SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC 832
MA186/2022
(Arising in CS89/2022)

In the matter between:

IDITH ALEXANDER **Petitioner**
Of Plaisance, Mahe, Seychelles, and having elected her domicile for the purposes of this suit at Christen Chambers, Office 201 Second Floor, Waterside Building Marina North Eden Island (represented by Ms. Evelyne Almeida)

vs

FARISCO CONSTRUCTION & MAINTENANCE (PTY) LTD **Respondent**
Pointe Conan, Mahe, Seychelles (represented by Mr. Frank Elizabeth)

Neutral Citation:	*Alexander v. Farisco Constrcution & Maintenance Pty Ltd* (MA186/2022) [2022] SCSC 832 (20 September 2022)
Before:	Adeline J
Summary:	Plaint alleging breach of contract, and petition for provisional attachment and seizure of property
Heard:	01 September and 05 September 2022 (Oral and Written submission)
Delivered:	20 September 2022

FINAL ORDER

Suit commenced by plaint – plaint discloses cause of action in contract law – alleged breach of contractual terms –Interlocutory application for provisional attachment and seizure of property – plea in limine litis raised – whether contract contains valid adjudication or valid arbitration clause – whether jurisdiction of the Court is ousted or not – whether the pre requisites for the making of a provisional attachment and seizure of property order are met.

- The plea in limine litis is dismissed.
- The petition for a provisional attachment and seizure of property succeeds.

RULING ON MOTION

Adeline J,

[1] By way of a plaint dated 19th August 2022, one Idith Alexander of Plaisance, Mahé, Seychelles ("the plaintiff") entered a suit in the Supreme Court commencing proceedings against one Farisco Construction and Maintenance (Pty) Ltd ("the defendant") a limited liability company, registered and incorporated in Seychelles under the Companies Act 1972.

[2] The cause of action disclosed by the pleadings in this suit is one based on Contract Law, the plaintiff alleging that the defendant has breached a building contract ("the Contract") between the plaintiff and the defendant dated 2nd June 2021.

[3] The reliefs being sought by the plaintiff for the alleged breach of the contract are the following:

(i) payment of the final debt of SCR 1, 762, 138.25/- with cost.

(ii) payment of the final debt with interest at the average commercial unsecured lending rate of 15.29% running from the date of the letter of demand or such later date as the Court may deem fit.

(iii) that the defendant provides the plaintiff with all the soil that will be needed for the works, and

(iv) Any such order as it may deem necessary in the circumstances

[4] There is also before this Court, an application made by way of a petition supported by an affidavit of facts and evidence, ("the petition") filed as MA 186/2022 (arising in CS 89/2022) made pursuant to Section 280 of the Seychelles Code of Civil Procedure.

[5] By this petition, the plaintiff in CS 89/2022, now ("the petitioner"), applies to this Court for an order to:

(i) provisionally attach the funds amounting to SCR 1, 115, 338.25/- being held in account no 0101086690 at the Absa Bank.

(ii) provisionally attach the funds in account no 1002064434017 held at the Nouvobanq if the funds in account no 0101086690 held at the Absa Bank is not enough.

(iii) provisionally attach the funds in account no 32002064434023 held at the Nouvbanq.

(iv) provisionally seize movable assets belonging to the respondent / defendant, which are:

(a) An Isuzu pickup bearing registration number S24258

(b) A Kia pickup K 2700 bearing registration number S31728

(c) A t – king pickup dump truck bearing registration number S34660

(d) A Mazda BT 50 pickup bearing registration S34941

(e) An Isuzu reward pickup bearing registration number S35749, and

(f) An Mj motor cycle bearing registration number S15232.

[6] Having filed a statement of defence in respect of the plaint in answer to the petition, the respondent (also the defendant in the suit) through Counsel, raised a *plea in limine litis*, seeking for dismissal of "this action" (which is understood to be the plaint and the petition) on the following grounds:

> "1. *The Supreme Court has no jurisdiction to grant the Order sought as clause II of the contract dated 2nd June 2021, requires the parties to resort to Adjudication in the event of any dispute arising out of or in connection with the contract, and*

2. "Clause II of the contract dated 2nd June 2021 constitutes an "ouster clause" in law and has ousted the jurisdiction of the Supreme Court to adjudicate over the matter without recourse to adjudication first".

[7] The contract which is the subject matter in contention which learned Counsel refers to and of which sub clause 11.1 entitled Adjudication and sub clause 11.2 entitled Notice of Dissatisfaction under clause II entitled Resolution of Dispute, is attached to the supporting affidavit to the petition, (exhibit A2). For ease of reference, a verbatim of the sub clauses reads:

11.1 ADJUDICATION

Unless settled amicably, any dispute or differences which arise between the contractor and the Employer out of or in connection with the contract, including any valuation or other decision of the Employer, shall be referred by either Party to adjudication. The adjudicator shall be any person agreed by the Parties." (The underlined emphasis is mine).

11.2 NOTICE OF DISSATISFACTION

If a party is dissatisfied with the decision of the adjudicator, or if no decision is given within the time set out in the Rules, the Party may give notice of dissatisfaction referring within 28 days of receipt of the decision or the expiry of the time for the decision. If no notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the Parties. If notice of dissatisfaction is given within the specified time, the decision shall be binding on the parties who shall give effect to it without delay unless and until the decision of the adjudicator is revised by an arbitrator". (The_Underline emphasis is mine).

[8] It is around what is the correct construction of the two sub clauses, amongst other things, that the issues to be addressed in determining this petition revolve, as Counsel

representing each of the two parties gives their own and different construction of the two sub clauses to justify their position *viz a vis* the application / petitioner.

SUBMISSION ON BEHALF OF THE RESPONDENT / DEFENDANT

[9] The gist of learned Counsel for the Respondent's opposition to the motion emanating from his oral submission, is that clause II of the contract, exhibit A2, indicates an arbitration contract which is governed by the Commercial Code of Seychelles, and that in effect, Clause II of the said contract is "an ouster clause that has ousted the jurisdiction of the supreme Court by the parties themselves who have elected to go to adjudication first then arbitration".

[10] Learned Counsel cited the case of Eastern European Engineering Limited vs Vijay Construction (Proprietary) limited, Civil Appeal SCA 13/2015 (Appeal from the Supreme Court MA61/2015 arising in 13/2015) which he said, is one of the case law authorities on the point. Learned Counsel also submitted, that there is an ongoing case between IPHS vs Vijay Construction (Proprietary) limited before the Supreme Court in which case the same legal point is in contention between the parties.

[11] Learned Counsel added, that under the provisions of the Commercial Code, there are only two exceptions that would have entitled a party to this arbitration contract to come straight to Court. That is, if there was an allegation of 1. Fraud and 2. Duress which are not the case in the instant case.

[12] Learned Counsel cited the ongoing case of IPHS (Supra) in which case, he said there is an allegation of fraud. Learned Counsel referred the Court to Article 113 (1) of the chapter on Arbitration (Article 110) in the Commercial Code, emphasising, that the use of the word "shall" herein, connotes that it's a mandatory provision. I am inclined, at this point, to state the provisions of Article 113 (1) which is couched in the following terms;

> *"1. The Court seized of a dispute which is subject of an arbitration agreement shall at the request of either party, declare that it has no jurisdiction, unless, in*

so far as the dispute is concerned, the agreement is not valid, or has terminated".

[13] In addition to his oral submission, learned Counsel did submit in writing to expand some of the legal points he canvassed orally. In his written submission expanding on the *raison d'être* of an arbitration agreement, learned Counsel referred the Court to an article entitled "Jurisdictional Tension Between Domestic Courts and Arbitral Tribunals" by one Emilia Onyema that illustrates the point, that an arbitration agreement is an alternative "Adjudicative Mechanism" to litigation in the form of an arbitral tribunal that makes final binding decisions in its own right such as judicial decisions.

[14] As per Counsel's written submission, as such, the intervention of the Court where there is a contract containing an arbitration clause is only limited for the preservation and interim measures under Article 113 (2) of the Code, but that has to be in respect of the Arbitration process itself after it has commenced. He is of the opinion, that Court's interim reliefs cannot be independent of the adjudicative arbitration proceedings.

[15] Learned Counsel cited the case of Intour SLR V Emerald Cove [2000] SLR 21, in which case, the Court held, that if a plaint is filed in a matter which the parties have chosen to resolve by arbitration, the Court has to declare that it has no jurisdiction to resolve the dispute. Counsel also stated, that in the instant case, the Court should declare that it has no jurisdiction to entertain the plaint for the substantive reliefs being sought for, and the petition seeking for the interim relief. That, according to learned Counsel, will cause the parties to proceed to their chosen avenue to settle their disputes, which is to the adjudicator and subsequently to the arbitrator.

[16] Learned Counsel also submitted, that the limited powers conferred upon the Court to intervene in disputes arising from a contract containing an arbitration clause agreement, can also be exercised under Article 144 of the Commercial Code, specifically on matters that arise out of the arbitration agreement, such as issues concerning or relating to the conduct of the arbitration process, and the making of an interim or a final award for example.

[17] In essence, learned Counsel's submission has focused mainly on his proposition, that the contract in question, IA2, is an arbitration agreement "which the parties to the same have willingly and voluntarily entered into, the effect of which has ousted the Court's jurisdiction to entertain the plaint, and in this instance, the Court must declare that it has no jurisdiction to entertain the plaint.

[18] As to the petition for an Order of provisional attachment and seizure, the gist of learned Counsel's argument, is that, given that the Court has no jurisdiction to entertain the plaint, it equally has no jurisdiction to entertain the petition. In a way, on the face of it, that makes logical sense because the petition has been filed in Court as an MA (a miscellaneous application) arising from the main case CS589/2022 but that may not necessarily follow because at times the law defies logic. In addition, it is the contention of learned Counsel, that Article 113 (2) of the Commercial Code allows application for preservation or interim measures in respect of matter arising from the arbitration process.

SUBMISSION ON BEHALF OF THE PETITIONER / PLAINTIFF

[19] In her oral submission for the petitioner / plaintiff learned Counsel submitted, that if she understands the respondent / defendant's argument to be that this proceeding "is exclusively an arbitration matter," it is, in fact, the respondent that has ousted the arbitration clause became when the dispute arose between the parties, it should have taken the matter to arbitration rather than issuing the petitioner / plaintiff with a termination letter (exhibit IA3). Learned Counsel argued, that having not done so, this gives the Court jurisdiction to hear both, the plaint and the petition for an order for provisional attachment and seizure.

[20] Learned Counsel explained the provisions under Article 113 (2) of the Commercial Code, and then proceeded to emphasise, that the issue is not exclusively arbitration, contending, that as such, the Court does have complete right to hear the matter for the substantive reliefs being sought for by the plaintiff, and the provisional attachment and seizure petition. Learned Counsel also stated, that if the respondent 's / defendant's position is that the disputes should have been a matter to be taken to arbitration, that should have been canvased in respect of the plaint seeking for substantive reliefs not

in respect of the petition for provisional attachment and seizure of property. Article 113 2. is couched in the following terms:

> *"An application to the Court for preservation or interim measure shall not be incompatible with an arbitration agreement and shall not imply a renunciation of such agreement".*

[21] With specific reference made to the wording of clause 11.1 of the contract in question, learned Counsel argued, that clause 11.1 refers to resolution of disputes by "adjudication", not arbitration, and that there is no law in this country that provides for the jurisdiction of the Court to be ousted in instances where there is an adjudication clause in a contract.

[22] Learned Counsel remarked, that the respondent's submission seeking to rely on section 6 (1) of the English Arbitration Act 1996 to illustrate the effect of an arbitration agreement has no relevance to the issue which this Court has been called upon to determine, which has to be on the basis of our domestic law, more specifically, Article 111 (1) of the Commercial Code that reads:

> *1. "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".*

[23] It is the submission of learned Counsel, that when one reads clause 11.1 and 11.2 of the contract, clearly, the parties to the contract intended to have recourse to adjudication in the event of a dispute between them, and that the terms of the two sub clauses show a clear distinction between the two forms of dispute resolution. It is also submitted by learned Counsel, that one cannot construe the term adjudication at sub clause 11.1 to mean arbitration not only because they are two different forms of dispute resolution, but also, because it doesn't make any sense for the decision of the adjudicator to be revised by an arbitrator, and furthermore, that is not what the parties intended looking at the wordings of sub clauses 11.1 and 11.2. It is the contention of learned Counsel, that there is no arbitration clause in the contract in question, as

clearly, based on the wordings of sub clause 11.1 and 11.2, the parties intended to make use of adjudication as a forum to resolve any dispute between them.

[24] Learned Counsel explained, that in view that in the context of a construction contract, for example, our law is silent about the term adjudication, the Court has to seek for guidelines in English law, which in the circumstances, it is permitted to do by virtue of section 4 of the Courts Act. Therefore, references have to be made to the provisions of the Housing Grants Construction and Regeneration Act 1996, which provide for a different process called adjudication as opposed to arbitration under the provisions of the English Arbitration Act 1996. Learned Counsel made specific mention of an article from "lexis Nexis" entitled, "differences between adjudication and other forms of dispute resolution", in which article, the author states that "adjudication is a quick method of settling disputes on a provisional interim basis, and that it is binding until finally resolved by arbitration, litigation or agreement."

[25] Commenting on the case of Raymond Gambou vs EIDC CS25 of 2013, which was cited by learned Counsel representing the respondent / defendant, learned Counsel sought to distinguish between that case, and the instant one, in that, firstly, the distinction between adjudication and arbitration was not at all raised by the parties in his case, and that sub clause 25. 3 in Gambou, (Supra) expressly provided that any dispute will be subject to the Arbitration Act of the Republic of Seychelles, and more so, sub clause 25.10.11 constituted an irrevocable consent to arbitration by the parties. Learned Counsel added, that although the term adjudication was used in Gambou, (Supra) it was expressly stated, that it would be in terms of the Arbitration Act of Seychelles as amended, referring to the Commercial Code and the arbitration provision therein.

[26] In her submission, learned Counsel also cited the case of Le Roux vs Eden Island, stating, that in this case too the contract contains an adjudication clause, same as in Gambou, and it expressly stated, that adjudication would be in terms of the Arbitration Act of Seychelles. In that case, although the term adjudication was used, it was expressly stated in the contact, that the matter would be adjudicated by an arbitrator and that the parties consented to arbitration. Learned Counsel contended, that it was clear, that in Le Roux (Supra) the word adjudication meant arbitration.

[27] It is also contended by learned Counsel, that in giving sub clauses 11.1 and 11.2 their correct interpretation, it would be erroneous to construe adjudication to mean the same thing as arbitration because the two terms are not one and the same thing, and furthermore, it is expressly stated, that "the decision of an adjudicator is revised by an arbitrator". Learned Counsel put to the attention of the Court, that in its submission, the respondent/defendant has failed to give an explanation as to why the decision of the adjudicator would be revised by an arbitrator if the agreed sub clause 11.1 and 11.2 read together was intended to be an arbitration clause.

[28] It was emphasised by learned Counsel, that under the law of this country, notably the law of arbitration under the Commercial Code, the Court can only decline jurisdiction, or have its jurisdiction ousted, if the terms of the contract which is the subject matter of the dispute contains an arbitration clause, not an adjudication clause. As such, learned Counsel for the petitioner / plaintiff had this to say:

> *"It is the submission of the plaintiff that clause 11.1 and clause 11.2 is not an arbitration clause but an adjudication clause which is materially different, thus not the subject of the provisions of Articles 111 and 113 of the Commercial Code of Seychelles. On the basis that there is no arbitration clause, this honourable Court cannot decline jurisdiction in this matter and stay proceedings pending the outcome of arbitration".*

[29] Learned Counsel submitted, that if the Court is to decline jurisdiction to hear the plaint on the basis that its jurisdiction has been ousted because it finds the existence of an arbitration clause in the contract, it cannot also decline to make the order of provisional attachment and seizure, given that this is an interim / preservatory relief which the Court is empowered to do on application by a party, under Article 113 (2) of the Commercial Code.

[30] To assist the Court to determine whether sub clause 11.1 and 11.2 of the contractor is or is not an arbitration clause, learned Counsel referred the Court to the ruling of Andre, J in Bajrang Builders (Pty) limited vs Havini & Company (Pty) limited [2017]

SCSC 470, who at paragraph [10] of her ruling, citing the case of Emerald Cove Ltd vs Intour S . R . I, had this to stay;

> *"[10] In the matter of (Emerald Cove Ltd vs Intour Sri (Civil Appeal No 9 of 2000, the Court of Appeal observed that –:*
>
> *"It is evident, that an arbitration clause is valid in terms of Article 113 – 1, if it is capable of ousting the jurisdiction of the Court. However, the validity of the arbitration clause is determined by the proper law of contract .... Notwithstanding the wide importance of Article 113 –1 (a) Seychelles Court should not decline jurisdiction and so shut its door to a litigant, unless it is sure that the agreement to arbitrate is valid and subsisting. This he must do so by evidence that satisfies the Court to that elect".*
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> *"It is also because the Seychelles Court will not deny a litigant the protection of the law that it will insist that a party who ask for it to decline jurisdiction in the matter on the ground that there is a valid arbitration agreement must show readiness to submit to arbitration. It must be emphasised, that when there is an arbitration agreement, notwithstanding the validity of the agreement is determined by the proper law of the contract which may be foreign law, whether the Seychelles Court will decline jurisdiction or not, and the procedure for requesting the Court to decline jurisdiction is governed by Seychelles law. That procedure was stated in Beitsma vs Dingjam".*

[31] Learned Counsel submitted, that in Beitsma (Supra), it was held that the Supreme Court of Seychelles, in exercising its jurisdiction under section 4 of the Courts Act, when a party has been served and caused appearance before the jurisdiction of the Court, the question was not whether the Court had power to decline to exercise jurisdiction or order a stay of proceedings. It is added, that as a matter of procedure, the party who asks the Court for an order to stay proceedings must filed an affidavit so as to satisfy the Court not only that he is, but also, that he was at the commencement of proceedings ready and willing to do everything for the proper conduct of the arbitration.

[32] Learned Counsel stated, that the case of Beitsma confirms, that the power of the Supreme Court to decline jurisdiction at the request of either party to a Commercial transaction when the Court is seized of a dispute which is subject to an arbitration agreement, in found under Article 113 (1) of the Commercial Code, and the procedure to follow is as stated above in the proceeding paragraphs as elaborated in Beitsma vs Bingham No l, and confirmed or endorsed by the Court of Appeal in Emerald Cove. Ltd vs Intour S. R.I.

[33] Relying on these case law authorities, it was the submission of learned Counsel, that the respondent / defendant should have shown to the Court, that it is ready and willing to submit to arbitration, and to do everything necessary for the proper conduct of the arbitration proceedings, and it was since the commencement of the proceedings ready and willing to do everything for the proper conduct of the arbitration. In other words, as correctly put by learned Counsel, the respondent / defendant should have done two things which it did not, that is:

(i) Show to the Court (by way of notice of motion supported by affidavit evidence) that it is ready and willing to submit to arbitration and to do everything necessary for the proper conduct of the arbitration proceedings.

(ii) that it was since the commencement of the proceedings ready and willing to do everything for the proper conduct of the arbitration.

[34] Learned Counsel added, that it was incumbent of the respondent / defendant to prove that the arbitration clause is valid and subsisting by way of notice of motion supportedly affidavit evidence. Learned Counsel went on as to say, that learned Counsel for the respondent / defendant employed the wrong procedure when it sought to ask the Court to decline jurisdiction to entertain the plaint and to dismiss it as well as the petition for provisional attachment and seizure, by way of raising a plea in limine litis by virtue of section 90 of the Seychelles Code of Civil Procedure. Learned Counsel stated, that local domestic Jurisprudence clearly shows, that this should have been done by way of notice of motion supported by affidavit evidence in accordance with section 121 and 122 of the Seychelles Code of Civil Procedure.

[35] It is the contention of learned Counsel, which contention I concur, that Counsel for the respondent / defendant has moved the Court to decline jurisdiction to entertain the plaint as well as the petition for provisional attachment and seizure of property, simply on his belief, that there is in existence in the contract a purported arbitration clause, without proving that there is one by way of evidence in the form of affidavit evidence, to prove that the arbitration clause, if any, is valid.

[36] Learned Counsel went on as to say, that learned Counsel for the respondent/ defendant employed the wrong procedures when it sought to ask the Court to decline jurisdiction to entertain the plaint and dismiss it as well as the petition for provisional attachment and seizure by way of raising a plea in limine litis by virtue of Section 90 of the Seychelles Code of Civil procedure. Learned Counsel stated, that local domestic jurisprudence clearly shows, that this learned Counsel reminded the Court, correctly, that in the Bajrang Builders case, Govinden J (as she then was) 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, in that there were no averments to that effect in the supporting affidavit.

[37] Learned Counsel also made the point, that the prayer for the Court to dismiss the plaint as well as the petition because of the purported arbitration clause as maintained by Counsel for the respondent / defendant, is an incorrect relief that is being sought for, in view that based on the case law authorities discussed in the proceeding paragraphs of this ruling, where there is a valid arbitration clause in a contract, the appropriate relief to be sought for is for a stay of proceedings pending the outcome of an arbitration award.

ANALYSIS

[38] I have given due consideration to the submission made by the parties in this case, and the issues which this Court is being called upon to address, nothing, that there is no disagreement between the parties as to the correct statutory interpretation of Article 113 (1) of the Commercial Code. It is agreed between the parties, that an arbitration clause in a contract, is an arbitration agreement which the parties to the contract have voluntarily and willingly entered into to resolve any dispute that may arise between

them, which arbitration clause has the effect of outsting the jurisdiction of the Court to entertain their disputes.

[39] Within this background, the first issue to be determined, therefore, is whether sub clause 11.1 and 11.2 read together is an arbitration clause. It must be mentioned at the outset, that in my opinion sub clause 11.1 and 11.2 is modelled on the English construction contract. Under the provisions of the Housing Grants Construction and Regeneration Act 1996, adjudication as an alternative dispute resolution mechanism, ADR, is implied into construction contracts where there is no express provision for adjudication. In this instance, there is an expressed provision.

[40] In this country, there is no law, let alone statutory provisions that would imply in construction contracts an adjudication clause as an implied term. It is, therefore, not surprising that the contract expressly provides for "adjudication". Learned Counsel for the petitioner/ plaintiff has argued strenuously, that the contract in question is not an arbitration agreement because it does not contain an arbitration clause but an adjudication clause instead, which unlike arbitration, there is no statutory law governing adjudication in this country. I totally subscribe to learned Counsel's view, that the contract under which the disputes between the parties arose, contains an adjudication clause and that in the circumstances, Article 113 (1) of the Commercial Code cannot be applied.

[41] Therefore, I have not been persuaded by the efforts of learned Counsel for the respondent / defendant in trying to convince me into finding that the contract contains an arbitration clause, as clearly, as a matter of construction, the contract contains an adjudication clause at sub clause 11.1 which provides that "..... any disputes or difference which arise between the contractor and the employer ..... shall be referred by either party to **adjudication**, and at sub clause 11.2 ....if notice of dissatisfaction is given within the specified time, the decision shall be binding on the parties who shall give effect to it without delay unless the decision of the adjudicator is revised by an arbitrator". Clearly, therefore, if notice of dissatisfaction is not given within the specified time, then the decision of the adjudicator will remain that be an arbitrator decision.

[42] It would take a mountain of a struggle for anyone to persuade this Court into believing that sub clause 11.1 and 11.2 point to an arbitration clause in the contract. In fact, the word "adjudication" at clause 11 of the contract speaks for itself, indicating, that for all intent and purposes, the parties to the contract did opt for adjudication instead of arbitration to resolve any occurring disputes between them. Therefore, on the basis that the contract does not contain an arbitration clause, which follows that the provisions of Article 113 (1) of the Commercial Code cannot be relied upon to request this Court to decline jurisdiction, that alone, renders the *plea in limine litis* raised by Counsel for the respondent / plaintiff unsustainable, devoid of any merit and worthy of dismissal. The *plea in limine litis* is therefore dismissed.

[43] I find no necessity, although the submission of learned Counsels indirectly call for it, for a discussion on the differences between adjudication and arbitration, both being alternative dispute resolution mechanisms. Suffice to say, that there are few articles published on the web in the United Kingdom, in which adjudication and arbitration are discussed (see for example, Pinsent Masons, Adjudication versus other approaches to construction disputes, SEC Charges Shawn Good, on Arbitration vs adjudication, Tollers Solicitors Adjudication, Arbitration and Mediation - The Difference, and Clog – adjudication vs Arbitration. They all make good reading.

[44] Besides addressing the substantive law on arbitration correctly as is on our statute book, and the jurisprudence in this area of law by citing the relevant case law authorities such as Bajrang Builders (Pty) limited v Harini & Company (Pty) limited [2017] SCSC 470, Emerald Cove Ltd v Intour S.r i (Civil Appeal CO9 of 2000) and Beitsma v Bingjam in which cases over the years our Courts have developed the law further and came up with certain principles, learned Counsel for the petitioner / plaintiff did raise matters of procedural law, contending, for example, that the request for the Court to decline jurisdiction in this matter should have been made by way of notice of motion supported by affidavit. (see Bajrang Builders(Pty) Ltd v Harini & Company Pty limited [2017] SCSC). While I am in agreement with this proposition based on the case law authorities discussed earlier, having dismissed the *plea in limine* for the reason that the contract does not contain an arbitration clause, I find no good reason why I should elaborate on the rules of procedure developed by case law in the

light of the case law authorities cited. However, I subscribe to learned Counsel's view, that this omission in itself, warrant a dismissal of the *plea in limine litis.*

[45] It now remains for this Court to consider the merit of the petitioner's/ plaintiff's application for an order for a provisional attachment and seizure of the respondent's/ defendant's property, made pursuant to Section 280 of the Seychelles Code of Civil Procedure. The pre- requisite for obtaining an order of provisional attachment and or seizure is statutory based, and are laid down in Articles 280 and 281 of the Seychelles Code of Civil Procedure. Articles 280 and 281, set out the requirements for the making of the order, and these requirements are,

(i) that a suit has been commenced, and

(ii) the applicant / petitioner has a "bona fide" claim.

[43] Interestingly, the reading of the statutory provisions of Article 281, clearly and expressly state, that where those two requirements are met, the Court "shall direct the warrant to be issued". That indicates, the mandatory nature of such direction, the Court having no discretion to take into account other factors, although, under the provisions of Article 281, "the Court before any such warrant or Order is issued may require the Applicant to find such security as the Court may think fit. (See Eastern European Engineering Limited vs. Vijay Construction (Proprietary) (Limited) Civil Appeal SCA 13/2015 (arising from MA61/2015 arising in CC13/2015).

[44] Robinson J, is the Court a quo, relying on Eastern European Engineering Limited v Vijay Construction (Proprietary) limited (unreported) MC 275/2012 arising CC28/2012 and Zaccari v Andre (16 of 2008 SCSC 37) held the view, that in order for an application under Article 280, and 281 of the Seychelles Code of Civil Procedure to succeeds, it must be shown, firstly, that there is a clear danger that the Respondent may avoid the Judgment debt against it, and secondly, unless the provisional attachment or seizure Order is granted. The Petitioner would be unable to enjoy the fruits of the Judgment.

[45] The property against which a provisional Order for attachment, and or seizure is being sought, are monies in bank accounts and motor vehicles. Robinson J is the case of Benoiton Construction (Pty) Ltd (XP51 of 2004) SCSC 87 (07 March 2014) held the view, that motor vehicles are outside the ambit of the term moveable property in Article 533 of the civil code. In Eastern European Engineering Limited Supra, Twomey JA, had this to say:

> *"Vehicles are by their very nature not only capable of being moved but specifically designed for such purpose. As such they clearly fall within the scope of the ordinary meaning of the term "movable property", and can therefore be the subject of an Order of provisional seizure or attachment under Article 280, 281 of Code of Civil Procedure.*

[46] In the final analysis, therefore, on account of the evidence laid before this Court by way of affidavit by the petitioner / plaintiff, this Court is satisfied, that the requirements for the making of a provisional Order of attachment and, or seizure of property have been met, in that, the petitioner / plaintiff has a *bona fide* claim against the defendant in the suit that has commenced. Having carefully considered the averments in the supporting affidavit to the petition, I am satisfied, that there is a danger that the defendant may avoid satisfying the Judgment debt if Judgment is given in favour of the petitioner / plaintiff at the conclusion of the case.

[47] Moreover, I reasonably believe, that unless an Order for provisional attachment of the monies in the hands of third parties is made, the petitioner / plaintiff would be unable to realise the fruits of its Judgment if given in its favour in the suit. I am also of the view, that the order for provisional attachment and seizure ought to be made in the interest of justice.

[48] For the reasons given in the preceding paragraphs, I hereby make an Order attaching provisionally any money or all the monies to the extent of Seychelles Rupees One Million One hundred thirty eight and cents twenty five (SCR 1, 115, 338.25) due to or belonging to the defendant, which is or are in the hands of;

1. ABSA bank, in account Number 0101086690, (and if the funds in the said bank account is insufficient),

2. Nouvobanq, in account Number 1002064434017 and account Number 32002064434023.

[49] Nonetheless, as regards to the petitioner's / plaintiff's application for provisional seizure of the motor vehicles, I decline to make an order for their seizure for two reasons;

(i) No proof of ownership of those vehicles have been produced as exhibits to support the averments made in the supporting affidavit to the petition (see Francis v Port-Louis & Anor (358 of 2008) [2008] SCSC 4 (14 December 2008)

(ii) In terms of Article 236 (f) of the Seychelles Code of Civil Procedure, in the absence of evidence to the contrary, I consider the defendant's trade or business to involve the use of these vehicles. (See Eastern European Engineering Limited vs Vijay Construction (Proprietary) Limited, Civil Appeal SCA 13/2015 (Appeal from the Supreme Court MA61/2015 arising in 13/2015)

[50] I give notice, that the provisional attachment order made herein, is made pending the final determination of the suit pertaining to CS89/2022, or until further order of this Court.

[51] I further order, that in pursuance of the provisional attachment order made herein, the Registrar of the Supreme Court is directed to issue the warrants for the provisional attachment of the monies accordingly.

[52] A copy of the Order made herein is to be served on the respondent / defendant.

Signed, dated and delivered at Ile du Port on 20th September 2022.

B. Adeline

Judge of the Supreme Court