IN THE COURT OF APPEAL OF SEYCHELLES

F. B. CHOPPY (PTY)LTD APPELLANT

And

NSJ CONSTRUCTION (PTY) LTD RESPONDENT

SCA06/2011

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Counsel: Mr B. Hoareau & Mr. P. Pardiwalla for the Appellant
Mr F. Bonte for the Respondent

JUDGMENT

MSOFFE. J.A,

The controversy in this matter involves a building contract entered into by the parties on 11th April 2008. The implementation of the agreement encountered problems. On 1st March 2010 in Civil Side No 27 of 2010 the Supreme Court of Seychelles (Egonda Ntende, C.J.) ordered thus:-

> *Court: I will make the following orders which I take it that are by consent of Counsel and their clients of course. One, the parties have agreed to appoint Mr. Jacques Renaud to be an independent expert as a quantity surveyor to immediately, or as soon as possible, enter the site and value the works to date. The parties have also agreed that they will appoint Doctor Shelton Jolicoeur as the Arbitrator in this matter to hear evidence and deliver a final ruling resolving all issues between the parties. The parties*

have agreed that the ruling of the arbitrator will be final and binding on all the parties.

(Emphasis supplied.)

It is worthwhile observing here that the agreement had no arbitration clause. Nevertheless, the Court did not err in ordering arbitration because under Section 205 of the Civil Procedure Code (hereinafter the Code) it, can *suo motu* direct that parties go to arbitration. On 21st September 2010 the arbitrator made an award "in full settlement and satisfaction of all claims and counter claims submitted to this arbitration." In a letter written by the arbitrator on 21st September 2010 the award was filed in Court. It is not clear from the record whether once filed, the Registrar gave notice to the parties and whether any objection was filed within ten days from the date of the notice in terms of Section 206 of the Code. However, at the hearing of this appeal learned counsel for both parties informed the Court that notice was actually given in line with the provisions of the above section. Nonetheless, although the parties had agreed that the award would be final and binding, on 5th November 2010 the Appellant, then Plaintiff, filed a notice of motion seeking to set aside or modify the award. On 4th March 2011 the Court dismissed the objections to the award and accordingly entered judgment in terms of the award, hence this appeal.

The learned Chief Justice properly directed himself on the provisions of Section 207 of the Code on the grounds upon which an arbitrator's award may be set aside or modified. However, of particular interest for

purposes of part of this judgment will be his observations and decision appearing at pages 170 and 176, respectively, in his Ruling thus:-

> *3. The motion was supported by an affidavit sworn by Mr. Benjamin Choppy. The affidavit mentions 4 documents it purports to exhibit as A1, A2, A3 and A4, but none of those documents were actually annexed to the affidavit filed in the Court. These documents are the award, the affidavit of B. Choppy and Neil Mederick and Report of Quantity Surveyor, Mr Jacques Renaud. At the time of writing this decision I am unable to find these documents on the court record save for the award which was filed by the arbitrator.*
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> 22. *As noted earlier the attachments A2 and A3 were actually not attached to the affidavit of the Applicant as claimed in the affidavit itself. I have not had the opportunity to review the same. It is the duty of the Applicant to file full papers including all attachments and annextures. Where it fails to do so, as in this case, it fails in putting its case forward. The burden is upon a party who desires to establish certain facts to do so. <u>I am unable on reading paragraphs 8(iii) of the Applicant's affidavit to find the error in the figures mentioned in the award.</u>*
>
> (Emphasis supplied.)

In the affidavit in support of the motion for setting aside or modifying the award and in the attempt at showing obvious errors on the part of the arbitrator, Mr Benjamin Choppy had averred under paragraph 8(iii) thereto as follows:-

(iii) *Dr. Jolicoeur state that he has assessed the evaluated contract price to be SR7,099,646.68 as set out in the report of the Quantity Surveyor, without accessing the said amount himself. The amount of SR.1,260,416.68 which the Quantity Surveyor set as being the "adjustment due to rupee inflation" is clearly wrong. This should read SR.1,056,000, as clearly explained in exhibit PZA attached to the affidavit of Neil Federick. Furthermore the sum of SR.339,230,00 set out as "adjustment agreed" is also wrong, as it should read SR.270,480.00*

Hence the revised total contract sum should not be SR7,099,646.68 but should be SR.6,895,229.00. It is now shown to me produced, and exhibited herewith as A4 a copy of the Quantity Surveyor Jacques Renaud.

Under Section 207 of the Code 'an award may be modified" if, *inter alia*, it "contains some obvious error". The averment by Mr. Choppy under paragraph 8(iii) above was an attempt at showing that there were "some obvious errors" in the computation of the amount to be paid. In other words, Mr. Choppy was averring that there was a mathematical error in the computation of the figures in the award. In this respect, the documents

mentioned under paragraph 8(iii) were, and still are, important in determining whether or not there was an obvious error in computing the amount to be paid. Admittedly, the learned Chief Justice said that among the documents, he had only seen a copy of the award . With respect, without the other documents it is difficult to sustain his finding that "I am unable on reading paragraph 8(iii) of the Applicant's affidavit to find the error in the figures mentioned in the award".

Without prejudice to the foregoing, this appeal is compounded by another serious shortcoming. This is borne out by the complaint in the fourth ground of appeal which reads:-

(4) *The learned trial judge erred in law in holding that the arbitrator was correct in ordering the Appellant to effect payments to the Respondent, on the basis that there was a counter-claim before the arbitrator since as per the provision of section 205 of the Seychelles Code of Civil Procedure, it was the suit which was before the Supreme Court that had been referred to the Arbitrator and the suit comprised only a plaint filed by the Appellant and a defence filed by the Respondent.*

(Emphasis supplied.)

At the hearing of the appeal Mr. Pesi Pardiwalla learned counsel argued the above point on behalf of the Appellant. Very briefly, his contention was that only Civil Side No.27/2010 was sent to arbitration. Civil Side No.29/2010, which we are made to understand was a counter

claim, was never sent for arbitration. In view of this, Mr. Pardiwalla urged that the learned Chief Justice was in error in holding that it was also referred to the arbitrator.

In order to appreciate the above point, it is instructive to revisit part of the proceedings before us. The order for arbitration given by the learned Chief Justice on 1st March 2010 was in respect of Civil Side No.27 of 2010. The first time Civil Side No.29 of 2010 came into light was on 2nd March 2010 before the Master. The proceedings of that day tell it all as follows:-

Civil Side No. 29 of 2010
Mr Bonte for the Plaintiff
Mr Lucas for the Respondent

Court to Mr Lucas

Is the matter going to be defended?

Mr Lucas

Master there is another matter before the same parties that is before the Chief Justice. It is case No.27 of 2010 which was before the Court yesterday morning. May this matter be consolidated with the other one before the Chief Justice. But for today's sake I have filed a defence.

Court Which date has been given.

Mr Lucas

Unfortunately the matter has been stayed by the Chief Justice because we shall be referring both cases to an arbitrator. This process is being done now.

Court

So even for this case it will be before the Arbitrator?

Mr Lucas

Yes Master.

Court

So I do not give you a date?

Mr Lucas

No Master.

Court

The two cases, that is Case No. 29 of 2010 and Case No.27 of 2010 are consolidated together. And both cases will be taken before the Chief Justice.

MR VIDOT SECRETARTY

MASTER

On 30th April 2010 in a notice of motion for, *inter alia,* a stay of execution of the arbitrator's award learned D. Karunakaran, Acting Chief Justice, ordered the case to be mentioned before the Chief Justice on 10th January 2011. On 10th January 2011 and on subsequent dates the learned Chief Justice dealt with the application for setting aside the arbitrator's award. Throughout all this time there was no mention of Civil Side No. 29

of 2010. In other words, up to that stage of the proceedings the order by the Master dated 2nd March 2010 that both cases (Civil Side No.29 of 2010 and Civil Side No. 27 of 2010) be taken to the Chief Justice had not been complied with. Yet in his Ruling dated 4th March 2011 (which is the subject of this appeal) the learned Chief Justice stated under paragraph 18 thereto as follows:-

> *18. The last ground against the award is on the basis of obvious errors on the part of the arbitrator. This complaint is contained in paragraph 8 of the affidavit of the Applicant. Paragraph 8(1) claims that the order of the arbitrator for the applicant to pay immediately all sums due including for extra works as being contrary to the Respondent's letter on the subject which stated that payments for extra works. I see no error here. There was a claim and a counter claim by the parties before the arbitrator. This must be part of the Respondent's claim against the applicant. It would only be an error if the Respondent had not claimed it and it was awarded.*
>
> *(Emphasis added.)*

With respect, the above finding is not correct for the simple reason that it is not supported by the record before us. The record shows that Civil Side No. 29 of 2010 subject of the counter claim was never sent to the arbitrator. Apparently the same mistake was repeated in the Ruling dated 27th June 2011 concerning the application for stay of execution where under paragraphs 1, 4 and 13 thereof it is stated that Civil Side No. 27 of

2010 and Civil Side No 29 of 2010 were consolidated and sent to the arbitrator.

For the above reasons, we are constrained to visit, or rather interfere with, the conduct of Civil Side No. 27 of 2010 and Civil Side No 29 of 2010 now pending before the Supreme Court. In the interests of justice, we hereby vacate all orders made by the Supreme Court in Civil Side No. 27 of 2010 and Civil Side No 29 of 2010. There will be a fresh trial before a different judge in which Civil Side No. 27 of 2010 and Civil Side No.29 of 2010 will be consolidated and heard together.

The appeal is allowed. Since the court was partly to blame there will be no order as costs.

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J.H. MSOFFE
JUSTICE OF APPEAL

I concur:

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A. FERNANDO
JUSTICE OF APPEAL

I concur:

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M. TWOMEY
JUSTICE OF APPEAL

Dated this 31st August 20120, Victoria, Seychelles