

SUPREME COURT OF SEYCHELLES

Reportable
[2023]
CS 13/2022

In the matter between:

MAHE DESIGN AND BUILD
(PROPRIETARY) LIMITED
(rep. by Pesi Padiwalla)

Plaintiff

and

LEONARDUS HOEVERS
(rep. Alexandra Benoiton)

Defendant

Neutral Citation: *Mahe Design and Build (Proprietary) Limited v Hoevers (CS 13/2022)*
[2023].....October 2023.

Before: Pillay J

Summary: Plea in limine – arbitration clause – Court’s jurisdiction

Heard:

Delivered: 25th October 2023

ORDER

- [1]** The plea in limine fails.

- [2]** The Defendant shall file its Defence on the merits.

- [3]** Costs are awarded to the Plaintiff.

JUDGMENT

PILLAY J:

- [4] The Plaintiff sues the Defendant for payment of the sum of SCR 406, 311.21 with interest on the said sum on the basis of a breach of an agreement.
- [5] The Defendant filed a plea in limine on the basis that “the subject matter of the case arises from an agreement dated 24th September 2014 entered by and between the parties which includes a clause for arbitration (clause 45.0) which states that in case any dispute or difference shall arise between the parties such dispute shall be referred to arbitration, which clause constituting an arbitration agreement is valid and subsisting. As a consequence this court should declare that it has no jurisdiction to hear the matter and as such should be struck out.”
- [6] In support of her plea in limine, Learned counsel for the Defendant relies on the case of ***Benoiton Construction Company Pty Ltd v Consolidated Power Projects Group African Limited Con Co Case Number 64/2021 SCSC 831***. It is her submission that she is raising the current objection in accordance with section 113 of the Commercial Code. She submits that his Lordship Burhan J stated in the above referred case that “*this case is being commenced by a plaint and then reply by a preliminary objection has been taken by the Defendant and submissions filed that do not warrant an affidavit in support, therefore there is no requirement for an application or a notice accompanied by an affidavit in order to commence the objection*” and similarly she has brought the objection to Court. It is further her submissions that in accordance with his Lordship Burhan J’s statements “*the Court has to follow [the requirement in section 113 (1) of the Commercial Code] and if there is – if the Court finds that there is an arbitration clause find that they’re no longer has any jurisdiction to hear this matter and refer the case to arbitration.*”
- [7] In answer, Learned counsel for the Plaintiff refers the Court to the transcripts of 11th May 2022 when the case was mentioned before her Ladyship Carolus J. He references the requests by Learned counsel for the Defendant for time to file a defence and counter claim. He argues that by virtue of these mentions and adjournments for defence and counterclaim, the Defendant has succumbed to the jurisdiction of the Court. He contends

that there is no indication at any point in time since the filing of the plaint that they would be contesting the Plaint.

[8] Learned counsel for the Plaintiff further argues that having filed what is called a Defence and seeking an order from the Court that the matter be struck out indicates that the Defendant has accepted the jurisdiction of the Court because you cannot ask the Court to strike out a matter if the Court has no jurisdiction.

[9] Learned counsel contends that the procedure adopted by the Defendant is not the procedure to be used before the Courts of Seychelles. He contends that there must be an affidavit specifically stating that the Defendant has been ready and willing from the very beginning to resort to arbitration. Learned counsel references the cases of ***Pillay v Pillay [1970]***, ***United Concrete Products, Bietsma v Dingjang, No 1, 1974 SLR 292***, ***Emerald Co Ltd v Into SRI appeal No. 9 of 2000*** in support of his arguments.

[10] It is further Learned counsel's argument that the arbitration clause contains a time limit within which to bring arbitration proceedings or to instigate arbitration proceedings. He argues that the limit has passed. He adds that it is nonsense to say that the Court has no jurisdiction. The most the Court will do is to stay proceedings pending an arbitration and decline jurisdiction.

[11] So what is the applicable law in circumstances where the dispute before the Court is subject to an arbitration agreement?

[12] Section 113 of the Commercial Code provides as follows:

1. *The Court seized of a dispute which is the subject of an arbitration agreement shall, at the request of either party, declare that it has no jurisdiction, unless, insofar as the dispute is concerned, the agreement is not valid or has terminated.*
2. *An application to the Court for preservation or interim measures shall not be incompatible with an arbitration agreement and shall not imply a renunciation of such agreement.*

- [13] The case of ***Emerald Cove v Intour SRL*** [2000] SCA 83, the Court of Appeal found that the Judge’s reliance on the guidelines stated in cases such as ***Pillay v Pillay*** [1973] SLR 307 and ***Beitsma v Dingjan No. 1*** [1974] SLR 292, that ruled that the Defendant has to prove the validity of the arbitration clause under the foreign law and satisfy the Court that it was ready and willing to do everything for the conduct of the arbitration in order to stay the proceedings before the Court, must be read in light of sections 110 and 113 of the Commercial Code of Seychelles.
- [14] The Court of Appeal, at page 93, found that in terms of Article 113 (1), where an arbitration is valid, it is capable of ousting the jurisdiction of the Court. The Court of Appeal went on to find that “*The burden is on the person who claims ouster of the jurisdiction of the Seychelles Court to show that under the foreign law which is the proper law of the agreement, the agreement to arbitrate is valid and subsisting. This he must do by evidence that satisfies the court to that effect.*”
- [15] In ***Wartsila NSD v United Concrete Products*** [2005] SCAR 223 the Court of Appeal was called upon not to follow its decision in the case of ***Emerald Cove*** on the basis that those procedures accepted in ***Emerald Cove*** were redundant as a result of Article 113 (1) of the Commercial Code. The Court upheld the decision in ***Emerald Cove*** on the basis that Article 113 does not change the procedure to be found in ***Bietsma v Dingjan*** and ***Emerald Cove Ltd v Intour SRL***. The Court of Appeal confirmed the procedure in ***Emerald Cove v Intour*** [2000] SCAR 83, that “*a party who asks [the court] to decline jurisdiction in a matter, on the ground that there is a valid arbitration agreement must show readiness to submit to arbitration.*” The Court of Appeal went further, emphasising the point with a reference to the case of ***Pillay v Pillay (1978) SLR 217*** wherein Sauzier J in the penultimate paragraph states: “*I should point out that as from 1st January 1977 the law of Seychelles as to arbitration and arbitration agreement is laid down in book 1 title IX of the Commercial Code of Seychelles. The principles therein contained appear to be the same as those of French law set out in the Court of Appeal’s judgment [ie *Pillay v Pillay (1972 – 1973) SLR 307*].*”

[16] According to Sauzier J in **Beitsma v Dingjan No. 1 [1974] SLR 292** “as a matter of procedure the party who asks the Court for an order to stay the proceedings must file an affidavit so as to satisfy the Court not only that he is, but also that he was at the commencement of the proceedings ready and willing to do everything for the proper conduct of the arbitration.”

[17] The procedure for such a challenge as the present one as can be gleaned from the above is as follows:

(1) *the Defendant has to prove that the arbitration clause is valid and subsisting, and*

(2) *the Defendant must satisfy the Court, by way of an affidavit, that it is and was at the commencement of the proceedings ready and willing to do everything for the conduct of the arbitration in order to stay the proceedings before the Court*

[18] Indeed, as stated by Learned counsel for the Defendant, in the case of **Benoiton Construction Company (Pty) Ltd v Consolidated Power Projects Group Africa Limited (CS 64 of 2021) [2022] SCSC 831 (23 September 2022)** Burhan J found that “th[e] case has been commenced by plaintiff and in reply a preliminary objection has been taken by the Defendant and written submissions filed that do not warrant an affidavit in support.”

[19] Similarly, the current matter has been commenced by way of Plaintiff and a plea in limine litis was raised by the Defendant. To that extent it is in line with the procedure adopted in **Benoiton Construction Company (Pty) Ltd** above in that a separate motion was not required to bring the issue forth.

[20] However, his Lordship’s decision was based on the fact that “The facts admitted by both parties are sufficient to deal with question in issue. The affidavit has been filed to support the letter dated 23 July 2021 sent by the Defendant to the Plaintiff expressing his willingness to submit to dispute resolution.” Though his Lordship “observe[d] the affidavit does not contain an apostille” he found that the defect was curable and allowed time for the said defect to be cured.

[21] It would appear that though an affidavit in support was not required to bring the matter to the attention of the Court, an affidavit was required in order to prove the readiness and

willingness of the Defendant to do everything to conduct arbitration. In the matter at hand there has been no affidavit filed at all. In comparison to the case of **Benoiton** above where letters were provided as exhibits showing the Defendant's willingness to submit to arbitration, none have been forthcoming in the present matter.

[22] In consideration of all the above, in as much as the Defendant was not procedurally deficient in raising the issue of jurisdiction as a plea in limine in her Defence, and the Plaintiff accepts that there is an arbitration clause (which is valid and subsisting) the plea fails as there is no proof that the Defendant was willing and ready to submit to arbitration at the commencement of the proceedings.

[23] The Defendant shall file its Defence on the merits.

[24] Costs are awarded to the Plaintiff.

Signed, dated and delivered at Ile du Port on

Pillay J