IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA AD - 2022

Coram: - *M. Welbourne (Mrs), J.A. (Presiding)*

M. Wood, (Mrs.) J.A.

E. Baah, J.A.

Suit No. H1/104/2022

Date: 28th July, 2022

Heiland Resources Ltd.
No. 4 Osu Switchback = **Plaintiff/Respondent/Appellant**
Accra

Vrs

1. **Sinopec International Petroleum Services Limited** = **1st Defendant**
   No. 19A Airport West
   Accra

2. **Sinopec Jiangsu Oilfield Services** = **2nd Defendant**

3. **Sinopec International Services Limited**

No. B114, Kekeli Road **=3rd Defendant/Applicant/Respondent**
Airport Residential Area
Accra

4. **Sinopec Group** = **4th Defendant**

5. **Sinopec Service** = **5th Defendant**

6. **Sinopec Limited** = **6th Defendant**

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JUDGMENT

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WELBOURNE, J.A

This is an appeal against the Ruling of the High Court dated 6th July, 2021.
This case ought to ordinarily have been concluded by now if the parties were *ad idem* as far as the forum for dispute resolution goes whether per Arbitration or through adjudication.

It is interesting that the parties intention as stated in clause 16 of the Lateral Line Contract was to submit "all disputes" to Arbitration in accordance with Section 6 of the Ghana Arbitration Act (Act 798).

What was the genesis of the dispute? The Plaintiff/Respondent/Appellant's carried out works as a sub-contractor on the orders or requests of the 3rd Defendant/Applicant/Respondent on the project, which works were not specifically

spelt out in the "Scope of Works" as detailed in the Agreement Attachment 1 of the Agreement (see page 75 of the ROA).

All these works were quantified by the Respondent and according to the Appellant fully paid for by the Government of Ghana. The logical thing was for the Respondent to pay the Appellant for the works done but was that the case? The Respondent failed and or refused to do so for a project commenced in 2013/2014 to date. Details of these sums payable to the Appellant run into millions of US Dollars. (see pages 14- 15 and 198 of the ROA). This is the gravamen of the dispute.

On 24th July 2020, the Appellant made a Demand for Arbitration (see pages 116 to 185 of ROA) Exhibit TA10 - Stating the said claims as was subsequently spelt out in the Statement of Claim.

Interestingly, the Respondent objected to the demand for Arbitration by the Appellant on the ground that there were no separate contracts that were covered by a written Arbitration Agreement.

The Appellant on second thoughts, withdrew the Demand for Arbitration and filed a suit in court dated 20th November, 2020, where upon the Respondent made a volte face and called for the matter to be referred to Arbitration quoting clause 16 of the Lateral Line Contract on the Atuabo Gas Project.

The matter was argued by the parties before the court below and the learned judge referred the matter to Arbitration. It is from this ruling that the Appellant has appealed on the grounds as stated below.

As an avid proponent of the Alternative Dispute Resolution mechanism and in line with the Biblical admonition in Matthew Chapter 5 verses 25-26; *"(25) Settle matters quickly with your adversary who is taking you to court. Do it while you are still together on the way, or your adversary may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison; (26) Truly I tell you, you will not get out until you have paid the last penny";* I would have quickly affirmed the ruling of my learned sister of the court below. The case of **BCM Ghana Ltd v Ashanti Goldfields Ltd (Civil Appeal No J4/17/2005** the Supreme Court also stated that courts should strive to uphold dispute resolution clauses in agreements.

However, the law enjoins me to scrupulously peruse the record of appeal, consider the submissions of both counsel on the *pros and cons,* and arrive at an informed decision. I proceed to do so.

The Ruling of the trial court stated inter alia briefly thus:

> *"I have examined the affidavit evidence filed by the parties in the application together with the written submissions thereto. In my view, the matters in dispute between the parties do not fall within the exceptions to arbitration provided for in Section 1 of Act 798. The dispute between the parties being arbitrable and one within the contemplation of the parties to be subjected to the process of arbitration, I shall grant the application. In consequence, pursuant to Sections 6 (1) and (2) of Act 798, I hereby direct that in accordance with Clause 16.2 of the agreement between the parties, the dispute shall and is hereby referred to arbitration in accordance with the arbitration agreement contained therein"*

The Grounds of Appeal filed as appeared on pages 299 to 301 of the Record is as follows:

a. The ruling of the learned High court Judge is against the weight of the evidence on record.

b. The learned High Court Judge misdirected herself when she held that it was within the contemplation of the parties that the dispute between them be subjected to arbitration.

Particulars of Misdirection

i. The learned Judge failed to consider that the arbitral clause only covers or relates to the agreement for Lateral Line Civil Works (the "Lateral Line Contract") executed between the Appellant and the Respondent on 22nd November, 2014.

ii. The learned Judge wrongly extended the scope of the arbitral clause to the separate contracts entered into by the parties, which fell outside the scope of the Lateral Line contract.

iii. The learned Judge failed to consider that an agreement for arbitration is subject to party autonomy, and the parties must expressly agree to such an arbitral clause to be bound by it.

c. The learned High Court Judge misdirected herself when she failed to consider that since there is no arbitration clause governing the matter in dispute, the doctrine of kompetenz-kompetenz is inapplicable.

Particulars of Misdirection

i. The learned Judge failed to consider that the application of the kompetenz-kompetenz principle is predicated on the existence of an arbitration agreement between the parties.

ii. The learned Judge wrongly ignored the fact that the separate contracts entered into by the parties are totally different from the Lateral Line Contract and are consequently not covered by the arbitration agreement under the Lateral Line Contract.

d. The learned High Court Judge misdirected herself when she failed to consider that the Respondent glaringly objected to the jurisdiction of the arbitral tribunal to entertain any claim in relation to the matters in dispute between the parties, on the grounds that there exists no such agreement in writing to submit such a claim to arbitration.

Particulars of Misdirection

i. The learned High Court Judge failed to take into consideration paragraph 4 of the Respondent's reply to the demand for arbitration, which essentially denied the existence of an arbitral clause in relation to the separate contracts.

ii. The learned High Court Judge failed to consider that by the denial of the existence of an arbitral clause to the separate contracts entered between the parties, these contracts cannot be the subject matter to arbitration.

iii. The learned High Court Judge failed to consider that by referring the matter to arbitration, the Appellant would be left without a remedy because the Respondent is likely to and would deny the existence of an arbitral clause to the separate contracts.

e. Additional grounds of appeal may be filed upon receipt of the Record of appeal.

In this Appeal the Plaintiff/Respondent/Appellant will be described as the Appellant, while the 3rd Defendant/Applicant/Respondent will be referred to as the Respondent. The Record of Appeal will be described as the ROA.

The brief summary of facts as narrated by the Appellant are that:

The Ghana National Gas Company contracted the 1st Defendant/Appellant/Respondent (the "Respondent") to execute a natural gas infrastructure project at Atuabo in the Western Region of Ghana known as the "Ghana Early Phase Gas Infrastructure Project" or the "Western Corridor Gas Infrastructure Development Project" (the "Project"). Towards the execution of the project, the Respondent engaged the Appellant as a subcontractor under the following written agreements, thus providing the framework for subsequent dealings between the parties:

a. The Equipment Rental Agreement between the Appellant and the Respondent executed on 21st March, 2012 (the "Equipment Rental Agreement").

b. The Agreement for Lateral Line Civil Works executed between the Appellant and the Respondent on 22nd November, 2012 (the "Lateral Line Contract").

Under the Lateral Line Contract, the Appellant was engaged as subcontractor to perform specified civil works and associated activities provided in the scope of work to facilitate the construction of a sub project of the Project known as the "Onshore Natural Gas Pipeline system".

Prior to the commencement of the activities under the Lateral Line Contract, officials of the Respondent insisted that a team from the 2nd Defendant would perform a supervisory role in the activities.

The Respondent further required the 2nd Defendant to quantify and certify the work of the Appellant and further required the 2nd Defendant to sign prior to the Respondent paying any invoice raised by the Appellant.

Therefore, the Respondent acting through the 2nd Defendant, unilaterally introduced new terms and objectives that were outside the scope of the Lateral Line contract.

The parties in the execution of the Project, and based on the new terms introduced by the 2nd Defendant then entered into subsequent agreements which fell outside the scope of the Lateral Line contract. Some of these agreements were made through email exchanges while others were made orally at the project site ("Separate Contracts").

There was no agreement in writing to this effect and there was no arbitration agreement to these Separate Contracts entered into between the parties. Neither was there any intention on the part of both parties that the Separate Contracts were to be covered by the arbitration agreement under the Lateral Line Contract.

According to the Appellant's counsel, in an attempt to defraud the Appellant and evade its contractual liability, the Respondent has through the 2nd Defendant (contrary to the agreement between the parties) refused to honour its promise to the Appellant. The 2nd Defendant has deliberately refused to quantify and certify the work done by the Appellant.

So, the Respondent, through these various schemes acted in flagrant breach of those subsequent agreements and the laws of the Republic of Ghana in the execution of the Project.

Consequently, on **24th July, 2020,** the Appellant activated the arbitration agreement under the Lateral Line Contract. In activating the arbitration agreement, the Appellant wrongly made claims some of which fell under the scope of the Separate Contracts.

Consequently, the Respondent, obviously knowing that the Separate Contracts were not covered by the arbitration agreement under the Lateral Line Contracts, rightfully objected to the jurisdiction of the arbitral tribunal in a reply filed on **26th August, 2020.** So, the Appellant wrote to the Ghana Arbitration Centre on 14th December, 2020 to withdraw the demand for arbitration earlier filed.

Owing to the objection to the jurisdiction of the arbitral tribunal by the Respondent and the subsequent withdrawal of the demand for arbitration, the Appellant issued a Writ of Summons and Statement of Claim on **20th November, 2020** claiming the reliefs endorsed thereon.

The Respondent subsequently entered conditional appearance and filed an application for stay of proceedings to refer the suit to arbitration on 4th January, 2021. On 21st January, 2021, the Appellant filed its Affidavit in Opposition to the application for stay to refer the suit to arbitration.

The Respondent then filed a Supplementary Affidavit in support of the application for stay to refer the suit to arbitration on 11th February, 2021. And on 24th March 2021, the Appellant filed a Supplementary Affidavit opposing the referral of the suit to arbitration on 24th March, 2021.

The court ordered both parties to file their written submissions in support of their various positions in relation to the application.

The Appellant raised the following issues for determination in its written submission filed in support of the affidavit in opposition to stay proceedings to refer the matter to arbitration:

a. Whether or not considering that there is no written arbitral clause governing the separate contracts, the court has jurisdiction to refer the matter to arbitration.

b. Whether or not seeing as the matters relating to fraud are at the centre of this instant dispute, arbitration is the proper forum to determine the dispute.

c. Whether or not considering that there is no arbitration clause/agreement governing the matters in dispute, the principle of kompetenz-kompetenz is applicable.

The Appellant in its opposition to the Respondent's application for stay of proceedings and referral of the suit to arbitration submitted that the High Court ought to dismiss the Respondent's application on the following grounds:

a. The application is entirely incompetent on the basis that the crux of the matter which hinges on the Separate Contracts fell outside the scope of the Lateral Line Contracts and therefore not subject to arbitration.

b. The Respondent glaringly objected to the jurisdiction of the arbitral tribunal to entertain any claim in relation to the Separate Contracts on the grounds that there is no such agreement in writing to submit such claim to arbitration.

c. The kompetenz-kompetenz principle does not apply considering the peculiar nature of this case.

d. The arbitral tribunal is not the proper forum to hear the determine matters relating to fraud.

Nonetheless, on 6th July, 2021, the High Court in granting the Respondent's application ruled that, the dispute between the parties is arbitrable and was within the contemplation of the parties to be subjected to the process of arbitration.

The High Court's ruling ordered that: *"in accordance with clause 16.2 or the agreement between the parties, the dispute shall and is hereby referred to arbitration in accordance with the arbitration agreement contained therein."*

The High Court further ordered that: *"further proceedings in the substantive suit is hereby stayed pending the outcome of the process of arbitration hereby ordered."*

The High Court's ruling was premised on the assumption that the arbitral clause under the Lateral Line Contract extended to the Separate Contracts entered into between the parties.

The Appellant is aggrieved by the decision of the High Court and has filed the present appeal against same.

Consideration

The Grounds of Appeal will be dealt with in the same manner as by the Appellant as follows: Grounds b, c, d and a.

Grounds B

b. The learned High Court Judge misdirected herself when she held that it was within the contemplation of the parties that the dispute between them be subjected to arbitration.

Particulars of Misdirection

i. The learned Judge failed to consider that the arbitral clause only covers or relates to the agreement for Lateral Line Civil Works (the "Lateral Line Contract") executed between the Appellant and the Respondent on 22nd November, 2014.

ii The learned Judge wrongly extended the scope of the arbitral clause to the separate contracts entered into by the parties, which fell outside the scope of the Lateral Line contract.

iii. The learned Judge failed to consider that an agreement for arbitration is subject to party autonomy, and the parties must expressly agree to such an arbitral clause to be bound by it.

Learned Counsel for the Appellant in his address proffered three reasons for this ground as follows:

First, considering that there was no arbitration agreement whatsoever between the parties in relation to the Separate Contracts, the learned judge failed to consider that the arbitral clause only covers or relates to the Lateral Line Contract.

Second, the learned judge breached the principle of the parties' autonomy inferring that the parties intend to resolve issues arising from the Separate Contracts through arbitration when there was no arbitral clause to that effect.

Third, the learned judge failed to consider that the parties must expressly agree to an arbitral clause in order to be bound by it as consent is an essential element of an arbitral agreement or clause.

In response to the Appellant's arguments, learned counsel for the Respondent stated that the evidence on record does not support the claim by the Appellant of the existence of any Separate Contract. Counsel referred copiously to the Evidence Act, 1975 (NRCD 323) on the burden of proof. He contended that the Appellant has not been able to prove the existence of any such separate Contractual agreement between the parties. The Appellant has not been able to meet the standard of proof required to back its claim of the existence of separate contracts, aside the Lateral Line Contract and the Equipment Rental Agreement. All the separate contracts alleged by the Appellant are part of works performed in the execution of the Lateral Line Contract and the Equipment Rental Agreement towards realising the Project.

It is also the contention of the Respondent that the failure of the Appellant to prove the existence of any such separate contract left the learned judge with no other option than to make a finding to the contrary and to uphold the sanctity of the Lateral Line Contract, which is the only Contract, in addition to the Equipment Rental Agreement entered into by the parties.

From the foregoing, the learned judge cannot be said to have breached the principle of autonomy, as is being alleged by the Appellant. There was no separate contract aside the Lateral Line Contract and Equipment Rental Agreement and no evidence has been led to prove otherwise.

Contrary to what the Appellant alleges in paragraph 39 of its Witness Statement, the Appellant already gave its consent for the agreement governing their legal relationship

to be amenable to arbitration when it executed the Lateral Line Contract and agreed that all disputes **in connection with the agreement** had to be referred to Arbitration.

Clause 16 of the Lateral Line Contract provides as follows:

> *"All disputes in connection with the Agreement or the execution thereof which cannot be amicably settled through negotiations after 30 calendar days, following notice to either of the parties of the dispute, shall be submitted for Arbitration in accordance with the Ghana Alternative Dispute Resolution Act, 2010 (Act 798) or whichever Arbitration Law for the time being in force. The venue of arbitration shall be in Accra, the capital city of Ghana. The arbitration shall be conducted in English. The award of arbitration shall be final and binding upon both parties. Neither party shall seek recourse to a law court or other authorities to appeal for revision of the decision. The arbitration fee shall be borne by the losing party."*

From the above, the Respondent surmised that all disputes in connection with the subcontract and ultimately the Project are amenable to Arbitration and indeed, the parties elected Arbitration as the means of dispute resolution in connection thereto.

I have perused the entire record of appeal and on this ground, I indeed find that the 1st Defendant, acting through the 2nd Defendant significantly altered the scope of work contained in the Lateral Line Contract by altering the pipeline routes. This led to the Appellant working in a mountainous and marshy terrain requiring more resources, time and costs to construct and implement the civil works.

These works the 1st Defendant agreed to recalculate the sum due to the Appellant in other words, to quantify and pay for all works that fell outside the Lateral Line Contract.

Further, the Appellant had to build concrete pipeline bridges and river crossings in twelve (12) separate locations outside the scope of work. These amounted to USD290

per bridge and a total sum of USD3,480.00 for the concrete pipeline bridges and river crossings constructed by the Plaintiff/Appellant. See pages 212 and exhibits TA1, TA2, TA3, TA4, TA5 and TA6.

These exhibits depict pictures showing the e-mail correspondence for excavation of lateritic sand material, the building of concrete pipeline bridges and river crossings, the clearing, trenching and grading activities.

The e-mail correspondence from the Respondent to Appellant to conduct fine soil padding both above and below the gas pipeline and pictures thereof showing the Appellant doing that and the pictures of the construction of the bridges.

On this ground therefore, I find that there is ample evidence on the record that points to the fact that there were other contracts performed by the Appellant which fell outside the scope of works envisaged by the parties.

One may argue that all the other works were incidental to the performance of the main project. That may be so, but I find that the extra works were so extensive that they could not be described as ordinarily incidental to the Lateral Line contract. They were contracts (oral and per e-mails and per conduct)

On that score, I therefore find that the dispute arise from contracts that were not under the Lateral Line contract.

Ground C

Learned counsel for the Appellant argued that the learned judge misdirected herself when she failed to consider that since there is no arbitration clause governing the matters in dispute, the doctrine of kompetenz-kompetenz is inapplicable, for the following reasons:

First, the application of the kompetenz-kompetenz principle is predicated on the existence of an arbitration agreement between the parties which is not applicable on the current facts because the parties did not agree to confer competence on an arbitral tribunal in relation to the Separate Contracts.

Second, the Separate Contracts entered into by the parties are totally different from the lateral Line Contract and are consequently not covered by the arbitration agreement under the Lateral line Contract. So, the arbitral tribunal is divested of "kompetenz" to arbitrate over the Separate Contracts.

The Separate Contracts agreed upon by the parties were made **orally** and through email exchanges for works which fell outside the scope of work defined in the Lateral Line Contract.

Counsel for the Respondent contended on this point that the Arbitration Agreement captured in clause 16 of the Lateral Line Contract is the Arbitration agreement upon which the doctrine of kompetnz-kompenz is applicable in the instant case. Since there is no doubt that there is an arbitration agreement (clause 16) in the Lateral Line Contract, the court ought to refer the matter to arbitration for the arbitration tribunal to determine its competence over the matter; and that was what the learned judge in the court below did and rightly so.

Counsel for the respondent also submitted that, unless and until the Arbitration Tribunal declines jurisdiction over the matter, the court is not seized with jurisdiction to proceed with the instant action. It matters not which party objected to the jurisdiction of the Arbitration Tribunal before or after the commencement of the suit, once the same matter is initiated at the court.

On this ground, I find that the separate contracts covering the works done and executed by the Appellant, fell outside the scope of works defined in the Lateral Line contract. There was therefore no agreement between the parties to arbitrate on them accordingly, the doctrine of Kompetenz-Kompetenz is inapplicable.

Ground D

Counsel for the Appellant submitted that even if the court holds that the arbitration clause in the Lateral Line Contract subsists, the Appellant is not bound by the arbitral clause where there is "clear evidence" that the Respondent evinced the intention not to use the arbitral clause to resolve the issues in dispute.

Secondly, that since the Respondent has indicated that he would not be bound by the arbitration clause in the Lateral Line Contract to resolve the issues before the court. The Appellant may treat the arbitral clause as repudiated and make use of the courts.

Two arguments were argued on this part:

a. The Respondent's reply to the demand for arbitration essentially denied the existence of an arbitral clause in relation to the Separate Contracts. It was therefore disingenuous on the part of the Respondent to object to the jurisdiction of the tribunal to arbitrate on the Separate Contracts and now made a volte-face urging the Honourable Court to refer the suit to arbitration.

b. The denial of the existence of an arbitral clause in the Separate Contracts and the Respondent's blatant objection to the jurisdiction of the arbitral should be construed and deemed a waiver of the Respondent's right to arbitration.

c. Referring the matter to arbitration would leave the Appellant without a remedy because the Respondent is likely to and would deny the existence of an arbitral clause to the Separate Contracts.

In summary, the Appellant's counsel urged the court to allow the instant appeal and reverse the decision of the court below.

In counter to the above submission by the Appellant, the Respondent submitted that the initial objection to the jurisdiction of the arbitral tribunal did not take away the tribunal's capacity to determine its own jurisdiction or otherwise over the mater.

Further to the above, the fact that the Respondent objected on the ground that there exists no agreement in writing to submit a claim to arbitration, does not evince an intention on the part of the Respondent to deny the existence of the Lateral Line Contract, but rather to deny the existence of the alleged Separate Contract.

The Respondent objected to the jurisdiction of the Arbitral Tribunal on the premise that there was no Arbitration Agreement in writing because the Appellant had not been able to show proof of any other Separate Contract in writing. Their objection was also premised on the fact that a party cannot agree to an Arbitration when such an agreement is not in writing.

The Respondent stated for emphasis that they meant that there were no separate contracts in existence capable of harbouring an Arbitration Agreement.

The Respondent's initial objection to the arbitral tribunal does not weaken its defence, because in their opinion, there were no Separate Contracts and therefore no Arbitration Agreements in respect of same.

Having considered all the submissions on this ground, I find that the conduct of the Respondent in opposing the Demand for Arbitration by the Appellant indicates clearly that he was not in favour therefore he has waived its rights to arbitration.

The Respondent cannot be allowed to approbate and reprobate. He cannot be allowed to abuse or misuse the process to frustrate the Appellant from pressing forward with its claims. Why should he in one breath resist the call for arbitration and in another breath call for arbitration? By this conduct he has waived his rights to arbitration. In my mind this conduct ought to be deprecated roundly and this court will not be a party to this. Accordingly, this ground is also upheld. I am fortified by the recent case by the apex court. The Supreme Court in the case of **De Simone Ltd. vrs Olam Ghana Ltd. [2018-2019] 1 GLR 679 at 680,** has held that:

Holding (1)

> *"When one party commenced judicial proceddings, the other party may apply to the court, in limine litis or before filing a defence on merits, to decline jurisdiction."*

Holding (2)

> *"Section 7(5) of Act 798 ought not to be construed literally. Act 798 at section 27 invoked the legal doctrine of waiver to protect arbitration proceedings where a party with a right to object to the jurisdiction of an arbitration tribunal failed to raise the objection timeously. This provision confirmed two concepts: (i) a recognition that a right to arbitration may be waived and (ii) that time is of the essence. Therefore section 7(5) had to be construed in a manner that accorded with the principle of freedom of contract and the doctrine of waiver of arbitration rights underlying the provisions of the Act.*

Holding (3)

> ***"The very act of opposing arbitration was an irrevocable and unilateral act. For by opposing the application for the reference to arbitration,*** *the party opposing was telling the court it was not willing for a reference to be made under section 7(1) of the Act. For all the stated reasons the appeal succeeded and would be accordingly allowed. The High Court would consequently, be ordered to continue with the hearing of the matter from where it left off" (emphasis mine).*

See also the Supreme Court decision in the case of **A. J. Fanj Construction and Industrial Engineering Ltd., Civil Appeal No. J4/36/2021, dated 2nd March, 2022** on the issue of attempts to approbate and repprobate.

In the instant suit we find that the Respondent opposed the Demand for arbitration made by the Appellant. Subsequently, we also find the Appellant resisting the referral to Arbitration in accordance with Section 6(1) of Act 798 by the court below. It is therefore crystal clear that there is no consensus among the parties to use Arbitration as the mechanism to resolve their dispute. In the circumstances therefore, the option available to them is to use the adjudicatory process.

Ground A: The Ruling is against the weight of the evidence on record. The Appellant was convinced that the Ruling is against the evidence of record because of the following pieces of evidence:

a. The activities which fell within the scope of work as agreed by the parties are clearly stipulated in the Lateral Line Contract (page 75 of the Record of Appeal) named "**Scope of Work"** and tabled as **"Attachment 1"** to the lateral Line Contract. Those are the activities that are covered by Clause 16 of the Lateral Line Contract.

b. The matters relating to the Separate Contracts include the pipeline bridges, river crossings, geomatic works, fine soil padding, among others as these were not covered under the lateral Line Contract. **These Separate Contracts can be found at pages 119 to 149 as well pages 212 to 242 of the Record of Appeal.**

c. Exhibit WX3 attached to the Respondent's Supplementary Affidavit in Support, which can be found at page 190 of the Record of Appeal, clearly shows, and it is an admission on the part of the Respondent of the existence of the Separate Contracts entered into between the Appellant and Respondent which do not fall within the scope of the Lateral Line Contract.

d. The email exchanges between the parties, which can be found at page 213 of the Record of Appeal (attached to the Appellant's supplementary Affidavit opposing the stay and referral to arbitration), the Appellant relied on the promise of the Respondent to pay for the excavation of lateritic sand material. **This contract obviously fell outside the scope of the Lateral Line Contract and thus cannot be the subject of arbitration when there was no agreement to that effect**.

e. In Exhibit TA 10 of the Appellant's Affidavit in Opposition which can be found at pages 184 to 185 of the Record of Appeal, the Respondent objected to the jurisdiction of the arbitral tribunal to entertain any claim in relation to the Separate Contracts on the grounds that there is no such agreement in writing to submit such claim to arbitration. So, the Respondent cannot be allowed to approbate and reprobate to say that these same contracts are referrable to arbitration.

The evidence on record does not support the learned judge's reasoning that the dispute between the parties do not fall within the exceptions to arbitration provided for in Section 1 of Act 798.

a. The Appellant's Statement of Claim which can be found at page 4 of the Record of Appeal (specifically page 13 of the record of appeal), the Appellant particularized the fraud allegations made against the Respondent.

b. The allegations of fraud were further explained in the Appellant's supplementary Affidavit in opposition to the reference to arbitration, which can be found specifically at pages 204 to 208 of the Record of Appeal.

The evidence on record does not support the decision of the learned judge that the Separate Contracts were covered by clause 16.2 of the Lateral Line Contract.

The Respondent on the other hand referred the court to the Indian case of **Ayyasamy vrs Paramsivan [2016] 10 SCC 386** in which the court unanimously held that the mere allegations to an application for referral to arbitration does not divest the Arbitral Tribunal of its jurisdiction

The Respondent also further submitted that the photographs exhibited in pages 119 to 149 as well as pages 212 to 242 of the Record of Appeal are nothing more than mere photographs. That these photographs do not prove the existence of Separate Contracts aside the Lateral Line Contract for which all associated woks carried out were towards the objective of completing the project.

Similarly, that email correspondence is inevitable in the performance of any civil works, as parties are likely to communicate during the performance of the contract.

I have considered the submissions of both counsel on this and strictly speaking, the evidence is based on afidavit evidence with exhibits since it was not a full-blwn trial.

On the balance, I would say that there is ample evidence that both parties were not *ad idem* as far as the submission to arbitration was concerned.

Therefore since the parties could not be compelled to go into arbitration, the only option available was the courts. The trial judge failed to consider the objection by the Respondent to arbitration and therefore erred.

In the case of **Environment High Tech Limited vrs Chadeco Group Company Limited & Anor, (Suit No. FTR 101/09 dated 9th March, 2009)** His Lordship P. Bright Mensah J (as he then was) stated as follows:

> *"As I have held elsewhere in this Ruling, it is not so automatic that as soon as a party to an agreement raised a flag that there was an arbitration clause then therefore there should be referral. It is my considered opinion* ***that where one party to the contract has manifested a clear intention to be no longer bound by the terms of his contract or where he has openly repudiated it, the innocent party might treat the contract at an end and might seek such remedies as were open to him, an arbitration clause notwithstanding.*** *I shall revisit the issue. (enphases mine).*
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> *Presently, in the light of the above reasoning the irresistible conclusion is that regardless of an arbitration clause in a contract, the High Court has a discretion in the matter when considering whether to stay proceedings and to refer a matter to an arbitration in terms of S.8 of Act 38."*

The case of **Skanska Jensen International vrs Klimatechnik Engineering Ltd. [2003-2004] SCGLR 698,** is apposite here.

In conclusion the Appeal is allowed . The parties are to continue with the action in the court below.

Cost of Twenty Thousand Ghana Cedis (GH¢20,000.00) awarded in favour of the Plaintiff/Respondent/Appellant agaisnt 3rd Defendant/Applicant/ Respondent.

(Sgd)

Margaret Welbourne (Mrs.)

(Justice of Appeal)

(Sgd)

I agree Merley A. Wood (Mrs.)

(Justice of Appeal)

(Sgd)

I agree Eric Baah

(Justice of Appeal)

- Sefakor Kuenyehia with Eyram Fosu and Esinam Awoonor for Plaintiff/Respondent/Appellant

- Nyaabiire Nsobilla Atindaana for 3rd Defendant/Applicant/Respondent