

SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
CS 64/2021

In the matter between:

BENOITON CONSTRUCTION COMPANY (PTY) LTD
(rep. by Basil Hoareau)

Plaintiff

and

**CONSOLIDATED POWER PROJECTS
GROUP AFRICA LIMITED**
(rep. by Bernard Georges)

Defendant

Neutral Citation: *Benoiton Construction Company (Pty) Ltd v Consolidated Power Projects Group Africa Limited* (CS 64/2021) [2022] SCSC (23rd September 2022)

Before: Burhan J

Summary: Challenge in jurisdiction in view of arbitration clause.

Heard: 09 May 2022 and 07 June 2022

Delivered: 23rd September 2022

RULING

BURHAN J

[1] Learned counsel for the Defendant in his Statement of Defence took up a plea *in limine litis* that both parties had agreed in the Subcontract Agreement that in the event of a dispute arising between the parties in respect of the agreement, the dispute should be referred to arbitration.

[2] The Defendant submits that the Court should declare that it has no jurisdiction to hear this matter and the dispute should be referred to arbitration in terms of arbitration clause in the agreement. The Defendant provided its submissions regarding validity of the

arbitration clause (pages 1-4) and states that the Plaintiff is not calling into question the validity of the agreement or the arbitration clause but resists the application on the basis that “since the Defendant **allegedly** made no attempt towards resolving the dispute through adjudication by failing to respond to certain correspondence, the court must now completely disregard the arbitration clause”. Learned Counsel for the Defendant referred to articles 110 (4), 111 (1) and 113 (1) and article 150 of the Commercial Code.

- [3] The Defendant denies the allegation and submits that it is still willing to submit to dispute resolution. The Defendant further relies on article 1134 of the Civil Code that agreements once concluded shall have the force of law and both parties shall be obligated to abide by all clauses. The Defendant therefore asks the Court to dismiss the claim for want of jurisdiction or to stay the proceedings pending resolution of the dispute by arbitration.
- [4] The background facts of the case are that the Applicant, Benoiton Construction Company Ltd, a company incorporated in Seychelles has filed a civil suit action CS 64/2021 against the Respondent, Consolidated Power Projects Group Africa Limited, a company incorporated in Mauritius (the “main suit”). The main suit’s action was entered on 12th July 2021 (Plaint dated 5th July 2021, stamped by Supreme Court 12th July 2021). The Plaintiff has further filed Notice of Motion, MA 186/2021 dated 27th July 2021 and stamped 2nd August 2021 seeking security for damages and costs. Application for security for damages and costs was filed prior to the Statement of Defence in the main suit.
- [5] The Respondent in MA 186/2021 filed an affidavit in Response to the Motion for Security of Costs dated 15th October 2021, stamped 26th October 2021. The Respondent raised the same issues in the MA 186/2021 Affidavit (paragraphs 9-11) as in the Statement of Defence in limine litis: issue of jurisdiction. The Respondent stated that in view of the arbitration clause in the Subcontract Agreement between the parties the matter ought to be referred to the arbitration in terms of the clause and if the Court in the main suit 64/2021 decides that the matter should indeed be referred to the arbitration, the issue of security for costs and damages would not arise and neither party is prejudiced and the arbitral process will itself regulate the issue.

[6] This Court agreed with the Respondent and determined that it first needs to establish whether it has jurisdiction to hear the main suit CS 64/2021. Once the Court makes determination regarding its jurisdiction, it will then make determination in relation to security of costs application if it is still applicable.

Plaintiffs submissions in respect of the Plea in Limine.

[7] The Plaintiff submits that under article 113 (1) of the Commercial Code where dispute is subject to the arbitration agreement, the Court shall at the request of either party decline the jurisdiction to hear the dispute and refer it for arbitration unless the agreement is not valid or has terminated:

Article 113

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.

[8] The Plaintiff submits that a party requesting the court to decline jurisdiction must establish that there is a valid arbitration agreement, that a party is and was ready and willing at the commencement of the proceedings to submit to arbitration and was ready and willing to do everything for the proper conduct of the arbitration; and a party must file an affidavit to satisfy the court that a party was ready and willing. The Plaintiff relies on decisions of Wartsila NSD Finland OY v United Concrete Products (2004-2005) SCAR; Emerald Cove Ltd v Intour SRL (2000-2001) SCAR 83 and Beitsma v Dingjam No. 1 (1974) SLR 292.

[9] It is Plaintiff's submissions that the Defendant has failed to satisfy conditions of being ready and willing to submit to the arbitration and affidavit evidence requirement.

[10] Plaintiff states that Clause 23 of the Agreement between the Plaintiff and Defendant (Exhibit AB1 to Affidavit of Alderic Benoiton) contains dispute resolution mechanism according to which, the parties are first to attempt informal dispute resolution by senior

management; and in the event of failure to settle, the dispute is to be referred to an adjudicator; thereafter and in the event of unsuccessful adjudication, the dispute is to be referred to an arbitration.

[11] The Plaintiff submits that after an unsuccessful attempt of informal dispute resolution, the Plaintiff through letter written by its Attorney-at-Law (Exhibit AB2) dated 20th September 2019 notified the Defendant that it wished to refer the dispute to adjudication and requested the Defendant to indicate its agreement to refer the dispute within thirty (30) days.

[12] It is further submitted that by email dated 13 December 2019 (Exhibit AB3), the Attorney-at-Law informed the Defendant that it had to respond to the letter by 15th January 2020 failing which the Plaintiff would institute legal proceedings against the Defendant. The Plaintiff submits that the Defendant had acknowledged receipt of the email and the letter (reference made to email of Shaun Maree dated 13 December 2019, Exhibit (AB3) and the Defendant's letter dated 23 July 2021 (AB4)).

[13] It is submitted that the Defendant has not indicated its agreement to refer the dispute to adjudication within time frame specified by the Plaintiff and in accordance with Clause 23 of the Agreement. The Plaintiff states that only after the commencement of the suit, 5th July 2021 the Defendant sent a letter purporting to nominate an adjudicator. It is Plaintiff's submissions that the sequence of events clearly establish that at the time when proceedings were commenced, i.e. when the suit was commenced, the Defendant was not ready and willing to do all things necessary to the proper conduct of the arbitration. Plaintiff submits that "*the feeble and tardy attempt to appoint an adjudicator*" was aimed to delay and frustrate the Plaintiff in seeking payment of damages from Defendant.

[14] Plaintiff further submits that the affidavit of Mr Pieter Schalk Van Staden is bad in law as it has been sworn in South Africa before one Willem Munro Luttig, "*in his purported capacity as a Commissioner of Oath and Notary Public*" and the affidavit has not been apostilled. The Plaintiff submits that since the affidavit is defective, the application to request the Court to decline jurisdiction is not supported by any affidavit, is therefore not in accordance with *Beitsma v Dingjam* procedure and should be dismissed. The Plaintiff

relies on judgment of the Court of Appeal in Onezime v Attorney General & Anor (SCA CL 03/2021) [2022] SCCA 20 (Arising in CP 01/2021) (29 April 2022).

[15] The Plaintiff further submits at paragraph 4 of the written submissions that the Defendant is estopped by its conduct, namely by being not ready and willing to submit to arbitration, from requesting the Court to decline jurisdiction. In the alternative, the Plaintiff raises equitable principle of waiver, stating that the Defendant has waived its right to request the court to decline jurisdiction. Plaintiff submitted extracts from Halsbury's Law of England to support its submission regarding estoppel and waiver (Exhibits A4 and A5).

[16] The Plaintiff therefore asks the court to dismiss the Defendant's application and proceed to hear the matter.

Analysis

[17] As it appears from the Plaintiff's submissions, the Plaintiff does not dispute the validity of arbitration clause and therefore the main issue for determination, is whether the Defendant has shown to the Court that they were ready and willing to submit to dispute resolution and whether they have proven to the Court that they have acted in accordance with procedure laid out in Beitsma v Dingjam No. 1 (1974) SLR 292 and confirmed in Emerald Cove Ltd v Intour SRL (2000-2001) SCAR 83 and Wartsila NSD Finland OY v United Concrete Products (2004-2005) SCAR.

Ready and willing to submit to dispute resolution

[18] It was held in *Beitsma v Dingjam* that, "*the party who asks the court for an order to stay 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....*".

[19] Therefore a party must satisfy the Court that it was ready and willing at the commencement of the proceedings to submit to dispute resolution,

[20] When one considers the correspondence between the parties provided as exhibits, it is clear that the Defendant has expressed willingness to appoint an adjudicator in the letter

dated 23 July 2021. The willingness is expressed after around one year and six month period from 15 January 2020 the time limit specified by the Plaintiff by which, if no response was received, the Plaintiff intended to institute proceedings. The reply was sent after the filing of the plaint in the Supreme Court (12 of July 2021) which was also done close to a period of one year six months after the aforementioned deadline date 15 January 2020. It should be borne in mind that the Plaintiff too had waited almost for a period of one year six months to file the plaint in the Supreme Court. While it appears to this court that the Defendant has been galvanised into action by the filing of the plaint, at the same time, it appears that the Plaintiff too has been over indulging in awaiting for a period of almost one year six months to file plaint after his initial letter of 20th September 2019 and email of 13 December 2019 (which gave a deadline of 15 January 2020) regarding the request to refer the dispute to adjudication.

- [21] From the above it is apparent that the Plaintiff too delayed the filing of proceedings and despite notice of deadlines being given to the Defendant on the 20th September 2019 and 13th of December 2019 which deadline ended on the 15th of January 2020, the Plaintiff filed the plaint only on the 12th of July 2021. It is my considered view that the Defendant cannot be faulted for taking advantage of the delay and expressing his readiness and willingness to submit to dispute resolution soon thereafter on the 23rd of July 2021. The Plaintiff could have filed the plaint in January 2020 but chose to wait till the 12th of July 2021. It appears therefore laches cannot be attributed to the Defendant as he is permitted by case law *Beitsma* the opportunity to express his readiness and willingness to submit to dispute resolution by affidavit after the commencement of proceedings which he has done promptly, on the 23rd of July 2021 by letter.
- [22] In the light of the aforementioned circumstances it is not necessary to consider the other objections taken by the Plaintiff namely waiver and estoppel which have no effect considering the delay in filing proceedings was on the part of the Plaintiff and as the Defendant is provided an opportunity to express his willingness to submit to dispute resolution even at that juncture.

- [23] The other factors to be considered by Court in terms of Article 113 (1) of the Commercial Code of Seychelles is whether a valid arbitration agreement exists which has not been terminated. Both parties are in agreement of the fact that an arbitration agreement does exist is valid and has not been terminated.
- [24] With regard to the affidavit, the Plaintiff relies on the decision of the Court of Appeal in *Onezime v AG & Government of Seychelles* (SCA CL 3 of 2021) [2022] SCCA 20 (29 April 2022). The judgment concerned the appeal against the decision of the Constitutional Court dismissing constitutional petition on the ground that the affidavit, in support of constitutional petition, was defective and inadmissible as it had no apostille. The affidavit in *Onezime* was sworn before Kenyan Notary with “*red seal sticker and blue stamp with words “Were G. T. Sirioyi, Commissioner for Oaths/ Notary Public”*”. The Seychelles Court of Appeal upheld the decision of the Constitutional Court.
- [25] In this instant case the court is not dealing with a new application as in the *Onezime* case which required by law a petition and a supporting affidavit to be filed for Court to take cognisance of the case. This case has been commenced by plaint and in reply a preliminary objection has been taken by the Defendant and written submissions filed that do not warrant an affidavit in support. 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. I observe the affidavit does not contain an apostille. Yes, I agree with learned Counsel it is defective but the defect is curable. I grant the defendant three weeks to cure the said defect.
- [26] The proceedings in this case are stayed until the said date.

Signed, dated and delivered at Ile du Port on 23 September 2022

Burhan J