

## LE ROUX v EDEN ISLAND

(2012) SLR 175

F Elizabeth for the plaintiff  
K Shah SC for the defendant

**Ruling delivered on 31 May 2012 by**

**RENAUD J:**

By plaint entered on 24 November 2009 the plaintiff sued the defendant on the basis of an agreement entered by them. The defendant sought further and better particulars of the plaint which were duly provided by the plaintiff.

Instead of proceeding to enter its statement of defence, the defendant, acting as applicant on 24 March 2010 entered a notice of motion seeking for an order staying the proceeding on the ground that the agreement contains an arbitration clause in terms of which any dispute shall be referred to and be determined by adjudication in accordance with clause 25 (which expressly states that it does not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction), and that, in terms of clause 25.10 it constitutes an irrevocable consent by the parties to any proceeding in terms thereof and no such party shall be entitled to withdraw therefrom or claim at any such proceedings that it is not bound by such provisions, and constitute a separate agreement severable from the rest of the agreement and shall remain in effect despite termination, or invalidity for any reason, of the agreement.

Counsel for the respondent submitted that undoubtedly the agreement purports to sell or to offer for sale a plot of land and villa thereon at Eden Island, Seychelles. The agreement itself is entitled Agreement of Sale Villa. In annexure (c) at number 1 it is entitled "Offer to Purchase".

He submitted that the plaintiff is a non-Seychellois and as such is precluded from purchasing property in Seychelles and any agreement which purports to sell or offer to sell immovable property in Seychelles to a non-Seychellois without first having obtained sanction of the Government is unlawful, null and void.

Section 4(1)(c) of the Immovable Property (Transfer Restriction) Act provides as follows:

A non-Seychellois may not enter into any agreement which includes an option to purchase or lease any such property or rights, without having first obtained the sanction of the government.

The consequences of such an agreement are that it is rendered "unlawful and void." Section 5 of the Act 95 provides as follows:

Any transaction effected in contravention of the provisions of section 3, 4, 7(1) or (2) shall be unlawful and void, and in the case of a sale, purchase or acquisition of immovable property or rights therein, purporting to have been purchased or acquired shall be forfeited to the Republic.

Section 6 of the Act makes it an offence for any person to knowingly participate in such a transaction including a notary, estate agent or legal practitioner. Any person found guilty under the Act shall be liable to a term not exceeding two years or a fine not exceeding R50,000 or to both imprisonment and fine.

Counsel for the respondent in support of his submissions cited the case of *Abu v Winstanley & Ors* (1978) SLR 62, where it was held that in view of the prohibition contained in section 4(1)(a) (now section 3(1)(a)) of the Immovable Property (Transfer Restriction) Act (Cap 95), the purchase of land by a non-Seychellois was unlawful and void.

He also cited the case of *Bertha Alvina Assari v Ahmad Rajack Ramjauny* CS No 284 of 1999, where the Court held that a Mauritian national who had purchased immovable property jointly with a Seychellois had “no legal capacity to purchase” and therefore the Seychellois, Bertha Assari, was entitled to be registered as the sole owner of the whole of the property.

He argued that the agreement which purports to sell or to offer for sale immovable property to the respondent, a non-Seychellois, is not valid. Counsel submitted that in terms of article 113 of our Commercial Code, this Court can declare that it has jurisdiction at the request of the respondent.

Counsel for the applicant made particular and separate submissions in answer to the submissions of counsel for the respondent. He submitted that the agreement is neither illegal nor contrary to the provision of the Immovable Property (Transfer Restriction) Act (Cap 95), and that the case of *Abu v Winstanley & Ors* (1978) SLR 62 cannot be relied upon.

Counsel for the applicant, citing *Chitty on Contracts* (13th ed) at 1094, submitted that there is a startling consequence to the submission of the plaintiff that the entire agreement is illegal for want of sanction to purchase in that –

Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract.

The principle of public policy is this: No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act... It is upon that ground the court goes; not for the sake of the defendant, but because, they will not lend their aid to such a plaintiff.

The effect of illegibility is not substantive but procedural. It prevents the plaintiff from enforcing the illegal transaction.

Counsel for the applicant further submitted that accordingly the consequences would be that the plaint filed by the respondent cannot be entertained by the Court because, based on the submission of counsel of the respondent, the transaction is illegal for want of sanction. The Court would have to strike out the plaint thereby bringing an end to these proceedings.

The pleadings revealed that the parties have entered into the agreement which is entitled Agreement of Sale Villa and its annexure (c) at number 1 entitled "Offer to Purchase". This being so because the applicant has not responded to paragraphs 35 and 36 of the plaint which state as follows:

35. The agreement was subject to the resolute condition that the Government of Seychelles grant the sanction in terms of which the plaintiff, being a non-Seychellois, to acquire the parcel in terms of the agreement in terms of the Immovable Property (Transfer Restriction) Act (Cap 95 of the Laws of Seychelles).
36. Notwithstanding the lapsing of a period of sixty (60) days from the date of signature, the Government of Seychelles has refused and/or failed to grant the sanction.

This notice of motion can be decided only on the contents of the pleadings to determine whether or not the applicant had already obtained the sanction of the Government in respect of the agreement for the sale of an immovable property to a non-Seychellois. The applicant (as defendant) has not yet entered its statement of defence.

This Court at this stage of the proceeding cannot therefore establish on the basis of the pleadings so far laid before this Court as to whether or not the agreement between the parties is unlawful null and void, until evidence to that effect is adduced and proved by the plaintiff at the hearing.

In the circumstances this Court, at this stage of the proceedings, declines to make any finding as to whether the agreement between the parties is unlawful, null and void.

Counsel for the respondent objected to the motion and advanced three arguments as to why such a stay of proceedings should not be granted:

- (a) that the written agreement is void and unenforceable because its Schedule C is incomplete and the land parcel not described, and thus clause 25 is not enforceable in law;
- (b) that clause 25.1 of the Agreement does not oust the jurisdiction of the Supreme Court; and
- (c) that clause 25.1 is not mandatory but only constitutes an option for either party to refer disputes to adjudication.

I have the benefit of perusing the submissions of Counsel for the respective party and these have provided much assistance.

At common law, it is well established that an arbitration clause in a written agreement is a collateral agreement in its own right which is separate and severable from the main agreement. This was recognized by the decision of the English Court of Appeal in *Harbour Assurance v Kansa* [1993] QB 701. Ralph Gibson LJ said at 711:

An arbitration clause in ordinary terms that is to say, without special words to ensure survival is usually, and has been held to be self contained contract collateral to the containing contract.

Because the arbitration agreement is severable from the main agreement, even if the main agreement is attacked as void or unenforceable, it does not necessarily follow that the arbitration agreement is also void and unenforceable. If the arbitration agreement is valid, then the arbitration tribunal has jurisdiction to determine whether the main agreement is invalid or unenforceable.

The principle is found in article 110(4) of our Commercial Code which provides –

If an agreement containing an arbitration clause is judicially declared to be void, the arbitration clause therein shall also be void. However, an arbitration clause in an international agreement shall not be ipso facto void by reason only of the invalidity of such agreement.

A challenge to the validity of an arbitration clause in an agreement must therefore be based on grounds specific to the arbitration clause itself. It is not sufficient merely to allege that the main agreement is invalid or unenforceable. In the case of *Fiona Trust v Privalov* [2007] 4 All ER 951 (HL), Lord Hoffman at [7] said:

the principle of severability enacted in s 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a “distinct agreement” and can be void or voidable only on grounds which relate directly to the arbitration agreement.

In the instant case, clause 25.10 gives effect to the principle of severability enshrined in article 110(4) of our Commercial Code by expressly providing that the agreement to refer disputes to arbitration is separate from the main agreement and remains in effect notwithstanding the termination or invalidity of the that agreement for any reason.

Clause 25(1) of the agreement between the parties, which agreement is attached to the affidavit of the applicant in support of its motion, states:

subject to any specific provision to the contrary in this AGREEMENT, in the event of any dispute of any nature whatsoever arising between the PARTIES on any matter provided for in, or arising out of, this Agreement, that dispute shall be referred to and be determined by adjudication in accordance with this 25.

That agreement goes on to provide in its clause 25.3.4 that the adjudication shall be held in terms of the Arbitration Act of the Republic of Seychelles.

Clause 25.10.2 of that agreement further expressly provides that the provisions of its clause 25.2 -

constitute a separate agreement, severable from the rest of this AGREEMENT, and shall remain in effect despite termination, or validity for any reason, of the AGREEMENT.

It is evident from the affidavit of counsel for the respondent that it is not his contention that the arbitration clause in the agreement is invalid or unenforceable or that he is not bound by it. He only raised the argument to the effect that the main agreement is void and unenforceable because Schedule C is not complete and the land parcel is not described. This relates solely to the main agreement and these do not concern the validity of clause 25.1 and it is not said that clause 25.1 is invalid or incomplete for any reason specific to clause 25.1 itself.

Accordingly, I find that the validity of clause 25.1 is unaffected by the arguments made in relation to the main agreement, and an arbitrator or adjudicator has jurisdiction to determine those arguments if the situation arises.

Does clause 25.1 of the sale agreement oust the jurisdiction of this Court as argued by the respondent?

Article 111(1) of our Commercial Code provides as a general rule that:

An arbitration agreement shall be constituted by an instrument in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration.

Article 113(1) provides:

The Court seized of a dispute which is the subject matter 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.

As can be seen, article 113(1) provides an exception to the rule contained in article 111(1) and according to this article the Court may declare that it has jurisdiction at the request of either party, if in the opinion of the Court the arbitration agreement "is not valid or has terminated."

Clause 25.1 of the agreement provides for the referral of any dispute falling within its scope to an agreed dispute resolution forum. Its wording is sufficiently wide and it can apply to a dispute as to the validity and enforceability of the agreement.

I find that the Court can give effect to that provision of the agreement of the parties by declining its jurisdiction over the substance of the dispute.

Is clause 25.1 of the agreement optional or mandatory?

Clause 25.1 is worded:

subject to any specific provision to the contrary in this AGREEMENT, in the event of *any dispute of any nature whatsoever* arising between the PARTIES on *any matter* provided for in, or arising out of, this Agreement, that dispute *shall* be referred to and be determined by adjudication in accordance with this 25 [emphasis added]

It is evident that the mandatory word “shall” and/or “shall be” has been used in that clause and it leaves no doubt that that provision of the agreement is mandatory, so I find.

## **Conclusion**

In the final analysis I find, on the basis of the reasons stated above, that all the three arguments raised by the respondent are not maintainable and are accordingly dismissed.

I accordingly order a stay of the proceeding of this suit on the ground that the agreement between the parties contains an arbitration clause in terms of which any dispute shall have to be referred to and be determined by adjudication in accordance with its clause 25 thereof and that, in terms of its clause 25.10 it constitutes an irrevocable consent by the parties that no such party shall be entitled to withdraw therefrom or claim that it is not bound by such provisions which constitute a separate agreement severable from the rest of the agreement and remain in effect despite termination, or invalidity for any reasons, of the agreement.

For avoidance of doubt, if the referral to arbitration under the agreement is required to be done within a prescribed time, that prescribed time shall start from the date of this judgment.

I so order.