

THE REPUBLIC OF SEYCHELLES

IN THE SUPREME COURT OF SEYCHELLES HOLDEN AT VICTORIA

Miscellaneous Application No. 131 of 2010

(Arising from Civil Side No. 27 of 2010)

F.B Choppy (Pty) Ltd

Applicant

versus

NSJ Construction (Pty) Ltd

Respondent

Basil Hoareau for the Applicant

France Bonte for the Respondent

RULING

Egonda-Ntende, CJ

1. The applicant is seeking to set aside an Award of the Arbitrator dated 21 September 2010 on the three grounds. Firstly that the respondent was guilty of fraudulently concealing matters which ought to have been disclosed to the Arbitrator, namely the fact that at the time the Respondent entered into the contract with the Applicant on the 11th of April 2008 and during the duration of the contract, the Respondent did not have a valid licence, which authorised it to effect construction work of the nature as contemplated in the contract of 11 April 2008.
2. Secondly it is contended that the award contains obvious errors, both on the law and facts. Thirdly it is contended that the procedure adopted by the arbitrator and the decision of the arbitrator was contrary to the principle of natural justice.

3. The motion was supported by an affidavit sworn by Mr. Benjamin Choppy. The affidavit mentions 4 documents it purports to exhibit as A1, A2, A3 and A4 but none of the those documents were actually annexed to the affidavit filed in this court. These documents are the award, the affidavits of B Choppy and Neil Mederick and Report of Quantity Surveyor Mr. Jacques Renaud. At the time of writing this decision I am unable to find these documents on the court record save for the award which was filed by the arbitrator.
4. In opposition to this application the respondent has filed a sworn affidavit dated 23 December 2010 seeking the dismissal of this application.
5. Section 207 of the Seychelles Code of Civil Procedure, herein after referred to as SCCP, sets out the grounds upon which an award by an arbitrator may be set aside or modified. It states,

'An award shall not be objected to and shall not be set aside except on one of the following grounds-- (a) corruption or **misconduct of an arbitrator** or umpire; (b) either party having been guilty of **fraudulent concealment of any matter which ought to have been disclosed** or of wilfully misleading or deceiving the arbitrator or umpire; Provided however that an award may be modified by the court after hearing both parties, if it has left undetermined any of the matters referred to arbitration or if it has determined any matter not referred to arbitration, or **if the award contains some obvious error**; or, in any such case, the court may send the award back to the arbitrator or umpire to be modified.'
6. The three grounds raised by the applicant are clearly within the grounds provided by the law for setting aside or modifying an award. What remains is to consider whether those grounds bear any merit in relation to the case at hand.
7. In the affidavit of the applicant the first ground that claims that the respondent

fraudulently concealed that it did not have licence from the Seychelles Licensing Authority is covered by paragraph 5 and 6. I shall set out the said paragraphs.

'5. I aver that the decision of Dr. Jolicoeur should be set aside since NSJ Construction (Pty) has been guilty of fraudulently concealing matters which ought has been disclosed to Dr. Jolicoeur, in his capacity as arbitrator. NSJ Construction (Pty) Ltd ought to have produced a copy of their license from the Seychelles Licensing Authority so as to satisfy the arbitrator that: (I) NSJ Construction (Pty) Ltd had legally entered into the contract dated the 11th April 2008 with F.B. Choppy (Pty) Ltd, by which contract NSJ Construction (Pty) Ltd were to construct 8 self catering chalets, inclusive of 1'gran Kaz', 1 worker's house (two rooms) and a reception, on Parcel LD167 situated on La Digue, as per scope of works specified in the schedule annexed hereto; and (note there is no schedule annexed to the affidavit.) (ii) NSJ Construction (Pty) Ltd had the competence and know how to effect the work as set out in the contract. 6. I further aver NSJ Construction (Pty) Ltd was obliged to provide such licence, especially in view of the fact that the dispute was largely based on the quality and the progress of the work in question. Moreover the issue concerning the license of NSJ Construction (Pty) Ltd is also fundamental to the validity of such a contract, as it would have determine whether or not NSJ Construction (Pty) Ltd had entered into the contract with F.B. Choppy (Pty) Ltd in contravention of the Licences Act which was then in force. In other words the arbitrator would have able to know whether the contact was void from the beginning, in the event that it was against public policy. I aver that it is necessary and just that a representative of the Seychelles Licensing Authority by called to produce the relevant licenses issued to NSJ Construction (Pty) Ltd.'

8. Mr. Gregoire Payet's affidavit for the respondent on this issue states,

'6. The respondents dispute and object to the averments at paragraph 5 of the affidavit of the applicant firstly on the ground that there was no use for the production of the license of the 1st Respondent for the purpose of consideration of the award by the Arbitrator for the licence of the 1st Respondent was never issue of dispute either before the Arbitrator or the Supreme Court which proceedings were also submitted to the Arbitrator as part of the briefs which clearly disclosed a validly executed contract between the Applicant and Respondents; secondly, that the 1st Respondent had a duly registered license and duly paid with the Seychelles

Licensing Authority during the contractual period and hence the objection of the applicant on that ground is devoid of any merits and thirdly, I aver that it is the Applicant who has come before this Court and the Arbitrator “without clean hands” and in bad faith in that the applicant is only now invoking an issue pertaining to the 1st Respondent's license which has never arisen at any point in time in any of the filed pleadings before the Honourable Chief Justice in the original suit nor in the briefs submitted in support of their case before the arbitrator.'

9. The pleadings of the applicant in this court never raised the issue whether in fact there was a valid contract at all between parties on account of any incapacity by the respondent. The case presented by the applicant was that there was a valid contract which the respondent had breached in performance. The applicant has not claimed that it raised this issue in its pleadings before the arbitrator. Or that it submitted any evidence in relation thereto. It is raising this matter for the first time.
10. The applicant has not provided any legal basis upon which the respondent was under a duty to disclose to the Arbitrator whether or not it had a valid license. The allegation of fraudulent concealment is simply absurd. In civil disputes before this court it is the party alleging the existence of a relevant fact who must prove the same. However he must start with pleading it as a relevant and necessary fact to his case. This was not done by the applicant at any stage of the proceedings before this court and or the arbitrator. It is clearly an afterthought. This ground has no merit whatsoever.
11. The award is attacked in that it contains a discussion of the elements of conventional building contracts in Seychelles which it contra-distinguishes with the contract of the parties in this case without their having been a witness to testify on elements of a conventional building contract in Seychelles on the record and the applicant having an opportunity to cross examine such witness or comment on

a publication if it came out of a publication. Paragraph 7 of the affidavit of the applicant refers. Firstly from a reading of the award it is clear this discussion of the elements of a conventional building contract is not evidence as such. And it does not form the basis for the decision of the arbitrator. The arbitrator appears to use his general knowledge of the elements of a conventional building contract to provide a background to the discussion that will follow. Given the variance of the contract of the parties from the conventional elements of a building contract in Seychelles, it was merely a background explanation of why this contract turned out to be so difficult to implement. The arbitrator was using his expertise to explain the evidence before him and not to supply the evidence for the decision of the case.

12. It was held in *Fox v Wellfair Ltd [1981] Lloyd's Rep. 514* that an arbitrator may use his personal knowledge to evaluate the evidence and submissions before him but not to supplement or supplant that evidence. Lord Denning stated at page 522,

'His [the arbitrator's] function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him. He can and should use his special knowledge so as to understand the evidence that is given – the letters that have passed – the usage of trade – dealings in the market – and to appreciate the worth of all that he sees upon view. But he cannot use his special knowledge – or any rate he should not use it – so as to provide evidence on behalf of the defendants which they have chosen not to supply themselves.'

13. Dunn L.J., in the same case at page 528 explained it in the following words,

'it seems to me that an expert arbitrator should not in effect give evidence to himself without disclosing the evidence on which he relies on to the parties, or if only one to that party. He should not act on his private opinion without disclosing it. It is undoubtedly true that an expert arbitrator can use his own expert knowledge. But a distinction is made in the cases between general expert knowledge and knowledge of special facts relevant to the particular case.'

14. *Fox v Wellfair (supra)* was cited with approval in *Checkpoint Ltd v Strathclyde Pension Fund Ltd [2003] EWCA Civ. 84*. It is clear to me that the arbitrator was drawing on his general knowledge of the building industry in Seychelles hence the discussion of elements of conventional building contracts in Seychelles. He did not adduce evidence for himself to consider without affording the parties an opportunity to comment on the same. The arbitrator did not make any reference to special facts that were relevant to a decision in the present case. It was essentially general knowledge.

15. Secondly the arbitrator notes from the Report of Jacques Renaud, the Court appointed Quantity Surveyor (by agreement of the parties hereto), that there was no lead consultant in the management of this contract, and the design and specifications of the contract were lacking in detail. The arbitrator quoted that report in part, 'many details were left to imagination and differing interpretation.' This, in my view, provided sufficient basis for the arbitrator to conclude that the absence of a lead consultant contributed to the problems in the implementation of this contract.

16. The arbitrator clearly identified the issues for a decision in paragraph 5 of the award. In paragraphs 14 to 21 of the award the arbitrator dealt with all the factual issues and taking into account the evidence before him from both the applicant and respondent and the independent Quantity Surveyor he made his findings and provided reasons for doing so. I am unable to accept the charge that he did not take into account the affidavits of the applicant and his Quantity Surveyor. A reading of paragraphs 14 to 21 shows that he did.

17. I am satisfied that this second ground against the award fails.

18. The last ground against the award is on the basis of obvious errors on the part of the arbitrator. This complaint is contained in paragraph 8 of the affidavit of the applicant. Paragraph 8(i) claims that the order of the arbitrator for the applicant to pay immediately all sums due including for extra works as being contrary to the respondent's letter on the subject which stated that payments for extra works would be paid at the completion of all work. I see no error here. There was a claim and counter claim by the parties before the arbitrator. This must be part of the respondent's claim counter claim against the applicant. It would only be an error if the respondent had not claimed it and it was awarded.

19. Paragraph 8(ii) sets out the alleged second error. The arbitrator ordered that all outstanding payments be paid including what had been deducted as retention money from interim payments because there was no provision in the agreement that deductions of retention money be made from interim payments. The applicant contends that although there was no express statement to that effect it can be implied that the retention would be deducted whenever a payment was made.

20. Clearly the arbitrator did not accept that deductions of retention money ought to have been made on the basis of an implied reading. I do not think this can be referred to as an error of fact or law. Strictly the arbitrator was right to find that there was no provision authorising such deductions from interim payments.

21. The last error is with regard to the adjusted contract sum and taking into account rupee floatation. This is contained in paragraph 8 (iii) of the affidavit of the Applicant. It attacks the final figure of the contract sum as found by the Report of

the Quantity Surveyor of S7,099,646.68 as being clearly wrong in light of exhibit P2A attached to the affidavit of Mr. Neil Fredrick. Secondly that the sum of SR339,230.00 as adjustment agreed is also wrong and should read SR270,480,00. Therefore the final contract sum should be SR6,895,229.00.

22. As noted herein earlier the attachments A2 and A3 were actually not attached to the affidavit of the applicant as claimed in the affidavit itself. I have not had the opportunity to review the same. It is the duty of the applicant to file full papers including all attachments and annexures. Where it fails to do so, as in this case, it fails in putting its case forward. The burden is upon a party who desires to establish certain facts to do so. I am unable on reading paragraph 8(iii) of the applicant's affidavit to find the error in the figures mentioned in the award.

23. In the result I find that this application is without merit and dismiss the same accordingly.

24. As the objections to the award have failed I enter judgment in this case in terms of the award of the arbitrator in accordance with Article 206 of the SCCP.

Signed, dated and delivered at Victoria this 4th day of March 2011

FMS Egonda-Ntende
Chief Justice