COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] SCCA 75 (16 December 2022)
SCA MA 38/2022
(Arising in CS 89/2022)

In the matter between

FARISCO Construction and Maintenance (Pty) Ltd **Applicant**
(rep. by Mr Frank Elizabeth)

And

Idith Alexander **Respondent**
(rep. by Mr Joel Camille)

Neutral Citation: *FARISCO Construction and Maintenance v Alexander* (SCA MA 38/2022) [2022] SCCA 75 (Arising in CS 89/2022) (16 December 2022)
Before: Fernando, President, Robinson JA, Andre JA
Summary: Rule 5 of the Seychelles Court of Appeal Rules — Application for special leave to appeal to the Court of Appeal — Section 12 of the Courts Act — Supreme Court refused to grant leave to appeal — Court of Appeal may grant special leave — Contract and obligations — Building contract — Article 113 of the Commercial Code — Building contract requiring disputes to be adjudicated by an adjudicator — *"Revision"* of the decision of the adjudicator by an arbitrator — whether or not clause 11 amounted to an arbitration agreement — Grounds in support of an application for special leave — Defence in *limine litis* cannot stand — Application dismissed
Heard: 1 December 2022
Delivered: 16 December 2022

ORDER

Application for special leave to appeal against the Ruling of the Supreme Court is dismissed with costs in favour of the Respondent

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ORDER ON MOTION

F. Robinson JA

Background

[1] The Applicant, the Defendant in the main suit, is FARISCO Construction and Maintenance (Pty) Ltd, represented by one of its directors, Mr Ahmed Mohammed Jabber. The Respondent, the Plaintiff in the main suit, is Mrs Idith Alexander.

[2] On 7 November 2022, the Applicant filed an application for special leave to appeal against an interlocutory ruling of the Supreme Court dated 20 September 2022, hereinafter referred to as the *"Ruling"*. The Ruling dismissed the two pleas in *limine litis* raised by the Applicant in its statement of defence and granted the Respondent's provisional attachment and seizure application. Also, the Ruling ordered that the action shall be heard on the merits,

[3] The application is made under section 12 (2) (c) of the Courts Act, which stipulates that should the Supreme Court refuse to grant leave to appeal under section 12 (2) (b), the Court of Appeal may grant special leave to appeal.

[4] The Respondent filed a suit before the Supreme Court in case number CS89/2022 against the Applicant for damages for breach of a building contract entered into between them on 2 June 2021, hereinafter referred to as the *"Contract"*.

[5] This application is concerned with clause 11 of the Contract, which provides as follows —

> *"11.1 Adjudication*
>
> *Unless settled amicably, any dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any valuation or other decision of the Employer, shall be referred by either party to adjudication. The adjudicator shall be any person agreed by the Parties.*
>
> *11.2 Notice of Dissatisfaction*
>
> *If a Party is dissatisfied with the decision of the adjudicator or if no reason is given within the time set out in the Rules, the Party may give notice of dissatisfaction referring within 28 days of receipt of the decision or the expiry of the time for the decision, If no notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the parties. If notice of*

dissatisfaction is given within the specified time, the decision shall be binding on the Parties who shall give effect to it without delay unless and until the decision of the adjudicator is revised by an arbitrator."

[6] To the Respondent's claim, the Applicant filed a statement of defence, which raised two pleas in *limine litis*, which read as follows —

> *"1. The Supreme Court has no jurisdiction to grant the Order sought as clause 11 of the contract dated 2 June 2021 requires the parties to resort to Adjudication in the event of any dispute arising out of or in connection with the contract.*
>
> *2. Clause 11 constitutes an ouster clause in law which ousts the Supreme Court's jurisdiction to adjudicate the matter without the parties having recourse to Adjudication first."*

[7] The Applicant reserved its defence on the merits pending the Supreme Court's determination concerning the issue of its jurisdiction.

[8] The contention raised by the pleas in *limine litis* was that the dispute was subject to an arbitration agreement; hence, the Supreme Court has no jurisdiction to decide it under Article 113 (1) of the Commercial Code. In line with its contention, the Applicant urged the learned trial Judge to interpret clause 11 of the Contract to mean that the parties have chosen to resolve their dispute by arbitration.

[9] After filing the plaint, the Respondent applied for interim measures in the form of an application for provisional seizure and attachment. The Applicant's response to the provisional seizure and attachment application contained only the two pleas in *limine litis* raised in the statement of defence.

[10] In the Ruling dismissing the pleas in *limine litis*, the learned trial Judge did not decline jurisdiction to entertain the application on the basis that, *"*[40] […] *the contract under which the disputes between the parties arose, contains an adjudication clause and in that circumstances, Article 113 (1) of the Commercial Code cannot be applied."* Hence, as mentioned above, the learned trial Judge dismissed the two pleas in *limine litis*. In the Ruling, the learned trial Judge granted the order for provisional seizure and attachment pending the final determination of the main suit or pending further order of the Supreme Court.

[11] The Applicant sought leave from the learned trial Judge to appeal against the Ruling under section 12 (2) (b) of the Courts Act, which application was refused.

Consideration of the contentions of the parties

[12] In the case of *EME Management Services Ltd v Islands Development Co Ltd (2008-2009) SCAR 183*, this Court determined that before granting special leave to appeal, it has to be satisfied that the interlocutory judgment disposed so substantially of all the matters in issue as to leave only ancillary matters for determination. Also, this Court determined that it must be satisfied that there were grounds to treat the case as exceptional. To treat a case as exceptional, this Court held that an applicant had to show that the interlocutory order was manifestly wrong and irreparable loss would be caused to it if the case proper were to proceed without the interlocutory order being corrected.

[13] In the case of *Gangadoo v Cable and Wireless (2013) SLR 317,* this Court stated the following on the issue of special leave —

> *"[13] This Court stated in the cases of Seychelles Hindu Kovil Sangam v Pillay SCA 17/2009 and Islands Development Company v EME Management Services SCA 31/2009, that the words "special leave" have been used with a purpose, namely in this situation the Court of Appeal is being called upon to exercise its jurisdiction in a matter where no appeal lies as of right but also interferes with the exercise of discretion by the Supreme Court in refusing to grant leave to appeal… "special leave" should therefore be granted only where there are exceptional reasons for doing so, or in view of reasons which may not have been in the knowledge of the applicant at the time leave to appeal was sought from the Supreme Court or for reasons that supervened after the refusal to grant leave by the Supreme Court. The reasons before the Court should be such that the non-granting of "special leave" by this Court is likely to offend the principle of fair hearing enunciated in the Constitution. In this regard it is to be noted that an appeal against an interlocutory judgment or order has a tendency to delay the main action and contravene the rights of a person to a fair hearing within a reasonable time as stipulated by art 19(7) of the Constitution."*

[14] **Gangadoo** [supra] quoted with approval the decision of the Court of Civil Appeal of the Supreme Court of Mauritius in the case of *Pillay v Pillay (1970) SLR 79*, in which the Mauritian Court held —

> *"The interlocutory judgment in this case does not put an end to the litigation between the parties, or at all events does not dispose so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision. Moreover the applicant will be entitled as of right to question the decision in the interlocutory judgment if and when he exercises his right to appeal from the final judgment. An appeal at this stage would entail unnecessary delay and expense … ".*

[15] In the case of *St Ange v Choppy MCA18/1970,* which has been quoted with approval in **Gangadoo**, the Mauritius Court of Civil Appeal considered how its discretionary powers should be exercised in the case of an application for leave to appeal from an interlocutory judgment. The Mauritius Court stated that it must be satisfied that *(a)* the interlocutory judgment disposes so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision, and *(b)* there are grounds for treating the case as an exceptional one and granting leave to bring it under review.

[16] In the case of *Fregate Island Private Limited and DF Project Properties Civil Appeal SCAMA4/2016* (delivered on the 21 April 2017), this Court adopted the same thinking as in this Court's decisions cited above.

[17] Essentially, the Applicant has set out the following grounds in its affidavit in support of its motion for special leave to appeal against the Ruling —

(1) the learned trial Judge erred in law on the issue of its jurisdiction to entertain the dispute under Article 113 (1) of the Commercial Code;

(2) the intended appeal raises serious and important questions of law concerning the issue of the jurisdiction of the Supreme Court under Article 113 (1) of the Commercial Code, and a decision of the Court of Appeal would be in the public advantage and interest;

(3) there are exceptional reasons why special leave should be granted. In this respect, the affidavit evidence of the Applicant averred that the Ruling of the learned trial Judge on the issue of its jurisdiction to entertain the dispute and to grant the order for provisional attachment and seizure is manifestly wrong, and irreparable loss

would be caused to it if the case proper were to proceed without the Ruling being corrected;

(4) the Ruling disposed so substantially of all the matters in issue as to leave only ancillary matters for determination.

[18] The Applicant also complained that the Ruling of the learned trial Judge contravened its right to a fair hearing under the Constitution, given the failure of the learned trial Judge to allow the Applicant to file its reply and be heard on the Respondent's application for provisional seizure and attachment.

[19] In her affidavit evidence, the Respondent denied the Applicant's claims and claimed that it had not satisfied the criteria for special leave. In support of her position, the Respondent averred *inter alia* that the Applicant had not substantiated its claims.

[20] To avoid unnecessary repetition, I will reproduce the parties' submissions at the point where I will resolve the issues raised by the application.

[21] Article 113 of the Commercial Code stipulates —

> *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.*

[22] In the light of the legal principles enunciated above, it is clear that for this Court to exercise its discretion to grant special leave, the Applicant's affidavit evidence must show that there are grounds for treating the instant case as an exceptional one. The Applicant's position in the Supreme Court was that the Contract contained an arbitration agreement — clause 11.1 and 11.2 read together.

[23] The Applicant argued that special leave should be granted because the appeal raised a question of public importance as to whether or not the Supreme Court has jurisdiction to

decide the instant case. Also, he submitted that regard must be had to the severe consequences of the interim measures. He asked this Court to determine the question to the advantage and interest of the public.

[24] I consider the submission of Counsel for the Applicant concerning that part of the Ruling dealing with the application for interim measures. It is unclear why the Applicant suggested that the learned trial Judge did not allow him to reply to the said application. We note that the Applicant filed a response introducing only the two pleas in *limine litis*.

[25] I now consider the issue raised with respect to the disputed clause 11 of the Contract. In the Ruling dismissing the pleas in *limine litis*, the learned trial Judge stated —

> *"[42] It would take a mountain of a struggle for anyone to persuade this Court into believing that sub clause 11.1 and 11.2 point to an arbitration clause in the contract.* ***In fact, the word "adjudication" at clause 11 of the contract speaks for itself, indicating that for all intent and purposes, the parties to the contract did opt for adjudication instead of arbitration to resolve any occurring disputes between them. Therefore, on the basis that the contract does not contain an arbitration clause, which follows that the provisions of Article 113 (1) of the Commercial Code cannot be relied upon to request this Court to decline jurisdiction,*** *that alone, renders the plea in limine litis raised by Counsel for the respondent/plaintiff unsustainable, devoid of any merit and worthy of dismissal. The plea in limine litis is therefore dismissed."* Emphasis supplied

[26] I note that the disputed clause 11 provided that an arbitrator could revise the adjudicator's decision. Given my finding below, it suffices to state that it appears that a question has arisen as to whether or not the disputed clause 11 contained an arbitration agreement under the relevant provisions dealing with arbitration under the Commercial Code. I reproduce clause 11 in part to emphasise the point I am making — *"11.2* […]. *If notice of dissatisfaction is given within the specified time, the decision shall be binding on the Parties who shall give effect to it without delay unless and until the* ***decision of the adjudicator is revised by an arbitrator****."* Emphasis supplied.

[27] On the other hand, Counsel for the Respondent submitted that the Applicant should have filed an affidavit to satisfy the court that he was ready and willing to do everything necessary for the proper conduct of the arbitration: see *Wartsila NSD Finland OY and*

United Concrete Products Civil Appeal No. 16 of 2003, in which other relevant authorities were discussed, namely *Emerald Cove Ltd v Intour S.R.I. Civil Appeal No. 9 of 2000* and *Beitsma v Dingjam No. 1 1974 SLR 292*, Pillay v Pillay No. 25 1971-1973 SLR 307. In the instant case, the Applicant contended that it was correct in pleading in *limine litis* that

> the court had no jurisdiction to decide the case. However, he neither substantiated his argument nor explained why we should depart from the established authorities of our courts. Hence, on the face of the pleadings in the instant case, the defence in *limine litis* cannot stand.

[28] I have considered whether or not the Ruling with respect to the defence in *limine litis* disposed so substantially of all matters in issue as to leave only ancillary matters for determination. I note that a statement of defence on the merits has been filed. I also note that the learned trial Judge delivered one ruling for the points of law raised in the statement of defence and the Applicant's response to the provisional attachment and seizure application. Given my finding below, I find no necessity for a discussion as to whether or not the Ruling with respect to the defence in *limine litis* disposed so substantially of all matters in issue as to leave only ancillary matters for determination.

[29] As mentioned above, the Applicant had failed, in any case, to follow the correct procedure established under the authorities; hence I dismissed the application for special leave to appeal against the Ruling of the Supreme Court and award costs to the Respondent.

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F. Robinson, JA

I concur

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Fenando, President

I concur

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Andre, JA

Signed, dated and delivered at Ile du Port on 16 December 2022