**SUPREME COURT OF SEYCHELLES**

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**Reportable**
[2020] SCSC 594
CS MC 09/2020

In the matter between

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| **VetiverTech (Proprietary) Limited**<br>*(rep. by Bernard Georges)* | **Applicant** |
| and | |
| **Complete Energy Solutions Limited** | **Respondent** |
| **The Public Utilities Corporation**<br>*(rep. by (Mr. Rajasunderam)* | **Interested Party** |

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| **Neutral Citation:** | *VetiverTech (Proprietary) Limited v Complete Energy Solutions Limited & Anor* (CS 09/2020) [2020] SCSC 594 24 August 2020 |
| **Before:** | Burhan J |
| **Summary:** | Ex-parte interim interlocutory injunction, American Cyanamid principles, service outside jurisdiction, urgency, international arbitration |
| **Heard:** | 23 July 2020 |
| **Delivered:** | 24 August 2020 |

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**ORDER**

The ex parte application for interim relief is dismissed with costs for the Interested Party.

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**RULING**

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**BURHAN J**

[1] This is an ex-parte application by the Applicant VertiverTech (Proprietary) (VT) Limited for interim relief seeking an interim interlocutory injunction, pending an inter-partes hearing where the Applicant is seeking an interim injunction to restrain the Respondent

Complete Energy Solutions Ltd (CES) from receiving an aggregated sum of US$517,626.00 plus interest at 12% from the Interested Party (Public Utilities Corporation PUC) due to the Respondent for payments under a Five MW PV Plant Project between the Respondent and the PUC. This interim injunction is requested pending the conclusion of the arbitration instituted by the Applicant against the Respondent before the Dubai International Arbitration Centre.

[2] The background facts of the case are that the Applicant (VT), is a company registered in Seychelles, engaged in provision, installation and maintenance of photovoltaic panels to commercial and domestic entities in Seychelles. The Respondent CES is a company registered in United Arab Emirates (although, according to statement of the Applicant's Counsel on page 2 page of the 10th July 2020 Court Proceeding Transcript – "company is Egyptian company"). The Respondent is engaged in provision, installation and maintenance of photovoltaic panels to commercial and domestic entities worldwide. The Interested Party is the Public Utilities Corporation (the "PUC") of Seychelles.

[3] The connection between the Interested Party (PUC) and the Respondent CES is that both entered into a contract by an agreement on the 1st August 2018 (the "main agreement") where the Respondent undertook to design and contract for the PUC 5MW photovoltaic farm on Romainvile Island in Victoria Harbour (Five MW PV Plant Project).

[4] In order to obtain local expertise, the Respondent (CES) entered into a separate contract with the Applicant (VT) by agreement on 25th July 2017 (the "consortium agreement"), which was prior to the Respondent bidding for the project, where the Applicant would perform the works on the project under the supervision of the Respondent.

[5] However, disagreements arose between the Applicant VT and the Respondent CES. The Applicant avers that as a result the Respondent is withholding US$217,626.00 due to the Applicant for works performed on the project. It is further averred that the Respondent is purporting to terminate the consortium agreement between them and employ another company to carry on with the works assigned to the Applicant in terms of the consortium agreement.

[6] On the 15th of May 2019, the Applicant's Attorney sent a letter to the Respondent giving them notice of dispute in terms of Clause 11.1 of the consortium agreement (arbitration clause) and a period of 15 days to resolve it in good faith. The Applicant avers that no response was received from the Respondents.

[7] The Applicant thereafter proceeded in terms of the said Clause 11.1 and filed an Arbitration Application Form to Dubai International Arbitration Centre. The Applicant's Counsel avers that the arbitration has now formally commenced (page 2 of the 10th July 2020 Court Proceeding Transcript). The Applicant claims the sum of US$217,626.00 for unpaid invoices, US$300,000.00 for loss of profit as a result of the breach of consortium agreement and interest at 12% per annum.

[8] Having thus filed the Arbitration in Dubai, the Applicant (VT) has applied for an ex-parte interim interlocutory injunction before the Supreme Court of Seychelles as it verily believes that the only way to secure the sums due, is to obtain the injunction as interim interlocutory relief, restraining the PUC from paying the US$517,626.00 plus interest at 12% to the Respondent, pending the inter-partes hearing. The Applicant believes that the works under the main agreement would be finalised between the Respondent and the PUC before the inter-partes hearing of injunction application can be held and before the determination of the arbitration. The Applicant believes that the Respondent will have no further assets or presence in Seychelles and the Applicant will be left without a remedy.

[9] The Applicant's Counsel is relying on Section 113(2) and 144 of the Commercial Code and avers that despite the fact that there is an arbitration in a foreign jurisdiction, parties can seek interim relief in the Courts of Seychelles. The provisions state:

> *"Section 113*
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> . . .
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> *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."*
>
> *"Section 144*

*Generally, any matter arising out of an arbitration agreement, the conduct of the arbitration, the making of an interim or final award and the execution thereof, which are not dealt with in this Code, shall be left to the discretion of the Court upon the application of an interested party."*

[10] It would be pertinent at this stage to come to a finding as to whether the provisions of Article 113 and 144 are applicable to this particular arbitration being conducted overseas. On analyzing section 11.1 of the arbitration clause in the consortium agreement, it is clear that parties have decided that the arbitration is to be held at the Dubai International Arbitration Centre and that the arbitration be subject to the laws of another jurisdiction namely the United Arab Emirates. In such a situation the law of the country in whose territory the arbitration takes place, the lex arbitri, will generally be different to the law that governs the substantive matters in dispute. In the case of ***Smith Ltd v H&S International*** **[1991] 2 Lloyds Report 127 at 130,** it was held that the lex arbitri, the law governing the arbitration comprises rules, which include inter-alia, the rules governing interim measures. In the absence of any information in respect of the law/ rules governing the arbitration in Dubai, this court cannot come to a finding on the facts before it at present that the provisions of the Commercial Code of Seychelles applies to interim measures in the arbitration being held at the Dubai International Arbitration Centre. Also discussed in **Law and Practice of International Arbitration Fourth Edition by A. Redfern and M. Hunter at 2-05 to 2-08.** Learned Counsel has failed to satisfy Court on this issue.

[11] It is apparent that learned Counsel for the Applicant is relying on the principles established by ***American Cyanamid Co v Ethicon Ltd*** **[1975] AC 396,** where the court set out guidelines in respect of the issue of interlocutory injunctions and directed which factors a court should consider in such an application:

a) Whether there is a serious question to be tried;
b) Whether an award of damages would be an adequate remedy;
c) Where does that balance of convenience lie and who does it favour?
d) Whether there are any special factors.

[12] These guidelines were followed by Seychelles courts in *Pest Control v Gill* (1992) SLR 177; *Delorie v Dubel* (1993) SLR 193; *Techno International v George* SSC 147/2002, 31 July 2002; *Dhanjee v Electoral Commissioner* (2011) SLR 141). The principles and considerations were well summarized in ***Exeter Trust Com v Indian Ocean Tuna Limited*** (253 of 2009) [2010] SCSC 89 (26 May 2010):

> *". . . I note in matters of interlocutory injunctions, the Court must be satisfied prima facie that the claim is bona fide, not frivolous or vexatious; in other words, that there is a serious question to be tried vide: American Cyanamid Co v Ethicon Ltd [1975] UKHL 1; [1975] 1 All ER 504 at p. 510. Unless the materials available to the court at the hearing of the application for an interlocutory injunction, disclose that the petitioner has a* ***real prospect of succeeding*** *in his claim at the trial, the court should not go on to consider whether the* ***balance of convenience*** *lies in favour of granting or refusing the interim relief that is sought. In considering the balance of convenience, the governing principle is whether the petitioner would be* ***adequately compensated by an award of damages****, which the respondent would be in a financial position to pay, and if so, the interim injunction should not be granted. Where there is doubt as to the adequacy of remedies in damages available to a party, the court would lean to such measures as are calculated to preserve the status quo."*(emphasis added)

**Serious Question to be tried / Real Prospect of Succeeding**

[13] Normally interim relief is sought after filing a detailed plaint/petition containing in detail the nature of the action/cause of action including all relevant documentation. In such instances court is in a better position to assess not only whether there is a serious question to be tried, the applicable law and whether the plaintiff has a real prospect of succeeding. In this instant application, no such plaint or petition or other details has been filed and therefore this court cannot at this stage of this interim application determine whether the Applicant has a real prospect of succeeding in a matter pending in another jurisdiction.

**Whether an award of damages would be an adequate remedy**

[14] In ***University of Seychelles-American Institute of Medicine Inc Ltd v Government of Seychelles*** **((Miscellaneous Application No. 130 Of 2011)) [2011] SCSC 71 (06 November 2011)** it was stated that, *"[t]he main reason for the grant of a temporary injunction is to preserve the status quo and to protect a party from suffering irreparable*

*harm or injury which would not be adequately atoned for by damages".* In determination of this question of irreparable loss, the courts should consider whether an award of damages would be an adequate remedy.

[15] When one considers the facts submitted to court, this is a clear case where damages have to be awarded in the event of the Applicant VT succeeding. There is nothing to indicate that the status quo would change or that irreparable harm or injury would not be adequately atoned by damages. Had the Applicant filed a plaint in the Seychelles and subjected himself to the substantive law of Seychelles and succeeded, his remedy/relief would have been quantified in damages. The governing principle is that if damages would be an adequate remedy, the injunction should not be granted. Further as averred CES is a registered company in the United Arab Emirates. Learned Counsel for the Applicant cannot say he has no remedy or would suffer irreparable damage if the interim order is not given, as the Applicant VT, upon obtaining an award from the arbitral tribunal, could enforce such award or even apply for interim relief in the United Arab Emirates where the arbitration is pending and the Respondent Company is registered.

**Where does that balance of convenience lie and who does it favour**

[16] Balance of convenience was further explained in ***Dhanjee v Electoral Commissioner*** **(2011) SLR 141** and it was stated that further considerations should be: whether more harm will be done by granting or refusing the injunction; whether the risk of injustice is greater if the injunction is granted than the risk of injustice if it is refused; and whether the breach of the appellant's rights would outweigh the rights of others in society.

[17] Learned Counsel for the Interested Party has brought to the notice of court that that the Respondent is doing several solar projects in the Seychelles and they cannot concede to the applicants claim for interim relief, as it could jeopardize the future of several solar projects being done in the country by the Respondent. This court is of the view that the balance of convenience lies in refusing the application, as there is a possibility that if such interim relief as prayed for is granted, there would be a stoppage of the project undertaken by the

Respondent. This would adversely affect the project and would cause further delay in the completion of their works.

**Whether there are any special factors**

[18] Although Learned Counsel for the Applicant intimated to court that the urgency in filing this application was due to the ongoing Covid-19 crisis and as the airport was closed, service of summons out of the jurisdiction would not be possible on the Respondent. The situation has now changed as the airport is now open and this court has already given a return date for service of summons out of the jurisdiction i.e 16th September 2020. Further, during submissions, it was brought to the notice of court that the project is still ongoing and the retention money, which is payment the applicant intends to restrain, is to be paid only six months after the project is concluded. Therefore, at present and in the absence of an award from the arbitration centre to be enforced, this court is of the view that no urgency or special circumstances exist for the issue of an interim injunctive relief. It also should be borne in mind that as the Respondent Company is registered in the United Arab Emirates there is an opportunity for the Applicant to seek enforcement of the award in the UAE where the arbitration is being held.

[19] For all the aforementioned reasons, the ex parte application for interim relief is dismissed with costs for the Interested Party.

Signed, dated and delivered at Ile du Port on 24 August 2020

24-08-2020

Burhan J