

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** F. MacGregor (PCA), S. Domah (J.A), M. Twomey (J.A).

## Civil Appeal SCA 31/2014

(Appeal from Supreme Court Decision 17/2013)

---

Intelvision Network Limited	1st Appellant
Intelvision Limited	2nd Appellant

Versus

Multichoice Africa Limited	Respondent
----------------------------	------------

---

Heard: 21 August 2015

Counsel: Laura Valabhji for 1st Appellant and Kieran Shah (SC) for 2<sup>nd</sup> Appellant  
Leon Kuschke (SC) and Bernard Georges for Respondent

Delivered: 28 August 2015

### JUDGMENT

M. Twomey (J.A)

- [1]** When is an exclusive jurisdiction clause in an agreement not an exclusive jurisdiction clause? Essentially this is the main issue raised in this appeal. The facts of this case are the following: The first Appellant and the Respondent entered into an agreement on 16 April 2004 whereby the 1<sup>st</sup> Appellant was appointed on a non-exclusive basis to conduct the Digital Satellite Television business of the Respondent and to pay the Respondent an amount ranging from USD 5.00 to 35.00 per month per equated subscriber of the service. In order to enable the 1<sup>st</sup> Appellant to carry out the activities as agreed, equipment was supplied to it by the Respondent. The 2<sup>nd</sup> Appellant was not a party to this agreement but is a subsidiary of the 1st Appellant and effects its business operations in Seychelles.
- [2]** The agreement was terminated on 30 June 2007 and it is averred by the Respondent in the plaint it subsequently filed in the Supreme Court, that the equipment it had supplied to the 1<sup>st</sup>

Appellant was not returned and in breach of the agreement the Appellants continued to downlink the signals of channels for which the Respondent had the sole right to distribute in Seychelles and also failed to make payment in respect of subscribers to the service.

- [3] The Appellants in their pleadings raised a plea *in limine litis*, namely, that clause 28 of the agreement signed by the parties compelled them to an interpretation and implementation of the agreement in accordance with the law of South Africa. They further submitted that disputes or claims arising from the agreement had to be made before the agreed forum, that is, the High Court of Witwatersrand, South Africa. They therefore prayed the Seychelles court to decline jurisdiction.
- [4] Robinson J in an order made on 21 August 2014, relying on the uncontradicted expert evidence of Mr. John Newdigate SC, advocate of the High Court of South Africa, and both the fact that the Appellants had pleaded to the merits of the action by the Respondent and had not applied for a stay of proceedings, found that the Appellants had “unequivocally and irrevocably submitted to the jurisdiction of [the] court.” She found that the Supreme Court of Seychelles had jurisdiction to hear the case.
- [5] She also found that under the *stipulation alteri* doctrine in South African contract law, the 2<sup>nd</sup> defendant could not become a party to the agreement between the 1<sup>st</sup> Appellant and the Respondent. It was not resident in South Africa, had no assets there and had not submitted to the jurisdiction of the South African court and could therefore not be joined to any suit there. The cause of action was therefore more amenable to the jurisdiction of Seychelles than South Africa.
- [6] She further found, relying on the case of *Nedfin Bank Ltd v Halberstadt* [1986] SLR 151, that as the proper law of contract in this case was South African law, and since that law as determined conclusively by the expert witness interpreted clause 28 as not being an exclusive jurisdiction clause, the jurisdiction of the court of Seychelles was not excluded.
- [7] She also accepted the proposition of the expert witness that the South African case of *Foize Africa (Pty) Ltd v Foize Beheer BV and ors* 2013 (3) SA 91 determined that parties cannot exclude the jurisdiction of a court by their own agreement. She further found the guidelines

as stated in *Spiliada Maritime Corporation v Consulex Limited* [1987] AC 460 were applicable in this case. She concluded that since the Respondent had chosen to engage the jurisdiction of the Seychelles court, in order for a stay of proceeding to be granted, the Appellants would have to show that not only was Seychelles not the natural or appropriate forum but that another available forum was clearly or distinctly more appropriate than that of Seychelles.

**[8]** This, she stated, the Appellants had failed to do in this case. In the circumstances she refused to order a stay of proceedings and dismissed the plea in *limine litis*.

**[9]** It is an appeal from this order that is now before us. The Appellants have filed four grounds of appeal as follows:

1. The learned judge erred when applying the doctrine of *forum non conveniens*. The learned judge failed to properly consider the factors which are specific to the case in hand raised by the Appellants (then defendants) which would have pointed to South Africa as a more convenient forum. The failure to properly appreciate those factors prevented the burden from shifting to the plaintiff to show special circumstances as to why the matter should nevertheless be heard in Seychelles.

2. The learned judge erred in her application of South African law when considering the issue of jurisdiction namely when determining whether clause 28 of the representation agreement was an exclusive jurisdiction clause or not. When applying the law of South Africa, the learned judge failed to appreciate that under South African law, the *lex fori* is used to determine the matter of whether a jurisdiction clause is exclusive or not.

3. The learned judge in ruling that if a challenge to jurisdiction is not pleaded from the outset means a party has waived an opportunity to challenge jurisdiction. She erroneously referred to the Supreme Court Rules enforced at the time and the Civil Procedure Rules in the White Book for England and Wales presently, which is dissimilar to the rules of the Seychelles Code of Civil Procedure. It is the practice in Seychelles that a statement of defence must cover the defence on the merits even if a plea in *limine litis* is taken.

4. The learned judge was in error in not holding that when the parties freely negotiated a contract providing for an exclusive or non-exclusive jurisdiction the parties must be held to their bargain and the court should decline jurisdiction.

[10] For the purposes of this appeal we treat the grounds as one. As we have already pointed out the only issue to be decided by this court is whether the agreement between the parties contained an exclusive jurisdiction clause. It seems to us that the steps necessary in resolving the issues raised on this appeal are the following: what is the proper law of contract in this case – domestic law or South African law, does the agreement between the parties contain an exclusive jurisdiction clause and if not what is the proper forum for this action.

### ***The proper law of contract***

[11] Clause 28 of the agreement states:

“This agreement shall be interpreted and implemented in accordance with the law of the RSA. The parties to this agreement irrevocably consent and submit to the jurisdiction of the Witwatersrand Local Division of the High Court of South Africa in respect of any dispute or claim arising out of or in connection with this agreement.”

[12] There are clearly two limbs to this clause, the first of which refers to the *proper law* (applicable law) of the contract and the second of which refers to the *forum* to which disputes in relation to the contract must be referred. In terms of the *proper law* of contract, the Appellants have argued that it is the law of Seychelles that should determine the *proper law* in this case.

[13] The doctrine of *proper law* can be explained as follows: the essential validity of a contract is governed by its proper law, in other words, the legal system by which the parties intended their agreement to be governed or where their intention is not stated, the legal system with which the agreement has its closest and most real connection to. Hence, if the contract states clearly that one or either of two conflicting systems is to prevail, this will be *prima facie* evidence that the law mentioned is to govern the contract.

[14] In terms of procedural rules to be followed in private international law when determining the proper law of contract, Seychellois jurisprudence until the enactment of the Seychelles Civil Code had reiterated that French rules applied (*Rose v Mondon* (1964) SLR 134, *Morgan v Morgan* (1972) SLR 79, *Pillay v Pillay* (1973) SLR 307 and *Pillay v Pillay* (1978) SLR 217). That was because at the material time it was the French *Code Civil* which was in force.

[15] *Rose* decided that the judgment of the Court of Appeal of Seychelles in *Augustin v Bailey* (1962) MR 115 had conclusively laid down the rules of private international law to be followed in Seychelles. In *Augustin*, the Court of Appeal of Seychelles in Mauritius stated:

“Since the rules of private international law in any country must necessarily have their foundations in the internal laws of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. These laws are basically and almost entirely French so that, subject to any exceptions which may arise through litigation we must be guided by the French Rules of private international laws.”

[16] In 1975, we enacted our own Civil Code and although it is substantially based on the *Code Civil* of France, logically it is our Code and the Seychellois jurisprudence emanating from it that must now guide us on the question of private international law. In this sense the Appellants are correct to say that it is Seychellois law that should apply when deciding on the proper law of the contract in this case.

[17] But what are the principles of Seychellois law relating to contracts that can be distilled from our laws and our jurisprudence and which are applicable in this case? We are of the view that the following articles of the Civil Code of Seychelles are applicable in the circumstances:

“Article 1134: Agreements lawfully concluded shall have the force of law for those who have entered into them.

They shall not be revoked except by mutual consent or for causes which the law authorises.

They shall be performed in good faith.

Article 1135: Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.”

- [18] These provisions in our law attest to the autonomy of free will and the obligatory nature of the agreement. The parties in the present agreement have given unto themselves the law that should be applied in the event of breaches to it. This agreement remains binding unless both parties mutually revoke it. That being the case the courts of Seychelles have to give effect to the agreement of the parties, that is, as expressed and agreed in clause 28 of the agreement.
- [19] The corollary of our finding is that the law that must be applied insofar as the interpretation of clause 28 of the agreement is concerned must be South African law.

***Exclusive jurisdiction clauses.***

- [20] Before we go on to consider South African law on this issue, we are of the view that a pronouncement of this court is necessary on the proof of foreign law in Seychelles. Both *Pillay v Pillay* (1973) SLR 307 and *Beitsma v Dingjan* (No 1) (1974) SLR 292 confirm that foreign law must be proved. In *La Serenissima v Boldrini* (2000-20011) SCAR 226 Ayoola P stated:

“[T]he established principle of the law of Seychelles [is] that foreign law must be pleaded and proved by evidence and that unless there is proof to the contrary, foreign law is to be presumed to be the same as the law of the country concerned (see *Green v Green* (1973) SLR 300 and *Privatbanken Aktieselskab v Bantele* (1978) SLR 226 at p 239. The principles which guide courts in this jurisdiction, in this regard, are the same as in England, a clear statement of which is contained in Halsbury’s Laws of England (4th ed, vol 8(1)) para 1093, thus –

*“Subject to certain exceptions, foreign law is a question of fact which must be especially pleaded by the party relying upon it, and must be proved to the court. The English court cannot generally take judicial notice of foreign law, and it presumes that this is the same as English law unless the contrary is proved. Thus, the onus of proof of foreign law lies on the party relying on it. [Emphasis added]”* [19]

[21] We are of the same view. Mr. Newdigate SC was called by the Respondent as an expert on South African law as it was relying on South African law to interpret clause 28 of the agreement. His evidence remains uncontroverted. The Respondents called no evidence and did not introduce any proof of South African law contrary to what Mr. Newdigate presented to the court. In the circumstances, Robinson J, rightly so in our opinion admitted Senior Counsel’s evidence as uncontroverted expert evidence.

[22] The second limb of clause 28 has perhaps exercised the parties and the court the most in this case. It is a choice of court or jurisdiction provision. We reproduce it again:

“The parties to this agreement *irrevocably consent and submit* to the jurisdiction of the Witwatersrand Local Division of the High Court of South Africa in respect of any dispute or claim arising out of or in connection with this agreement.” (emphasis added)

[23] It is true that a simple reading of the provisions above convey the message that this indeed is an exclusive jurisdiction clause. It could not be clearer. There is no use of the word *may*. The word *shall* could be substituted for the phrase “irrevocably consent and submit.” But lawyers know the dangers of reading a contract in a vacuum. A contract must be read as whole. Our own law, in particular, Article 1161 stipulates that:

“All the terms of the contract shall be used to interpret one another by giving to each the meaning which derives from the whole.”

[24] This seems to be a universal contractual principle. Mr. Newdigate SC stated that the principles in South African contract law is no different on this point – clause 28 cannot be read in isolation but must be read according to the meaning of the words in their context and together with the rest of the contract. In this respect clause 1.6 of the agreement is relevant. It states:

“The use in this agreement of any expression covering a process available under South African law shall, if any of the parties hereto is subject to the law of any other

jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such jurisdiction.”

[25] The effect of this provision, as has been pointed out by the expert, Mr. Newdigate SC and as submitted by Mr. Kuschke SC, is not to exclude the parties from being subject to the law of another jurisdiction. The sum total of the two provisions read together is that clause 28 does not involve exclusive jurisdiction. All it does is to give the parties the option of more than one jurisdiction to sue for breach of the contract in appropriate circumstances. Put a different way, the parties have not by their agreement excluded the jurisdiction of the courts of Seychelles.

[26] The expert went on to state that in any case under South African law, a clause such as clause 28 does not exclude a court’s jurisdiction. In this respect he referred inter alia to the cases of Foize, Butler v Banimar Shipping Co. SA 1978 (4)SA753, Yorigami Maritime Construction Co. Limited v Nissho-Iwai Co. Limited 1977 (4) SA 683. Even if the clause were to be interpreted as providing for exclusive jurisdiction, a South African court, would according to Mr. Newdigate:

“apply it on the basis that it does not exclude the court’s jurisdiction, but that the court has a discretion, to be exercised on the basis of all relevant facts and circumstances, as to whether it should refuse to exercise its discretion on the basis of such clause”

(See John Newdigate, SC, ‘Opinion’, 23 April, Cape Town 2014)

[27] The present case is on all fours with the *Nedfin Bank v Halberstadt* (1986) SLR 151 case in which de Silva J stated:

“Whether or not this clause is an exclusive foreign jurisdiction clause has to be decided according to the proper law of contract, which in this case is the South African law, and the burden of proving that the clause was an exclusive jurisdiction clause would be on the party relying on it, who in this case is the defendant.”

Likewise, in the case before us, the onus of proving that the clause was an exclusive jurisdiction clause was on the Appellants, the defendants in the case below.



- [28] As we have pointed out the Respondents did not call any expert to contradict Mr. Newdigate SC. Mr. Shah SC for the 2<sup>nd</sup> Respondent , however, both in the court below and in this appeal relies on the canon of interpretation of *expression uni usest exclusion alterius* (the expression of one subject, object, or idea is the exclusion of other subjects, objects, or ideas) to maintain that the express terms in clause 28 ousts the jurisdiction of Seychelles. In his submission if the contract had intended to include the jurisdiction of Seychelles for the resolution of breaches of the agreement it would have so stipulated. Critics of the maxim of *expression unius* have referred to it as a *loose canon* as it is too broad, and requires the person applying it to use his/her knowledge of context and common sense.
- [29] We are of the view that the provisions of clause 28 as read with the rest of the agreement are merely illustrative, not exclusionary. The parties might well consent to the jurisdiction of South Africa but it does not mean to the exclusion of other jurisdictions. This is what Mr. Newdigate explained as the *non-transitive* nature of clause 28. As he further pointed out, clause 28 allows the parties to submit to the jurisdiction of South Africa but it does not create an obligation to do so.

### ***Forum conveniens***

- [30] In the absence of an exclusive jurisdiction clause, Robinson J rightly and carried out the *forum non conveniens test*. Such a test is normally required when a stay of proceedings is applied for by a party. This did not happen in the present case. The defendants (now Appellants) were served within the jurisdiction of Seychelles and filed a statement of defence both in law and on the merits of the case. Robinson J found that by so doing they had submitted to the jurisdiction of the court of Seychelles. The Appellants have taken issue with this finding. They submitted first, that the Civil Procedure Code of Seychelles do not have analogous rules to that of England in relation to challenging the jurisdiction of the court from the outset of proceedings, second, that a failure to ask for the stay of proceedings did not constitute a waiver to submit to the jurisdiction of the court and third, that a statement of defence on the merits does not amount to submission to the jurisdiction of the court in which it is filed.

[31] Sauzier J in *Beitsma* (supra) was of the same view as Robinson J when he stated:

“This action is clearly an action *in personam* and the defendant was present within the jurisdiction of this court when it was served in person with a summons to appear to the plaintiff. This fact alone was enough to found the jurisdiction of the court...The question therefore is not whether the court has jurisdiction but whether the Court has power to decline to exercise such jurisdiction and should stay the proceedings.”

We are of the same view. It is the fact that the defendants were served within the jurisdiction of Seychelles that triggers the exercise of discretion of the judge as to whether or not to stay proceedings in this case.

[32] The exercise of such discretion is the consideration of whether Seychelles is the *forum conveniens* and involves the weighing of multiple factors including the nature of the claim, the legal and practical issues arising, availability of witnesses and their evidence and expense, see *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. It is precisely the same test as that that has evolved in the power of the court to stay actions on the grounds that the forum chosen by the plaintiff is inappropriate for trial (*forum non conveniens*).

[33] The trial judge in the present case, Robinson J, in our opinion, ably carried out the test as stated by Goff J in *Spiliada*. She stated that she did not find that the convenience of witnesses travelling from South Africa to Seychelles should weigh heavily on the exercise of her discretion as to the appropriate place for the case to be heard, nor the fact that South African law should be applied to the merits of the case in view of the availability or expert witnesses on South African law. In the event she found that the defendants (now the Appellants) had not put forward any evidence that would have been relevant to the exercise of her discretion.

[34] The Appellants have submitted that it was for the plaintiff (now the Respondent) to show that the named forum was less appropriate than Seychelles to hear the case. We are of the view that it has done so. As has been clearly demonstrated and not disputed the 2<sup>nd</sup> Appellant is not even a party to the agreement between the 1<sup>st</sup> Appellant and the Respondent. Neither of the Appellants are resident in South Africa, nor do they have assets there. The assets on which execution are sought are in the main in this jurisdiction.

[35] As an appellate court we will not interfere with the exercise of the discretion of a trial judge unless it can be demonstrated that that exercise was in clear disregard of natural justice(see Ward v James (1963)1 QB 273, 293). We are satisfied that all the fundamental rules of natural justice and fairness have been followed.

[36] In the circumstances, a discussion on whether the actions of the Appellants amount to a submission to the jurisdiction of the court of Seychelles would be purely academic and we therefore choose not to venture in the consideration of the point.

[37] This appeal is dismissed in its entirety with costs.

M. Twomey (J.A)

**I concur:.** .....

F. MacGregor (PCA)

**I concur:.** .....

S. Domah (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015