

**IN THE SUPREME COURT OF SEYCHELLES**

**CIVIL SIDE: MA321 of 2015**

**(arising in MC36/2014)**

**[2018]SCSC 615**

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**IN THE MATTER OF THE COMMERCIAL CODE ACT  
AND IN THE MATTER OF THE APPOINTMENT OF AN ARBITRATOR**

**VIJAY CONSTRUCTION (PROPRIETARY) LIMITED**

Applicant

Versus

**CIVIL CONSTRUCTION COMPANY LIMITED**

Respondent

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**IN THE MATTER OF AN APPLICATION TO SET ASIDE  
AN ARBITRAL AWARD UNDER SECTION 134 OF  
THE COMMERCIAL CODE ACT**

**CIVIL CONSTRUCTION COMPANY LIMITED**

Applicant

Versus

**VIJAY CONSTRUCTION (PROPRIETARY) LIMITED**

Respondent

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Heard:

Counsel: Mr. Francis Chang-Sam together with Miss Edith Wong for Applicant

Mr. Bernard Georges for Respondent

Delivered: 27 June 2018

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**Ruling on Petition**

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**F. ROBINSON, J**

### **The claim**

1. This application arose out of the arbitration award, (Arbitration in Case MC No. 36/14 Vijay Construction (Proprietary) Limited v/s Civil Construction Company Limited), which determined that the Applicant, Civil Construction Company Limited (hereinafter referred to as "*CCCL*"), owed the Respondent, Vijay Construction (Proprietary) Limited (hereinafter referred to as "*Vijay*"), the sum of United States Dollars One Million Four Hundred Thousand and Thirty-Eight and One Hundred and Eighty-Five (USD 1,438,185.00/-) in relation to a stone quarry and crusher plant at Cap Samy on Praslin (hereinafter referred to as "*the Award*"). CCCL is seeking an order, under Article 134 of the Commercial Code Act (hereinafter referred to as the "*Commercial Code*"), to set aside the Award in its entirety.

### **The relevant procedural history and background facts**

2. At all material times, CCCL was and is a company registered in Seychelles, which has among its objects to carry on the business as quarry owner and suppliers of quarry construction materials to the public. At all material times, Vijay was and is a company registered in Seychelles, which has among its objects to carry on the business as building contractors.
3. On 17 July, 2008, CCCL and Vijay entered into two agreements, entitled the Agreement and the Finance Agreement, which were drafted by Vijay. Vijay took over the operations of the quarry soon after the signing of the Agreement and the Finance Agreement. Vijay remained in control of the operations of the quarry for slightly over three years. At about 27 July, 2013, Vijay returned the quarry to CCCL. Thereafter, Vijay submitted an account to CCCL in which it claimed a sum of USD 1,499,615.00/- for the quarry machinery and equipment, by an email dated 3 April, 2013. In reply, on 30 September, 2013, CCCL counter submitted a final account of its own in which it "*transpired*" that it was in fact Vijay, which owed CCCL a sum of USD 663,933.00/-. Hence, a difference arose between CCCL and Vijay.

4. On 30 April, 2014, Vijay applied to the Supreme Court for the appointment of an arbitrator. On 1 October, 2014, D' Silva, J nominated Joe Pool of Joe Pool Associates, 107 Oceangate House, Victoria as the arbitrator, by agreement of both CCCL and Vijay, *"to look into the said matter between the parties as per the agreement between them"*.
5. CCCL and Vijay agreed that they met a number of times with Joe Pool; that they had a site visit of the quarry, on Praslin, with Joe Pool; that at the request of Joe Pool submitted written submissions to him; that there was never any formal hearing of their issues before Joe Pool, where they would tender evidence under oath and the evidence would be tested under cross-examination; and that there was a lot of informality regarding documents submitted. Vijay also averred that the hearing proceeded in the manner it did with the agreement of CCCL and Vijay and in the spirit of clause 9 of the Finance Agreement, which contemplated an informal resolution of any disputes between CCCL and Vijay.
6. On 8 June, 2015, Joe Pool delivered the Award in favour of Vijay (USD One Million Four Hundred Thousand and Thirty-Eight and One Hundred and Eighty-Five (USD 1,438,185.00/-). Sometime after 8 June, 2015, CCCL received a written communication, by email, sent to it by Joe Pool to which was attached a document dated 8 June, 2015, in which he stated that the document was his ruling in the arbitration.
7. On 2 September, 2015, CCCL received a fresh email from Joe Pool, who claimed that following a submission from Vijay about interest rate, he was giving CCCL 7 days to reply to Vijay's demand for a ruling on the applicable interest rate. CCCL protested very strongly against this afterthought on the part of Vijay. In particular about the admission of the letter from Nouvobanq (as hearsay evidence) regarding the applicable interest rate. The issue of interest was not raised as a ground of challenge.
8. On 8 September, 2015, Joe Pool ruled in favour of Vijay and accepted Vijay's claim on the issue of interest rate. Joe Pool also for the first time informed CCCL that he was submitting his ruling to the Registrar. This issue was not raised as a ground of challenge.

### **The grounds of challenge**

9. The grounds on which the application under Article 134 of the Commercial Code are advanced are set out in detail in the Petition, supported by Affidavit and advanced in Counsel's written submissions. Vijay disputed the grounds of challenge in its Answer, which is supported by a Confirmatory Affidavit and Counsel's written submissions.

**The analysis**

10. This court has considered all documents on file. The role of this court is not in the nature of a qualitative analysis of a particular reason or reasons in the way an appellate court would determine an appeal.
11. This court reads Article 134 of the Commercial Code —

"Article 134

1. An arbitral award may be attacked before a Court only by way of an application to set aside and may be set aside only in the cases mentioned in this article.

2. An arbitral award may be set aside:

- (a) if it is contrary to public policy;
- (b) if the dispute was not capable of settlement by arbitration;
- (c) if there is no valid arbitration agreement;
- (d) if the arbitral tribunal has exceeded its jurisdiction or its powers;
- (e) if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made;

- (f) if the award was made by an arbitral tribunal irregularly constituted;
  - (g) if the parties have not been given an opportunity of presenting their case, and of substantiating their claims, or if there has been disregard of any other obligatory rule of the arbitral procedure, insofar as such disregard has had an influence on the arbitral award;
  - (h) if the formalities prescribed in paragraph 4 of article 131 have not been fulfilled;
  - (i) **if the reasons for the award have not been stated;**
  - (j) if the award contains conflicting provisions.
3. An award may also be set aside:
- (a) if it was obtained by fraud;
  - (b) if it is based on evidence that has been declared false by a judicial decision having the force of res judicata or on evidence recognised as false;
  - (c) if, after it was made, a document or other piece of evidence has been discovered which would have had a decisive influence on the award and which was withheld through the act of the other party.
4. A case mentioned in sub-paragraph (c), (d) or (f) of paragraph 2 shall be deemed not to constitute a ground upon which an award may be set aside, where the party availing himself of it had knowledge thereof during the arbitration and did not invoke it in the course of the same.

5. Grounds for the challenge and exclusion of arbitrators provided for under articles 121 and 123 shall not constitute grounds upon which the award may be set aside within the meaning of paragraph 2(f) of this article, even when they become known only after such award is made.

6. Subject to the rules enunciated in this article, an error of law contained in the award shall not be a ground upon which the Court may set aside such award."

Emphasis is mine

12. In considering and determining the grounds of challenge, the following case law is used as persuasive authority by this court.
13. In the case of *Ngāti Hurungaterangi v Ngāti Wahiao* CA 415/2016 CA54/2017 [2017] NZCA 429 the New Zealand Court of Appeal stated the purpose of the arbitral obligation to give reasons —

"[61] ... Within the arbitral framework for determining competing rights and obligations, the reasons explain how the adjudicator progressed from a particular state of affairs to a particular result. The reasons are the articulation of the logical process employed by a person whose particular skills, expertise or qualification the parties have chosen to decide their dispute. The reasons expose to the parties the disciplined thought pattern of the specialist adjudicator, thereby dispelling any suggestion of arbitrariness. A requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not [Flannery v Halifax Estate Agencies Ltd, above n 8, at 381].

[62] In *Flannery v Halifax Estate Agencies Ltd* the English Court of Appeal observed that the duty to give reasons is a function of due

process, and therefore of justice [At 381—382]. Fairness requires that the parties, especially the disappointed party, should be left in no doubt why they have won or lost or their expectations have otherwise been frustrated. Without reasons the disappointed party will not know whether the panel has misdirected itself, and thus whether he or she may have an available right of appeal. These observations were made in the context of determining whether a Judge at first instance was required to give reasons for a conclusion essential to his decision — in that case for preferring one expert witness to another. The principle holds equally true, however, for the arbitral process. As we are about to explain, the nature and extent of the reasons required to fulfil this function varies according to the context. But the underlying purpose for which reasons are necessary remains common to both processes. ”

14. As to the nature and extent of the duty to give reasons for an award, the New Zealand Court of Appeal stated at para 63 of the **Ngāti Hurungaterangi** case —

“[63] ...The leading authorities stand for a common theme: the nature and extent of the duty to give reasons for an award necessarily imports a degree of flexibility according to the circumstances, including the subject matter being arbitrated, its significance to the parties and the interests at stake [Casata Ltd v General Distributors Ltd, above n 8, at [91]; Oil Basins Ltd v BHP Billiton Ltd (2007) 18 VR 346 (CA) at [57]; Westport Insurance Corp v Gordian Runoff Ltd, above n 8, at [53]; Flannery v Halifax Estate Agencies Ltd, above n 8, at 381–382”]. The subject matter may range from a mundane dispute between parties to a standard form building contract to a multinational contest over resource rights. The standard required is necessarily dictated by the context. The reasons must reflect the importance of the arbitral reference and the panel’s conclusion. There is no qualitative measure of adequacy. The

reasons are not required to meet a minimum criterion or extent — or to satisfy the curial standard [Westport Insurance Corp v Gordian Runoff Ltd, above n 8, at [53] and [169] — except that they must be coherent and comply with an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points. They must engage with the parties' competing cases and the evidence sufficiently to justify the result. [Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) [1981] 2 Lloyd's Rep 130 (CA) at 132–133]. They must be the reasons on which the award is based; if they do not satisfy these requirements, they are not reasons."

15. In view of the grounds of challenge it is appropriate that this court reproduces the salient provisions of the Agreement, the Financial Agreement and the agreed table of items.

16. **"AGREEMENT**

Now it is agreed by both parties to establish a quarry on Praslin on the site leased by CCCL on the following conditions:

1. Vijay Construction will purchase all Machines and Equipment needed for use of quarry.
2. Vijay Construction will organize its own manpower to set-up and operate the quarry.
3. CCCL agree for Vijay Construction to operate the quarry for a period of not exceeding 3 years from the start date of production.
4. After the period of 3 years Vijay Construction will sell all Machineries and Equipment to CCCL.



4. Vijay Construction will sell all machineries and Equipment to CCCL as purchase price less 10% depreciation per year. (Pro-rata for past year).
5. Vijay Construction will consult with CCCL for all purchases of Machineries and Equipment.
6. Vijay Construction will pay CCCL a price of RS 15.00 for every ton of stone crushed.
7. For the General Public Sales, Vijay Construction will pay 5% of the invoice value to CCCL, in lieu of RS 15/- per ton said above.
8. CCCL will allow Vijay Construction free access to quarry site.
9. Vijay Construction will provide copies of purchase invoices to CCCL for all Machineries and Equipment.
11. CCCL will correspond and handle all matters with regards to all Government of Seychelles land matters.
12. CCCL will Not be responsible if Government of Seychelles decide for some unknown reasons to acquire the quarry site."

17. **"FINANCE AGREEMENT**

CCCL and Vijay Construction Ltd have agreed in principal that CCCL Quarry in Praslin should increase their Quarry production to ensure Vijay Construction Ltd have sufficient quarry materials to construct their new Projects in Praslin namely, Raffles Resort and Hotel and Residence in Felicite Island.

For the above reasons, Vijay Construction Ltd or their suppliers has agreed to arrange an advance financing to upgrade CCCL Praslin quarry's

machinery and equipment. CCCL and Vijay Construction Ltd therefore mutually agrees the following Terms and Agreement:-

1. Vijay will arrange finance upto \$ 2 million either themselves or in association with their overseas suppliers.
2. Vijay will help to procure the necessary machinery and equipment.
3. Vijay will assist in setting up the quarry equipment on Praslin.
4. Vijay will provide assistance to operate the quarry.
5. Vijay or their suppliers will not charge any interest for financing up to 2 million dollars.
6. CCCL will agree a favourable price to supply quarry products to Vijay, taking into account the above assistance given.
7. CCCL will guarantee that priority is given to VIJAY for all quarry products.
8. CCCL will repay the finance arranged by VIJAY in about 3 years time. This may be done through material purchase or any other arrangements mutually agreed.
9. **Any difference that may arise should be resolved through discussions, failing which an independent person should be mutually appointed to give a ruling."**

Emphasis is mine

18. The table of items.

Item No.	Description	Vijay Claim \$	Award US\$
1	Store and Control Room	21,801 Less 25% profit element	16,350
2	Earthworks	73,800 Less 25% profit element	55,350
3	Earthworks for Block Pad	55,664 Less 25% profit element	41,750
4	Rock Armouring and Retaining Walls	15,750	15,750
5	Office Block	75,600 Less 25% profit element	56,700
6	Weigh bridge	29,175 Less \$1,500 for a replacement PC and printer and less 10% depreciation compounded over three years	20,175
7	Quarry Equipment	1,204,544 Less 10% depreciation compounded over three years	878,112
8	Quarry Equipment, Transport to site	18,000 less 10%	16,200
9	Quarry Equipment, Erection	50,000 less 25% profit element	37,500
10	Tarmac Road to Quarry	35,850 at cost ???	35,850
11	Volvo 290 Excavator	182,000 at cost less 10% depreciation compounded over three years	132,678
12	JCB Loader	88,000 less 15,000 in error. Less 10% depreciation compounded over three years	
13	Mitsubishi 20 Ton Truck	50,000 considered at cost less 10% depreciation compounded over three years	36,450
14	Atlas Copco Drilling Machine	317,000 at cost less 10% depreciation compounded over three years	231,093
15	Montabay Hammer	40,000 at cost less 10% depreciation compounded over three years	29,160
16	PUC Sub Station	83,333 at cost	83,333
17	Electrical Contractor	7,083 at cost	7,083
18	Electrical Works Control Tower	9,750 at cost	9,750
19	E.I.A Report	3,333 at cost	3,333
		Sub Total	1,708,804
		CCCL's Claim	
20	Blasting costs (see notes below)	Rs. 1,322,500 / 12.5	-105,800
21	Royalty	Rs. 15/ton on 100,000 tons / 12.5	-120,000
22	Public Sales:	5% on Rs. 11,204,729 / 12.5	-44,819
23	Materials to Vijay Construction	(see notes below)	nil
		Total due to Vijay	1,438,185"

***Failure to give reasons***

19. CCCL contended in paragraph 18 (1) of the Petition that *"the arbitrator failed to give reasons as to why he considered the two aforementioned agreement as "guidelines to an arrangement between friends" (3<sup>rd</sup> paragraph of the Award.) rather than legally binding documents as they were obviously intended to be, and that such mistaken belief underpinned the rest of the Award made."*
20. This court interposes to state that it agrees with the case law, which emphasised that awards should not be vitiated by fine points. The modern approach is in favour of sustaining awards where that can be done fairly rather than destroying them. In consideration of this ground of challenge concerning Joe Pool's failure to give reasons, this court is of the opinion that the Award should be read fairly and as a whole.
21. The Award reads —
- "In compiling this ruling I have taken into consideration the spirit of the initial agreement. Looking at the text of the agreements it is obvious that they were not drafted as legal documents but rather as guidelines to an arrangement between friends, whereby each would benefit whilst not profiting on the other."
22. CCCL's and Vijay's clear intent as per the ruling of the Supreme Court was that Joe Pool would *"go into the matters of the difference between the parties in connection with the accounts relating to the investment in the Quarry of the Respondent"*. It is significant that Joe Pool, a civil engineer, was chosen for his expertise. Joe Pool identified the relevant issue *"...to find a fair and just resolution of their [CCCL and Vijay] dispute in the matter of the Praslin Quarry"* (the Award). The process and methods adopted by CCCL and Vijay, which were mutually agreed between them, are significant. It is not disputed that Joe Pool engaged with the parties competing claims at length; and that the positions of CCCL and Vijay were discussed at length between them. Joe Pool **"after much discussions and negotiations with the parties"** presented what he considered *"to be a fair and just final account"*. [Emphasis is mine]. The Award stated **"[t]he following ruling is the result of numerous private meetings and negotiations with both Mr. Vijay Patel of Vijay Construction and Mr. Sunny Kan of Civil Construction Company Limited, to find a fair**

*and just resolution of their dispute in the matter of the Praslin Quarry*". [Emphasis is mine]. The Award stated "[i]n the table of items ..., *all items were discussed at length and mutually agreed with the exception of item 20; Blasting costs and item 23; Materials to Vijay*". [Emphasis is mine].

23. In light of all the above, this court is convinced that Joe Pool did not treat the Agreement and the Financial Agreement as not legally binding documents. Moreover, it is noteworthy that Joe Pool did not state in the Award that the Agreement and Financial Agreement are not legally binding documents. This court accepts the submission of Counsel for Vijay that the finding of Joe Pool was a perfectly reasonable finding in the circumstances and context of the arbitration, and that in addition Joe Pool gave as a reason for his finding that this was clear from reading the Agreement and the Finance Agreement.

***Failure to explain blasting costs calculations***

24. CCCL contended in paragraph 18 (2) of the Petition that "*the arbitrator failed to explain clearly his calculations as to the disputed blasting costs, specifically the cost per ton of rock blasted as well as he came to the conclusion that the figures offered by the Respondent for food and transport of the blasting crew were "generous" when no comparison was given to any other figure (paragraph 12 of the Award)*".
25. As stated in the **Ngāti Hurungaterangi** case, "*the nature and extent of the duty to give reasons for an award necessarily imports a degree of flexibility according to the circumstances ...*".
26. In the present matter, Joe Pool, chosen for his expertise, engaged at length with the parties' competing claims. As stated above, the process and methods adopted by CCCL and Vijay are significant. As submitted by Counsel for Vijay, in coming to his decision Joe Pool did so in accordance with the Commercial Code and the agreed procedure as set by CCCL and Vijay, which was inter alia, to discuss each party's claims with them in light of the Agreement and the Finance Agreement and the spirit in which they were entered, and to come to a finding which would be a "*fair and just final account*". It was not disputed that Joe Pool was furnished with documents of blasting costs from other jurisdictions. Moreover, the record showed that CCCL put up contradictory claims – R50, R150 and

R100 per ton of rock blasted. A finding was made by Joe Pool. According to the present circumstances this court is satisfied that Joe Pool had engaged with CCCL and Vijay sufficiently and after considering their intention and the "*numerous private meetings and negotiations between CCCL and Vijay*", a finding was made.

***Reasons for Joe Pool's interpretation of clause 6***

27. CCCL contended in paragraph 18 (3) of the Petition that —

*"the arbitrator also failed to give reasons as to why clause 6 of the Finance Agreement "could not be considered applicable to materials from the Praslin quarry during the period that the quarry had effectively been ceded to Vijay construction" when the original dispute between the parties was to what amounted to a favourable price for materials taken by the Respondent during the time it was managing and operating the quarry (27<sup>th</sup> paragraph of the Award) as both parties contemplated attributing a price for the materials from the start as provided in clause 6 of the Finance Agreement;"*

and in paragraph 18 (4) of the Petition that —

*"the arbitrator in the 28<sup>th</sup> paragraph of his award made the following remark, without setting out the reason therefor: "I find it very difficult to believe that one party should be asked to finance an interest free loan ... This is just too one sided." he appears to have forgotten his earlier statement in the 3<sup>rd</sup> paragraph of his award referred in sub-paragraph (1) of this paragraph, and to ignore the opening statement of the Finance Agreement "to ensure sufficient (and cheap) quarry materials to construct their Projects". The arbitrator appears to have overlooked completely the written submissions dated 18/3/2015 (at page 1 thereof) of the Applicant's attorney (a copy of which is attached)".*

28. Having considered the exhibits in the present matter, this court is satisfied that Joe Pool sought and received detailed submissions on the interpretation of clause 6 of the Finance Agreement. As this court understands it, clause 6 was an important clause to CCCL's late claim of charges (in excess of the royalty) to Vijay for products, which Vijay had purchased from the quarry. Having read the Award fairly and as a whole, this court is satisfied that Joe Pool considered the question in issue and gave reasons for his finding. The Award reads —

"No one outside the two parties truly knows about the reason and intent of this clause but I do believe that both parties knew and understood the purpose of this clause at the time of signing...

...It is worth noting that this claim was first presented many months after the quarry had been handed over to CCCL. For the three previous years there had not been any mention of this sum owed to CCCL. Furthermore I do not believe that any rate was discussed or agreed.

Having been selected by both parties and appointed by the Supreme Court to arbitrate in this matter, it has fallen on me to give what I consider to be a fair ruling in this matter.

I believe that clause 6 of the Finance Agreement could not be considered applicable to materials from the Praslin Quarry during the period that the quarry had effectively been ceded to Vijay construction under clause 3 of the Agreement.

Looking at the dispute in the spirit of fairness and mutual benefit, I find it very difficult to believe that one party should be asked to finance an interest free loan, operate a quarry, pay a royalty or levy and later sell the machinery and equipment to the other party at a depreciated rate of 10 % over three years and still be asked to pay for the materials taken during the time that the quarry was under their control. This is just too one sided. I

therefore cannot in all fairness, entertain this claim and therefore rule it to be invalid."

29. It is clear that Joe Pool accepted Vijay's version of the agreement between CCCL and Vijay and rejected that of CCCL, which as rightly submitted by Counsel for Vijay he was entitled to do. This court is also satisfied that CCCL and Vijay are bound by the ruling on this point and cannot appeal against it.

30. *The small instances*

31. CCCL contended in paragraph 18 (5) of the Petition that —

(1) In addition there are a number of small instances where the arbitrator, without giving any reasons, chooses to ignore and/or substitute figures or facts adduced by the Applicant by figures and facts he appears to pluck out of the air like a magician;—

(a) in the 10<sup>th</sup> paragraph of the award, the daily rate for calculating the cost of the blaster in view that he does not have the expertise, as opposed to the Applicant who employs a blaster in both of its quarries (on Mahe and Praslin)

(b) in the 14th paragraph of the award, the adoption of a lumpsum cost of R25, 000 for the logistics of transportations.

(c) In the 28th and 29th paragraphs of his Award."

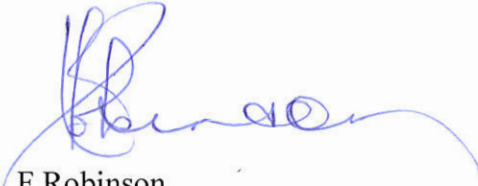
32. In relation to these grounds of challenge, this court accepts the submissions of Counsel for Vijay that they are devoid of merit and do not fall under the category of Article 134 of the Commercial Code and are all findings, which were in the province of Joe Pool, who was asked to give a ruling on the dispute.



**The decision**

33. In light of the above, this court is satisfied that CCCL has not made out a case for setting aside the Award in this matter. This court dismisses CCCL's application, with costs.

Signed, dated and delivered at Ile du Port on 27 June 2018



F Robinson

**Sitting as a Judge of the Supreme Court**