

IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , M. Twomey (J.A) , A.Fernando (J.A)]

Civil Appeal SCA 10/2014

(Appeal from Supreme Court Decision CS 30/2012)

Eastern European Engineering (Ltd)

Appellant

Versus

Vijay Construction (Pty) Ltd

Respondent

Heard: 15 April 2016

Counsel: Mr. Basil Hoareau for Appellant

Mr. Bernard Georges for Respondent

Delivered: 22 April 2016

JUDGMENT

S. Domah (J.A)

(1) The then Learned Chief Justice Egonda-Ntende dismissed an action brought by a Project Manager, the Appellant in this case, against a construction company, the Respondent, alleging fraudulent misappropriation of construction materials: i.e. an imported prefabricated house to accommodate workers involved in the project implementation. It was a FIDIC contract. Dissatisfied with the outcome, the Project Manager has appealed. The grounds of appeal are as hereunder.

- 1. The Learned trial Judge erred in law in allowing the Respondent to amend its Complaint, after both parties had closed their case.*
- 2. The Learned trial Judge erred in law and on the evidence in holding that Article 16.2 of the Contract was not applicable in circumstances of termination of the contract by the Appellant.*

3. *The Learned trial Judge erred in law and on the evidence in failing to hold that in terms of Article 16.2 of the Contract the Appellant would be the owner of the prefabricated houses erected on site.*
4. *The Learned trial Judge erred in law and on the evidence in holding that there was no obligation on the Respondent to construct the living quarters for the Respondent's worker on the site.*

- (2) It was the case of the Respondent that the ownership in the prefabricated structure did not pass on to the Appellant. The construction company had used it to discharge its obligation under the contract. He had to provide accommodation to its workers. However, after the Appellant had taken over the site by force and terminated the contract, it was under a duty to remove it under the contractual terms. It also pleaded that there are other pending issues between the parties which form the basis of a claim which has been lodged by the Respondent in another forum.
- (3) The Appellant was, as per his Complaint, the project Manager of the construction project but as per written contract he was at the same time the Employer. It was for the fixed sum contract of €20,504,063.86. It was not one for construction with materials supplied by the employer. Out of that fixed sum, a first payment of €3,000,000.00 had been made. The Appellant had averred that as per "construction practice" that sum was to be used for expenses related to preliminary works, including the provision of temporary accommodation for the workers. It was the case of the Appellant that this structure which was used to provide accommodation to the workers, upon completion of the hotel or earlier upon termination, should have devolved on to the Appellant. It was not in dispute that the Respondent imported the prefabricated goods from Singapore, cleared it through Customs. But it was never delivered on site nor returned to the Appellant after a premature termination of the contract by the Appellant. The latter's grievance is that the Respondent "fraudulently misappropriated the said prefabricated houses" in breach of contract. The Appellant assessed the prejudice caused by the breach at the sum of €34732.90 which it claimed from the Respondent.

- (4) The Respondent had also raised a plea *in limine*. This was not pursued even if it is our view that it should have been. Where there exists an arbitration clause in a contract of this nature, courts defer competence to arbitrators in principle and in practice: This rule should be encouraged in this jurisdiction: see **Wartsila NSD Finland OY v United Concrete Products SCA 16 of 2003; Mall of Mont Choisy Ltd v Pick ‘N Pay Retailers (Propriety) Ltd & Ors 2015 SCJ 10.**

Be that as it may, the case came for trial. The Appellant called evidence from Selwyn Knowles, the Assistant Commissioner of Customs, the gist of which was that the prefabricated structure imported from Singapore was bought and imported by the Respondent company in the name of the Savoy Hotel Project and benefited from a government concession under the Tourist Tax Incentive Act and enjoyed zero per cent trade tax and zero per cent GST.

- (5) Witness Denis Danny Love, one of the Managers of the Appellant company also deposed to state, *inter alia*, that an advance of 3 million had been paid to the Respondent to carry out preliminary works which included the importation of the pre-fabricated structure for the purpose of accommodating the workers on site. It was supposed to be delivered at the Beau Vallon site but it was not. He relied on the interpretation of Clause 6.6 according to which the contractor was to provide labour and facilities for those workers living and working at the site. He agreed that some workers resided outside. He also agreed that there was nothing in the contract which specifically stated that the advance payment was made to purchase temporary house for the workers. He also agreed that not all the workers were housed on site. His case is that the Respondent had bought the pre-fabricated units in the name of Savoy Project but used them elsewhere, appropriating them eventually.

- (6) For the defendant, it was the Managing Director of the defendant, Vijay Patel, who deposed to state that the prefabricated houses were used to house staff working on the project but who were operating from outside the site. The site did not allow for the accommodation of more than 70 and they had about 200 employees. He added that all

temporary facilities provided under the contract always remain the property of the contractor and are removed by him upon completion of the construction. The structure had been placed at Eden Island for the purpose. It was a FIDIC contract subject to standard interpretation applicable to FIDIC.

- (7) Witness Gavin Boner, the resident of the Management Company added that as per FIDIC interpretation and practice the provision of accommodation for workers falls under Preliminaries in a contract of construction and it is itemized as incidental costs in a BOQ as such in any contract of construction. The structure has to be removed by the contractor because it qualifies as Temporary Works under the FIDIC contract. Only the permanent work devolves on to the Employer. Accordingly, a claim for the restitution to the Employer of a prefabricated structure used in a construction project is unheard of.
- (8) The Respondent resists the appeal and submits that none of the grounds has any merit. We have gone through their skeleton arguments of Counsel on either side which they have supported in their oral submissions. Learned Counsel for the Appellant submitted on Grounds 1 and 4 together and also joined Grounds 2 and 3. Learned Counsel for the Respondent was happy to submit along that line.

GROUND 1 AND 4

- (9) Grounds 1 and 4 have to do with the issue of amendment made to one sentence in one paragraph of the plea. At the very end of the case, Learned Counsel for the Respondent moved to amend his plea by deleting two words, i.e. “on site,” in the averment part of a paragraph pleading denial. There was objection raised by the Learned Counsel for the Appellant. The Court heard the submissions of both Learned Counsel and delivered a ruling which allowed the amendment.
- (10) Learned Counsel for the Appellant repeated his submissions before us that the amendment should not have been granted. His stand was that: it was prejudicial to his case; he had come to Court to meet one case and, at the end of the hearing, he saw

himself facing another for which he was unprepared. He relied on the Mauritian case of **Maudarbaccus v. Gokool [1961] MR 154.**

- (11) Learned Counsel for the Respondent, for his part, relied on section 146 of the Seychelles Code of Civil Procedure to invoke the wide powers of amendment of the court and submitted that the amendment did not change the nature of the case which Appellant had to meet. With or without it, the case related to the ownership in the prefabricated shelter.
- (12) The law on amendment bears no repetition that the Court has wide powers of amendment and that amendments may be made at any stage of the proceedings. The Court's powers of amendment are bridled, however, by two considerations: one is that an amendment may not be brought which would alter the nature of the action; the other is that the amendment should not cause prejudice to the party against whose case it is being sought. Even then, if the prejudice can be cured by a postponement and the imposition of costs for such adjournment upon the party moving for the amendment, the amendment should be allowed.
- (13) In this particular case, the case which Learned Counsel had come to meet was whether the Respondent had "fraudulently misappropriated the said prefabricated houses." Whether the prefabricated houses were to be delivered or used on site or off site related to facts in evidence but did not change the nature of the defence case. It remained one for breach of contract on the disputed ownership of the shelter. In seeking the amendment, what Learned Counsel for the Respondent was seeking was only aligning the pleadings to the evidence adduced. Indeed, evidence had been adduced, allowed by the Appellant, outside the four corners of the pleadings as existed then. In the light of that admitted evidence, it was perfectly permissible for Learned Counsel to move for the amendment. The issue of the prejudice likely to result from the amendment was taken care of by the Learned Chief Justice. He gave an opportunity to Learned Counsel to meet the new situation. However, Learned Counsel chose not to do so. He could have moved for an adjournment to reconsider his position and adduce evidence, subject

to the costs of the day being borne by the Respondent. He chose to rest his case there for a reason best known to him.

- (14) As regards whether this amounted to an *aveu judiciaire*, the short answer is that not every amendment to a plea or pleadings becomes an *aveu judiciaire*. To be “an *aveu judiciaire*, there should be “an *aveu*,” i.e. an admission. Was there any admission to any of the averments in the plea? The answer is in the negative. More specifically, the relevant part of the plea reads: “Paragraph 9 is denied.” Paragraph 9 of the Plea has to do with the averred breach of contract by fraudulent misappropriation. Since there was a denial and the denial was maintained in the amendment, the argument of *aveu judiciaire* cannot arise.
- (15) The amendment had to do with evidence which had already been ushered in during the hearing, without objection from the Appellant, that with the increase in personnel from 70 to about 200, the site could not sustain more than 70. Accordingly, the object of the amendment was to align the pleadings with the evidence subject to the right of the Appellant to adduce evidence to meet the new pleading. Since opportunity had been given to Learned Counsel who elected not to exercise it, it can only be assumed that he was not prejudiced by the amendment. Nor can he be heard to argue that the Learned judge erred in allowing the amendment in law or on the evidence. Ground 1 has no merit and is dismissed.

GROUND 3 and 4

- (16) Under Grounds 3 and 4, it is the Appellant’s contention that the Learned judge erred in law and on the evidence: (a) in holding that Article 16.2 of the Contract was not applicable in circumstances of termination of the contract by the Appellant; (b) in failing to hold that in terms of Article 16.2 of the Contract the Appellant would be the owner of the prefabricated houses erected on site; (c) in holding that there was no obligation on the Respondent to construct the living quarters for the Respondent’s worker on the site.

(17) The issues in controversy under these grounds relate to the applicability of Articles 15.2 and 16.2 of the Contract. The Learned Chief Justice dwelled squarely on the interpretation of the terms of the relevant Articles applicable and their scope and limitations. Suffice it to say that those items of work which are to be returned to the Employer are: “contractor’s documents, plant, materials and other work for which it had received payment.” The “other work” referred to relate to the “Permanent Work” and not the temporary work. We agree with the reasoning of the Learned judge that Article 15.2 applied and not Article 16.2.

(18) We have to add that we fail to see in what way the prefabricated house which was imported by the Respondent in the name of “Savoy 9342,” could end up being the property of the Project Manager of construction project. That may well become a misappropriation by the Project Manager of the property of his principal. Grounds 2 and 3 have no merits.

All the grounds having failed, the appeal is dismissed with costs.

S. Domah (J.A)

I concur:.

M. Twomey (J.A)

I concur:.

A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 22 April 2016