of the suit.

High court judgment set aside

Mr. *Uzanda,* for the Appellant
Miss *Bayona,* for the Respondent

JUDGMENT OF THE COURT

(Dated 8 December 1995)

Omar, J.A.: The appellant, Guest and Chrimes Limited, a company incorporated in the United Kingdom and doing business at Rotherham, England, entered on 14/12/88 into a contract of sale of goods with the respondent, the National Urban Water Authority of Tanzania (NUWA). This contract of sale of goods has two important clauses relevant to this case. There is a resolution of disputes clause and the clause on the applicable law of contract. The former is to be governed by international arbitration and the latter by the contract laws of Tanzania.

The suit was filed at the High Court by the applicant/appellant who claimed against the respondent, NUWA, the sum of $ 70,397.90 and 30%, interest on $ 31,999.90 from the date of the suit till full payment. After considering the requirements of the contract the High Court (Mackanja, J.) dismissed the suit and referred the parties to arbitration according to clause 28 of their contract. The High Court in its ruling was satisfied that here was a dispute between the parties in the following words.:

> If there is refusal to pay and no agreement to pay can be proved the case must be treated as one which a "difference" or "dispute" has arisen which must therefore be determined by an arbitrator and not by an action. I fully subscribe to that proposition of law.

Mr. Uzanda learned Counsel for the appellant said categorically that there is no dispute between the parties because the respondent admitted to be indebted to the appellant up to £30,350.42, and the total amount the appellant is claiming is £30.349.92, which is 50 pence less than what is admitted. We have noticed in the wording of s. 6 of the Arbitration Ordinance that the interested party may apply for arbitration after the filing of the suit in Court but before the written statement is filed. Failure to do so does not vitiate the claim as Mr. Uzanda argued because the wording used is may and not shall. So it is not mandatory to make one's application within this interval. The application can be made at any time after the filing of the suit. But there is the last provision of section 6 which requires the presiding judge to be satisfied that whoever opts for arbitration "was at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration." This requirement of the section would appear to be more pertinent in this case where its contract has chosen foreign arbitration for the parties – an arbitration more involved and distant and calls for competence and capability by the applicant. This, the Court did not appear to have done, that is to say, it did not satisfy itself that NUWA the respondent was ready and willing to do all things necessary to the proper conduct of arbitration before making an order for staying the proceedings.

For clarity s.6 of the Arbitration Ordinance Cap 15 is hereby reproduced:

> 6. Where any party to a submission to which this Part applies, or any person claiming under him commences any legal proceedings against any other party to the submission or any person claiming under him, in

> respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before filing written statement, or taking any other steps in the proceedings, apply to the court to stay the proceeding; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, 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.

On the question of the alleged dispute between the parties, there is the admission of the respondent that the refusal by them to pay the debt was due to the acts of negligence by the appellant which acts of negligence concerned the presentation of defective documents to the LC negotiating bank which failed to effect payment in time. But these errors the respondent admitted in its Written Statement of Defence that they were later rectified. Clause 3 (d) of the written statement of Defence states:

> That by the time the plaintiff rectified the errors and submitted the document for payments, Credit Not No. 1312 TA was closed.

We are not concerned with the closure of the Credit Note; we are concerned with the refusal by NUWA to pay the existing debt and reasons given for this refusal between the parties. This admission in the Written Statement of Defence that errors were rectified puts an end to the dispute, so whatever was owed by the respondent to the appellant must be paid back.

Miss Bayona, learned Counsel for the respondent, in answer to Mr. Uzanda's submission, stated as follows:

> That the judge was right in dismissing the suit. Rightly he made a finding that there was a dispute: There has never been an agreement on the part

of the respondent to pay express or otherwise. Defendant/respondent under part of Written Statement of Defence said that plaintiff/ appellant could not be paid because he was negligent.

She then prayed for dismissal of the suit with costs.

Mr. Uzanda for the appellant in reply said that miss Bayona's submissions were not an answer to his submissions and if specific admissions of respondent were added up we would find as stated earlier that there is no dispute regarding liability between the parties. Respondent admitted 50 pence more than what the appellant was demanding.

In conclusion we agree that there was no dispute between the parties which necessitated recourse to arbitration and dismissal of the suit. In the event the High Court Judgment is hereby set aside. The hearing of the suit to proceed before another judge. Costs to the appellant.