

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2022] SCSC ...

MA55/2022

Arising in CS46/2021

In the matter of:

AN APPLICATION IN TERMS OF ARTICLE 113 OF THE COMMERCIAL CODE OF SEYCHELLES.

And

In the matter between:

MR. STUART LESLIE HIBBERD

Petitioner

(rep. by Guy Ferley)

And

EDEN ISLAND VILLAGE MANAGEMENT ASSOCIATION

Respondent

(rep. by Tamara Christen)

Neutral Citation: *Hibberd v Eden Island Village Management* [2022] SCSC

MA55/2022

Before: Dodin J

Heard: Written submissions

Delivered: 01 July 2022

RULING

DODIN J.

[1] The Defendant in case CS46/2021, Petitioner in this motion MA55/2022, moved this Court for an order that this matter be referred to arbitration and for the reasons set forth in the attached affidavit of the Petitioner Stuart Leslie Hibberd. The affidavit contains the following averments:

“I Stuart Leslie Hibberd, of Eden Island make oath and say as follows:

1. *I am the deponent above-named.*
2. *I am Defendant in suit Eden Island Village Management Association v Stuart Leslie Hibberd Cs 46 of 2021.*
3. *I have been advised by the attorney to my case and I verily believe same to be true that:*
 - (i) *Clause 30 of the constitution of the Eden Island Village Management Association provides that “in the event of any breach of this constitution by any person in any owner’s household or its employees, invitees or lessees, such breach shall be deemed to have been committed by owner itself; provided that the association shall be entitled, but not obliged, in addition to any other rights which it may have or remedies which it may have or remedies which may be available to it, to take such steps against the person actually committing the breach, with or without proceeding against the owner”. It has been shown to me and is attached herewith a copy of the said constitution **marked as A1.***
 - (ii) *Article 113 of the Commercial Code Act provides “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 been terminated.”*

4. *The agreement (the constitution) is still void and has not been terminated.*
5. *Based on the matters mentioned in paragraph 3 and 4 above I am requesting that the court declares that it has no jurisdiction in this matter and that the matter is referred to arbitration.*
6. *I state that all the averments as contained herein are true to the best of my information knowledge and belief.*
7. *I pray accordingly.”*

[2] The Plaintiff in CS46/2021 and now Respondent to this motion MA55/2022 objects to the Petition and in an affidavit in reply averred the following:

“I Mr. Chales De Clarisse, of Eden Island makes oath and state as follows:

1. *That I am the General Manager of the Eden Island Village Management Association (the “VMA”) who is the Respondent in this case (and Plaintiff in the main case) and authorised to swear to this affidavit.*
2. *I confirm that where the matters to which I depose are within my knowledge, they are true. Where the matters are not within my knowledge, the information is based upon the sources referred to herein and is true to the best of my knowledge and belief.*
3. *That the VMA is a duly registered association with a constitution and rules which I am legally advised pursuant to Cap 201 Registration of Associations Act Section 11 that “the rules for the time being of any registered association shall bind the association and every member thereof”*
4. *That pursuant to **Stuart Leslie Hibberd’s [“Hibberd”]** purchase a maison on Eden Island he by virtue of clause A.2 of his title deed agrees to become amember of the VMA and is therefore subject to its Constitution and the rules made thereunder.*

5. *That on or about the 24th May 2021 the VMA filed a plaint seeking the recovery of the sum of USD 77,053.72 with interest and costs which was registered with case registration number CS 46 of 2021.*
6. *That on the 17th March 2022, **Hibberd** filed a motion seeking “... for this matter to be referred to arbitration for the reasons set forth in the attached affidavit”.*
7. *When reading the affidavit of Hibberd comprised of seven (7) paragraphs:*
 - a) *I can see that it contains information to the effect that Hibberd is the deponent of his affidavit and defendant in the case registered as CS 46 of 2021 as paragraphs one (1) and two (2);*
 - b) *Paragraph three (3) is a mere copy paste of the clause 30 of the Constitution and Article 113 of the Commercial Code with no further averments as to their relevance nor validity nor binding nature;*
 - c) *Paragraph four (4) is a mere statement to the effect that “The agreement [constitution] is still valid and has not been terminated”;*
 - d) *Paragraph five (5) relies on paragraphs three (3) and four (4) to “request that the court declares that it has no jurisdiction in this matter and that the matter is referred to arbitration.”*
 - e) *Paragraph six (6) is his statement of truth and seven (7) his prayer.*
8. *I am legally advised that the criteria required for this Honourable Court to decline its jurisdiction to hear the matter is set out in the case of Emerald Cove v Intour S.R.L. Civil Appeal 9 of 2000 in which the criteria is set out as follows:*

a. **A Seychelles Court should not decline jurisdiction unless it is sure that the agreement to arbitrate is valid and subsisting;** therefore Hibberds affidavit must prove that the arbitration agreement is valid and applicable to this particular dispute, in other words that this dispute is one which falls under the arbitration clause and that the arbitration clause is one that completely ousts the jurisdiction of the Court; and

b. **That the party requesting the court to decline jurisdiction must show readiness to submit to arbitration.**

9. Taking the second criteria first, that the party requesting the court to decline jurisdiction must show readiness to submit to arbitration. The affidavit of Hibberd contains no averment whatsoever to the effect that he is ready and willing to submit to arbitration.

10. I am legally advised by my counsel that this is a key condition that ought to have been set out in Hibberds affidavit which has not been met and on this ground alone this Honourable Court should decline jurisdiction.

11. I am also advised that the case of *Bajrang Builders (Pty) Limited v Harini & Company (Pty) Limited* [2017] SCSC 470 is one where the LD Judge Govinden J (at the time) restated the criteria to decline jurisdiction and in this case refused to decline jurisdiction on the basis that the parties failed to satisfy the court that they were ready and willing to submit to arbitration.

12. Given that there is no such averment to that effect in the affidavit of Hibberd, **there is therefore no evidence whatsoever that he is ready and willing to submit to arbitration. As such Hibberd has failed to meet part of the criteria required for this Honourable Court to decline jurisdiction and as such I would invite this Honourable Court to dismiss the request on this basis.**

13. *On the first criteria, that the arbitration agreement is void. There is only the averment to the effect that “The agreement [constitution] is still valid and has not been terminated”. It is humbly averred that this is not a statement as to the validity of the arbitration agreement it is only a statement as to the validity of the constitution. **There is no averment whatsoever as to the validity or binding nature of the arbitration clause under Seychelles law. As such it is humbly submitted that there is no proof as to the validity of the arbitration clause and the VMA humbly invites this honourable court to find that Hibberd has failed to meet the first criteria required for a court to decline jurisdiction.***
14. *Similarly, it is averred that nowhere in Hibberds affidavit does he prove let alone state that this dispute is one that falls within the arbitration clause nor is there any proof that this arbitration clause is one that completely ousts the jurisdiction of this court.*
15. *I am legally advised by my counsel that the court must be certain that the arbitration clause is drafted such that the parties intend to completely oust the jurisdiction of the court before being able to deny any litigant their constitutional right to appear before and litigate before it.*
16. *Without touching on the validity of the arbitration clause whatsoever, I aver that the arbitration clause in the Constitution starts with “30.1 Subject to any specific provisions to the contrary in this CONSTITUTION, ...”. As such it is not an exclusive arbitration clause and in fact there are instances where a dispute is not one that is contemplated under this arbitration clause. At clause 29.3 of the Constitution sets out;*
- a. *“Nothing in this 29 shall derogate from, or in any way diminish, the right of the ASSOCIATION to institute proceedings in any court of competent*

jurisdiction for recovery of any money due by any MEMBER arising from any cause of action whatsoever, for the enforcement of any other obligation of a MEMBER in terms of this CONSTITUTION, or for any other relief.”

17. *The case before this honourable court, CS 46 of 2021 is one in which the association [VMA] is claiming the recovery of money due to it from a member [Hibberd]. This claim falls squarely within that contemplated by Rule 29.3 of the constitution which deals entirely with the recovery of money due by a member. This clause gives the right to the association [VMA] to institute proceedings in any court of competent jurisdiction and it is humbly submitted that the Supreme Court of Seychelles is a court of competent jurisdiction and that the VMA has the discretion under this clause to institute proceedings before the Supreme Court which it has done.*
18. *I am legally advised that Rule 29.3 is a carve out exception to the arbitration Rule at 30 of the Constitution.*
19. *I am legally advised by my counsel that this situation is similar to that of Bajrang Builders (Pty) Limited v Harini & Company (Pty) Limited [2017] SCSC 470 which also did not have an exclusive jurisdiction clause for arbitration and had carve out exceptions in its contract similar to that of the VMA. The Ld Judge in the case of Barjang Builders did not decline jurisdiction finding that the Supreme Court did have jurisdiction to hear the case based on the fact that the arbitration clause was not an exclusive one and therefore did not completely oust the jurisdiction of the Supreme Court.*
20. **As such not only is this NOT an exclusive jurisdiction arbitration clause but that the VMA constitution provides exceptions to arbitration and this**

case falls squarely within the exception provided at Rule 29.3 of the Constitution.

21. *As such Hibberd failed to prove that the arbitration agreement is valid, he failed to prove that it is subsisting, he failed to prove that the nature of the dispute is one that falls within that contemplated by the arbitration clause and failed to prove that the arbitration clause is an exclusive one completely ousting this honourable courts jurisdiction.*
22. *Additionally Hibberd failed to set out in his affidavit that he is ready and willing to submit to arbitration.*
23. *Over and above that the VMA in this affidavit has shown without going into its validity, that the arbitration clause is not an exclusive one and that this particular case falls squarely within the exception provided in the VMA Constitution.*
24. *I aver and verily believe that the filin of the motion to request the court to decline jurisdiction filed on eve of the hearing itself is a mere attempt to delay the progression of the case and ultimate repayment of the debts owed to the VMA.*
25. *Wherefore the VMA prays this honourable court to:*
 - a. *Dismiss the motion filed by Hibberd requesting the court to decline jurisdiction, and*
 - b. *grant costs to the Respondent.”*

[3] The only issue before this Court in this miscellaneous application is whether this Court should decline jurisdiction to hear the plaint and in terms of Article 113.1 of the

Commercial Code of Seychelles in view of the provisions for arbitration contained in paragraph 30 of the Village Management Association.

[4] Paragraphs 29.1 to 29.4 and 30.1 and 30.2 provide as follows:

“29. BREACH

29.1 *If any MEMBER fails in the observance of any of the provisions of this CONSTITUTION, or any rules and/or regulations made in terms hereof, and/of fails to comply with the provisions of the DESIGN GUIDELINES, and/or fails to observe any applicable laws, by-laws or any other regulations imposed by any relevant authority in relation to EDEN ISLAND (or any part thereof), the BOARD may, on behalf of the ASSOCIATION, serve notice on such MEMBER calling upon him to remedy such breach within a time specified in such notice and, failing timeous compliance –*

29.1.1 *enter upon the MEMBER’S PARCEL to take such action as may be reasonably required to remedy the breach, and the MEMBER concerned shall be liable to the ASSOCIATION for all costs so incurred, which costs shall be due and payable upon demand; or*

29.1.2 *call upon such MEMBER in writing to remove or alter any building, or other structure, or other IMPROVEMENTS erected or effected contrary to this CONSTITUTION, and/or any rules and/or regulations made in terms of this CONSTITUTION; or*

29.1.3 *institute proceedings, subject to 30 in any court of competent jurisdiction for such relief as the BOARD may consider necessary, and such MEMBER shall be liable for and shall pay all costs of such proceedings on the scale*

as between attorney and own client as well as all other expenses and charges incurred in obtaining relief; and/or

29.1.4 *impose a daily financial penalty, the amount of which shall be determined from time to time by the BOARD, on notice to the MEMBER.*

29.2 *In addition, if any MEMBER fails to make payment on the due date of LEVIES or other amounts payable by such MEMBER, the BOARD may give notice to such MEMBER requiring him to remedy such breach within 5 business days, and should he fail to timeously remedy his breach, the BOARD may, on behalf of the ASSOCIATION, institute legal proceedings against such MEMBER without further notice, and such MEMBER will be liable for an shall pay all legal costs on the scale as between attorney and own client together with collection commission and any other expenses incurred by the ASSOCIATION in obtaining recovery of the amounts due to it.* [Emphasis mine].

29.3 *Nothin in this 29 shall derogate from, or in any way diminish, the right of the ASSOCIATION to institute proceedings in any court of competent jurisdiction for recovery of any money due by any MEMBER arising from any cause of action whatsoever, for the enforcement of any other obligation of a MEMBER in terms of this CONSTITUTION, or for any other relief.* [Emphasis mine].

29.4 *In the event of any breach of this CONSTITUTION by any person in any OWNERS' household or its employees, invitees or lessees, such breach shall be deemed to have been committed by the OWNER itself; provided that the ASSOCIATION shall be entitled, but not obliged, in addition to any other rights whci it may have or remedies which may be available to it, to take such steps agains the person actually committing the breach, with or without proceeding against the OWNER.*

30. **ARBITRATION**

30.1 *Subject to any specific provisions to the contrary in this CONSTITUTION, in the event of any nature whatsoever arising between the ASSOCIATION and/or the MEMBERS and/or the DEVELOPER, or any one of them, on any matter provided for in, or arising out of this CONSTITUTION, that dispute shall be referred to and be determined in accordance with this 30.*

30.2 *The provisions of this 30 shall, however, not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction.”*

[5] Article 113 (1) of the Commercial Code allows the court to decline jurisdiction at the request of a party to proceedings. The article provides:

“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.”

The Defendant/Applicant has complied with that first requirement by filing this MA which is now before the court. I also find that this agreement between the Petitioner and Respondent in terms of the provisions of the Association remains valid and has not been terminated.

[6] The Respondent contends that despite such procedural compliance, paragraph 29 provide for exception to invoking arbitration. I find that Paragraphs 29.2 and 29.3 refer specifically to payments of levies and recovery of money deemed due. Both paragraphs refer to initiating legal proceedings in court for the recovery of the monies deemed due. This supports the Respondent’s contention that the Plaintiff is not precluded from initiating legal proceedings.

- [7] It must be noted that the court can decline jurisdiction only where the agreement is valid and has not been terminated in addition to there being no other option in the agreement for settling the issue other than by arbitration. The latter becomes more pronounced where the agreement clearly makes legal proceedings an exception to arbitration.
- [8] Paragraph 30.1 provides for arbitration in the event of there occurring an event of any nature between the Association and the member but is subject to any other provision of the Constitution. Hence from the strict interpretation of paragraphs 29.2, 29.3, 30.1 and 30.2, whilst arbitration can be invoked for a dispute in respect of payment of levies for services as claimed in CS46/2021, the constitution allows for legal proceedings to be taken against the defaulting member. The choice therefore is for the Plaintiff now Respondent Association to decide in this specific circumstance which line of action to take.
- [9] Consequently, I find that the Plaintiff, now Respondent can initiate and maintain legal proceedings against the Petitioner and that arbitration is not mandatory in the circumstances. This Court therefore finds no reason to decline jurisdiction in this case. This Petition is therefore dismissed.
- [10] Costs of this proceeding is awarded to the Respondent.

Signed, dated and delivered at Ile du Port, Victoria on 01st day of July 2022

C G Dodin

Judge