

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 11/2015

(arising in CC 38/2014)

[2017] SCSC 138

In the matter of:

EASTERN EUROPEAN ENGINEERING LIMITED

Applicant

versus

S.J. (SEYCHELLES) LIMITED

Respondent

Arising in:

S.J. (SEYCHELLES) LIMITED

Plaintiff

versus

EASTERN EUROPEAN ENGINEERING LIMITED

Defendant

Heard:

Counsel: Mr. Pardiwalla for applicant

Mr. Georges for respondent

Delivered: 15 February 2017

ORDER ON MOTION

Robinson J

[1] **Background**

[2] Applicant is Eastern European Engineering Limited. Applicant is Defendant in CC38/2014, the head suit. Respondent is S.J. (Seychelles) Limited. Respondent is Plaintiff in the head suit.

[3] The background to the application is as follows. It is common ground between learned counsel for Applicant and Respondent that Respondent entered into a written agreement made in writing, on 22 November, 2012, and amended by a supplementary agreement of the same date (*the agreement made in writing on 22 November, 2012, and amended by a supplementary agreement of the same date, between Plaintiff and Defendant, is hereinafter referred to as the "Agreement"*) with Applicant to carry out engineering work on Savoy Resort and Spa; that the written agreement contains an arbitration clause; and that the arbitration clause is valid and subsisting. The plaint alleges a cause of action for breach of the Agreement with regards to the issue of an Interim Payment Certificate stating the amount due and payable to Respondent and the consequent entitlement of Respondent to payment. The plaint claims the sum of United States Dollars (USD) 662, 898.96/- due and payable to Plaintiff.

[4] Defendant applies to stay proceedings in the head suit pending arbitration. Defendant seeks to enforce the arbitration clause before delivering any pleadings. The application is supported by an affidavit and a "*Directors Resolution*" exhibited thereto sworn by Vadim Zaslonov, a director of Applicant. Respondent opposes the application. Respondent files "*Answer to Application to stay Proceedings*" (*the "Answer to Application to stay Proceedings" is hereinafter referred to as the "Answer"*). Respondent contends that its action does not fall within the arbitration clause in the Agreement.

[5] The court has to decide whether to enforce the arbitration clause in the Agreement.

[6] **Case for Applicant and Respondent**

[7] Briefly the case for Applicant is as follows. The plaintiff avers that Defendant engaged Plaintiff to conduct engineering works on Savoy Resort and Spa, pursuant to the Agreement.

[8] A dispute arose between Plaintiff and Defendant evidenced by the plaint. Plaintiff contends that a sum of USD 662, 898.96/- is due to it.

[9] Vadim Zaslouov states the following at paragraphs 4, 5, 6, 7 and 8 of his affidavit in support of Defendant's application for a stay order —

"(4) The parties have by virtue of clause 20.2 of the Agreement undertaken to refer any matter of dispute between them to arbitration. In conformity with this clause the Applicant has always been ready and willing to submit to arbitration and to do all things necessary for the proper conduct of the arbitration.

(5) There have been several attempts to settle this matter amicably but it has however proven impossible to do so.

(6) I am advised and verily believe that the Arbitration clause contained in the Contract between the parties is valid under Seychelles Law, the Governing Law of the contract. That being so, the court, faced with an arbitration clause of this nature, (which clause is valid under Seychelles Law, and there being nothing in the contract or in Seychelles Law which prevented the Agreement being given its full effect) should decline to exercise jurisdiction and order a stay of proceedings.

(7) The Applicant is and has always been willing to submit to arbitration according to the contract.

(8) I therefore pray this honourable court to decline jurisdiction and order a stay of this present proceedings and let the parties proceed with arbitration as per the contract."

[10] On the other hand, learned counsel for Respondent denies that Plaintiff's action is one, which is contemplated by the arbitration clause. In his opinion, Plaintiff's action does not concern a dispute or controversy, but concerns the enforcement of a liquidated obligation

for payment, under the Agreement, in terms of Clause 14.4 of, which Defendant is obliged to pay the sum it has itself certified as being due to Plaintiff. Learned counsel for Respondent contends that the court has jurisdiction to force Defendant to pay the liquidated sum which is uncontrovertibly due.

[11] **Submission of counsel for Applicant and Respondent**

[12] Does the Plaintiff's claim fall within the ambit of the arbitration clause in the agreement?

[13] The submissions of Applicant in this case is broadly as follows.

[14] Applicant, through learned counsel, states that it is ready and willing for the dispute to be referred to arbitration and asked that the action be stayed: see Wartsila NSD Finland OY and United Concrete products Civil Appeal No. 16 of 2003; Beitsma v. Dinjam no 1 (1974) SLR P, 292; Emerald Cove Ltd v. Intour S. r. l. Civil Appeal No: 9 of 2000. There is no dispute on this point.

[15] Learned counsel for Applicant emphasises that whether the present claim is within the arbitration clause in the Agreement is essentially one of construction of that arbitration clause. The exercise which has to be done is to determine whether on its proper construction the arbitration clause does or does not cover Respondent's claim in issue. Clause 20.2 of the Agreement provides for "*any dispute, controversy or claim*". On this question of the construction of the arbitration clause, learned counsel contends that the words of the plaint must be held to be a "*claim*". In his opinion, paragraph 2, of the Answer, tactically omits the word "*claim*".

[16] Further, learned counsel argues against the finality of a certified Interim Payment Certificate. He submits that the Agreement contains no express wording preventing Applicant from raising a defence against sums certified for interim payment. On the question of the finality of a certified Interim Payment Certificate, learned counsel refers the court to other relevant clauses of the Agreement, as follows —

- (a) in terms of the Agreement, the arbitrator shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the

Employer relevant to the dispute, (clause 20.2 of the Agreement, so far as relevant to the submission of Applicant);

- (b) it is a claim for money and not for money due - the Agreement provides for defences which Applicant may raise to the claim, namely, fraud, mistake, invalidity of the claim and so forth; all matters in dispute in the head suit;
- (c) the "*Employer*" may make any correction or modification in any "*Payment Certificate*" previous *Payment Certificate*". A "*Payment Certificate*" shall not be deemed to indicate the *Employer's* acceptance, approval, consent or satisfaction. (Clause 20.2 of the Agreement so far as relevant to the submissions of Applicant);
- (d) the defence that the "*Performance Certificate*" shall be signed by two directors of the *Employer*".

[17] On the other hand, learned counsel for Respondent contends that Plaintiff's claim is one for money due under article 1315 of the Civil Code. In terms of Clause 14.5 of the Agreement, the sums certified in an Interim Payment Certificate become due and payable within 10 business days after the issuance of it. In other words the sums certified in an Interim Payment Certificate are binding on Applicant. Under article 1315 of the Civil Code, the only defence available to Defendant is that it has paid the sum due to Plaintiff. In his submission, the court has jurisdiction to hear and determine the issues which have arisen in the plaint.

[18] A second point arises for the consideration of the court in relation to the question of notice of a dispute under Clause 20.1 and Clause 20.2 of the Agreement. Learned counsel emphasises that Clause 20.2 of the Agreement should be construed in light of Clause 20.1 of it. There is no dispute on this point. He states that it is inappropriate for Applicant to make application for a stay of proceedings in the head suit. In his opinion Applicant should have complied with Clause 20.1 of the Agreement notifying it [Respondent] of a dispute, which has arisen with regards to a certified Interim Payment Certificate which it [Applicant] had issued in terms of the Agreement because an Interim Payment Certificate is to be looked upon as binding on Applicant so as to stop it from raising any defence and

so enabling Respondent to immediate judgment under article 1315 of the Civil Code. In other words, Applicant must pay whatever has been certified, being left to recuperate with regards to any defence e.t.c., in subsequent litigation or arbitration. In support of the submission learned counsel relies on the following passage orbiter from the *Emerald Cove Ltd* case —

"It is to be observed in passing, although no argument has been pressed on us in that regard on this appeal, that summary procedure afforded by the writ for the eviction of a person, claimed by the owner of the property to be in wrongful occupation of his immovable property in Seychelles, could be hardly be a subject of arbitration or a matter over which an arbitrator could exercise powers. We venture to suggest that where the party who claims to be the innocent party has rescinded the agreement by operation of law and relying on the rescission has taken steps to evict the other party by resort to the writ *habere facias possessionem*, it is for the aggrieved party to submit the question of the validity of the rescission to arbitration if there is an agreement to arbitrate disputes and differences arising from the contract. This he can still do notwithstanding his eviction from the property which he claims to hold by virtue of the contract."

[19] For the above reasons, learned counsel contends that there is no dispute to arbitrate.

[20] **Analysis of the contentions of Applicant and Respondent**

[21] Should this suit be stayed? The court finds the questions raised for its consideration far from easy and has come to a determination unassisted by any authorities.

[22] In light of the submissions of learned counsel for Applicant and Respondent, the court reads articles 1134 and 1315 of the Civil Code of Seychelles Act, (*the Civil Code of Seychelles Act is hereinafter referred to as the "Civil Code"*) and the relevant Clauses of the Agreement. (Though headed "Conditions" the provisions are referred to internally as "Clauses").

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 1315

"A person who demands the performance of an obligation shall be bound to prove it.

Conversely, a person who claims to have been released shall be bound to prove payment or the performance which has extinguished his obligations."

Clause 14.4 Execution of Interim Payment Certificates

"...

The Employer may make any correction or modification in any Payment Certificate that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction."

Clause 14.5 Payment

"The Employer shall pay to the Contractor

...

(b) the amount certified in the Interim Payment Certificate – within ten (10) business days after issuance of the Interim Payment Certificate by the Employer, (subject to accepted statement by the Employer.

..."

Clause 20.1 Amicable Settlement

"Should any dispute arise between the parties under or out of this Contract, or out of the execution and completion of the works, or out of the remedying of defects and flaws, including disputes on any certificate, determination, instruction, opinion or valuation of

the Employer, each Party shall notify another party of such dispute, and both parties shall try to settle such dispute amicably before any arbitration starts

However, unless otherwise agreed between the Parties, the arbitration shall not start before expiration of a 2-week period starting on the day of the notice of a dispute, even though attempts may not be made to settle the dispute amicably."

Clause 20.2 Arbitration

"Provided that the procedure described in Sub-Clause 20.1 of the Contract has been followed, any dispute controversy or claim arising out of or in connection with this Contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the International Chamber of Commerce.

...

The arbitrator shall have power to open up, review and revise any certificate, determination, instruction opinion or valuation of the Employer relevant to the dispute. Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties shall not be altered by reason of any arbitration being conducted during the progress of the works."

- [23] Learned counsel for Respondent states that Clause 14.5 (b) of the Agreement refers to a liquidated and ascertained sum which is established as being due; and that Respondent ought to be paid leaving Applicant to recuperate with regards to any defence e.t.c., in subsequent arbitration. The court admits that the approach of Respondent is compelling. However, the court is convinced that the right view depends on the terms of the Agreement. The court agrees with Applicant, through learned counsel that the issue turns on the proper construction of the Agreement. The correct approach is to ask whether on its proper construction, that is to say on the ordinary meaning of the words used, the arbitration clause does or does not cover the "*dispute controversy or claim*" in issue. In other words is the certified Interim Payment Certificate binding on Applicant? It is not clear to the court the matters on which arbitration will be sought.
- [24] The court turns to consider the arbitration clause, the certification Clauses and other relevant Clauses in the Agreement as urged by learned counsel for Applicant in his

submissions. Thus are referred to arbitration: (i) *"any dispute controversy or claim arising out of or in connection with this contract"*; (ii) *"any dispute controversy or claim arising out of or in connection with the breach, termination or invalidity thereof"*. The plaintiff alleges a breach of the Agreement. Paragraph 6 of the plaintiff alleges that — *"Upon a revised application made on 13 February 2014 by the Plaintiff for an interim payment (number 7), the Defendant, in accordance with the said provisions of the said agreement, issued Interim Payment Certificate No. 7 on 1 March 2014 in the sum of USD 662, 898.96"*. Paragraph 7 of the plaintiff alleges that — *"in breach of the said provisions of the said agreement, the Defendant failed to pay Plaintiff the said sum certified within the period of 10 business days or at all"*. Under heads (i) and (ii) above *"[c]ontract means the Articles of Agreement, these conditions, the Specification, the Drawings, the Schedules, and the Appendices to the Contract"* (Clause 1.1.1 of the Agreement), of which, in the court's opinion, the issues which have arisen in the plaintiff with regards to interim payment and the Interim Payment Certificate form part. Simply as a matter of the words used, which are of the widest import, the court can see no reason why Plaintiff's alleged claim for money due to it should not be as to *"any dispute controversy or claim arising out of the ... breach thereof [of the contract]"*.

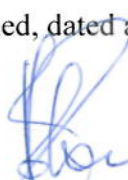
- [25] The meaning which the court has given to these words as a matter of first impression is supported by the approach to the arbitration clause which the court has adopted, namely, that the words *"any dispute, controversy or claim"* suggest an intention to embrace all disputes, controversy or claim *"arising out of the ... breach thereof [of the contract]"*. Clearly this provides for the reference to arbitration of all *"disputes controversy or claim arising out of the ... breach thereof [of the contract]"*. Further, there is in the court's opinion, nothing in the Agreement, which suggests that the arbitrator does not have jurisdiction to hear and determine the issues which have arisen in the plaintiff; and that the arbitrator does not have the power to grant all the reliefs sought in the plaintiff. Put shortly, as correctly suggested by learned counsel for Applicant, the Agreement needs clear wording before the certification Clauses will prevent the raising of a defence or cross claims in terms of the Agreement against the sums certified for payment in an Interim Payment Certificate.

[26] With regards to the question of notice under Clause 20.1 of the Agreement, the court respectfully disagrees with the position of Respondent, through counsel. In the court's interpretation of Clause 20.1 of the Agreement, it gives "*either party*" the right to give notice of "*any dispute*" which may have arisen "*between the parties under or out of [the] Contract, ... including disputes on any certificate*" and contemplates that "*both parties*" may thereafter "*try to settle such dispute amicably before any arbitration starts*". Consequently, the court is convinced that Clause 20.1 of the Agreement contemplates that either party gives notice of "*any dispute*" to the other party; and that in the present case either Applicant or Respondent may have given notice of a dispute which had arisen between them. Further, learned counsel states that the court should apply the principle upon which the Seychelles Court of Appeal has so decided in the *Emerald Cove Ltd* case. The court states that it is fundamental and necessary to consider the role of precedent in the present case, in which a question of construction of the Agreement is the important question between Applicant and Respondent. Learned counsel states that the principle upon which the Seychelles Court of Appeal has so decided in the *Emerald Cove Ltd* case binds the court, a lower court and requires it to follow and adopt it because it is relevant to the decision in the present case before the court. The court has given serious consideration to the principle upon which the Seychelles Court of Appeal has so decided. Thus in the present case in light of the *Emerald Cove Ltd* case learned counsel states in short that the Interim Payment Certificate is binding on Applicant; and that Respondent ought to be paid leaving Applicant to recuperate with regards to any defence in subsequent arbitration. On the other hand the court is of the opinion that the scope of an arbitrator's powers in any given case depends fundamentally upon the terms of the arbitration agreement; that is to say upon its proper construction in all the circumstances.

[27] **Decision**

[28] For the reasons stated above, it is the court's view that the clear language of the Agreement should prevail and that the matter should be referred to arbitration. The court exercises its discretion and stays proceedings in the head suit with costs.

Signed, dated and delivered at Ile du Port on 15 February 2017


F Robinson
Judge of the Supreme Court

