MALL OF MONT CHOISY LIMITED v PICK 'N PAY RETAILERS (PROPRIETARY) LIMITED & ORS

2015 SCJ 10

Record No: SC/CPM/PWS/00787/2014

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Mall of Mont Choisy Limited

Plaintiff

v/s

1. **Pick 'N Pay Retailers (Proprietary) Limited**
2. **Red Apple Retail Company Limited**
3. **Red Apple (Mont Choisy) Limited**

Defendants

JUDGMENT

In a plaint with summons dated 26 June 2014, the plaintiff company (Mall of Mont Choisy Limited) is suing the three defendant companies before the Commercial Division of the Supreme Court and is claiming from the latter a sum of Rs 201 million together with all sums including rentals which may become due at the time of judgment for alleged breaches of contract. In a letter dated 11 July 2014 and addressed to the Court, Mr Thierry Koenig SA appearing for the defendant companies, challenged the jurisdiction of the Court on the ground that "*there is a contractual arbitration provision binding the parties…………and ….that pursuant to the provisions of Civil Code, the Court is bound to decline jurisdiction and refer the parties to arbitration.*" On 12 July 2014, Mr Koenig was requested by the Court to put in a preliminary objection in relation to the challenge of the jurisdiction of the court.

Accordingly, a preliminary objection dated 5 August 2014 was duly filed. In the preliminary objection, the defendant companies no longer relied on the provisions of the Civil Code. Instead the preliminary objection was grounded on section 5(1) of the International Arbitration Act (the Act) which provides:

> "*Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action*

> *to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute."*

It was contended by defendant companies that the plaintiff company is bound by an arbitration clause found in a lease agreement dated 3 October 2012. The defendant companies therefore moved the Commercial Division that the case be referred to the Supreme Court pursuant to section 5(1). In fact, relying on that arbitration clause, the defendant companies have on 10 July 2014 seized the Permanent Commercial Arbitration Court of the Mauritius Chamber of Commerce and put in a claim for damages against the plaintiff company for breach of contract.

The motion for referral was granted by the Commercial Division on 17 September 2014 after Mr André Robert Jr., attorney at law for the plaintiff company informed the Court that the defendant companies "*for the sake of celerity"* had no objection to the motion.

Before examining the section 5 claim referred to us, we wish to observe that the present application under section 5 did not comply strictly with Rule 13(1) and (2) of the Supreme Court (International Arbitration Claims) Rules 2013. Rule 13(1) and (2) sets out how and when an application should be made and it reads as follows:

> *"(1) Where a party to an action before a referring Court contends that the action is the subject of an arbitration agreement, it shall make an application ("a Section 5 claim") to that effect to that Court, supported by written evidence in the form of one or more affidavits or witness statements, together with any supporting documents.*
>
> *(2) Where the application complies with paragraph (1) and section 5(1) of the Act, the referring Court shall immediately stay its proceedings and notify the Chief Justice who shall promptly constitute the adjudicating Court."*

The rationale behind the procedure set out in Rule 13(1) and (2) is obvious. The objective is to bring by way of affidavits and witness statements all relevant and material facts and points in law concerning the application before the referring Court and also to set out the case of the applying party for the benefit of the adjudicating Court. The action before the Commercial Division was referred to us without any affidavit in support. To remedy this omission and the parties having no objection, we

requested that affidavit evidence together with supporting documents be put in so as to enable us to adjudicate on the section 5 claim before us. However, it goes without saying that for the sake of clarity and expediency, it is important that the procedure set out in Rule 13(1) and (2) be adhered to and this Court may not be so lenient in the future.

The facts in so far as they are material and relevant to the section 5 claim before us are as follows: Mont Choisy Mall Limited and defendant no. 1 entered into an agreement to develop and lease a supermarket in a shopping centre in Grand Baie (ADL). The ADL was signed on 6 and 18 April 2011 (Document A). After the signature of the ADL, the promoters caused the company Mall of Mont Choisy Limited i.e the plaintiff company to be incorporated and the latter took over the commitments of Mont Choisy Mall Limited. There is no dispute that the plaintiff company is to be deemed a party to the ADL and to be in effect the lessor. The ADL provides at paragraph 1.1.3 for the signature of a lease between the parties and that until such signature, the ADL will serve as a recordal of the salient terms of the lease agreement. It also provides at paragraph 4.1 that the lease agreement will be used as the document forming the basis of recording the agreement reached between the lessor and lessee in terms of letting of the supermarket. It further provides at paragraph 4.2 that the lease agreement will govern the relationship between the parties from the commencement date and will be signed once the supermarket starts trading. Paragraph 16 of the ADL provides that the ADL and any matter connected thereto shall in all respects be governed by the laws of Mauritius and the Courts of Mauritius shall have exclusive jurisdiction. There is no arbitration clause in the ADL.

On 17 September 2012 in an email with the heading "Mont Choisy Lease Agreement", defendant no 1 attached a draft lease agreement for the perusal of the plaintiff company and wrote "*in order for Red Apple Retail Company Limited to obtain a trading licence the signed lease agreement by all parties is required and we therefore ask that you kindly address this with a sense of urgency in order for the trading licence to obtained (sic) timeously.*" (Document K refers). It is contended by the plaintiff company that whilst the draft lease agreement was still under consideration, it was urged to sign the draft for the sole purpose of assisting the defendant no. 1 to obtain its trading licence. Accordingly, in the further contention of the plaintiff company, the lease agreement which contains the arbitration clause and which was signed by only one of its directors and was undated is not a formal lease

agreement. Hence the stand of the plaintiff company is that the parties are not bound by a valid arbitration clause.

Section 5(2) of the Act provides as follows:

> *"(2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed."*

It follows from section 5(2) that on an application for referral to arbitration, the court will, in line with the wish of the parties, grant the application where the latter have entered into an arbitration agreement, the validity and applicability of which are not challenged. Where a party objects to referral and challenges the validity and applicability of an arbitration agreement, the question arises as to the test that the court should apply in deciding the issue.

The relevant case law and text book writers reveal the existence of two opposing schools of thought as regards how the Court should approach the question of validity and applicability of the arbitration agreement and the degree of scrutiny it should exercise. The Supreme Court of Canada sets out and analyses the two schools of thought in the case of **Dell Computer Corporation v Union des Consommateurs and Olivier Dumoulin [(2007) 2 SCR 801] at paragraphs 68 to 88**. The first school, it is said, "*favours an interventionist judicial approach to questions relating to the jurisdiction of arbitrators."* Since the Court has the power to review the arbitrator's decision regarding his or her jurisdiction, then it is argued to avoid duplication of proceedings, the question of validity or applicability of the arbitration agreement should be within the jurisdiction of the court to decide once and for all. On the other hand *"the other school of thought gives precedence to the arbitration process. It is concerned with preventing delaying tactics and is associated with the principle commonly known as the 'competence-competence' principle. According to it, arbitrators should be allowed to exercise their power to rule first on their own jurisdiction."* The Supreme Court of Canada notes on this question that "*despite the lack of consensus in the international community, the prima facie*

analysis test is gaining acceptance and has the support of many authors”, i.e a non-interventionist judicial approach is favoured in most jurisdictions.

Section 5(2) states equivocally that the Court should examine the arbitration agreement on a *prima facie* basis. It is therefore clear that the legislator has opted for a non interventionist judicial approach.

The *travaux préparatoires* to the Act lend strong and conclusive support to this view. In this respect, we find it apt and appropriate to refer extensively to paragraphs 39, 40 (c) and (d), 41, 42 and 43 which read as follows:

> *“39. Section 5 of the Act enacts Article 8 of the Model Law and gives effect inter alia to Mauritius’ obligations under Article II.3 of the New York Convention.*
>
> *40. Article 8 has been modified in order to give real efficacy to the so-called “negative effect” of the principle of kompetenz kompetenz. This has been achieved through the following mechanism:*
>
> *..*
>
> *(c) The Supreme Court (constituted as specified in Section 42 of the Act) shall then refer the parties to arbitration unless the party who refuses to have the matter referred to arbitration shows on a* ***prima facie basis that “there is a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed” (“the nullity issue”). (Emphasis supplied)***
>
> *(d) Only if a party is* ***able to meet that very high threshold on a prima facie basis will the Supreme Court itself proceed to a full determination of the nullity issue. (Emphasis supplied)***
>
> *41. This mechanism is meant to ensure that the parties will be referred to arbitration save in the most exceptional circumstances.*
>
> *42. In its initial assessment of whether there exists a “very strong probability” that the arbitration agreement is null and void, inoperative or incapable of being performed, the Supreme Court should not engage into a full trial (or even a mini-trial) of the relevant issues, but should assess them on a “prima facie” basis. The burden of proving that the parties did not validly agree to arbitration lies on the party seeking to impugn the arbitration agreement. Where doubt remains after a prima facie assessment, that doubt must be resolved in favour of referral to arbitration without a full trial (or mini-trial) of the unresolved issues.*
>
> *43. It will then fall to the arbitrators to resolve these issues pursuant to Section 20 of the Act (which enacts the principle of kompetenz*

> *kompetenz contained in Article 16 of the Amended Model Law), subject to the parties' right to return to Court if they so choose after the tribunal's determination, pursuant to Sections 20(7) or 39 of the Act."*

Furthermore, in deciding whether to refer a case to arbitration, the Court should be satisfied that "*there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed."* The "v*ery strong probability"* test is, in our view, a very high one.

The judgment of the Supreme Court of Canada in the case of ***Dell Computers*** indicates that this test may be satisfied when "*the challenge to the arbitrator's jurisdiction is based solely on a question of law."* We further read from the headnote to the case the following "*If the challenge requires the production and review of factual evidence, the Court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the Court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence on record. Before departing from the general rule of referral, the Court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding."*

We respectfully take the same view. We further note that a section 5 claim under the Act is supported by affidavit evidence and is determined by the adjudicating court on the strength of the affidavit evidence. Such affidavit evidence may prove inadequate to decide a real issue of validity and/or applicability of an arbitration agreement. It stands to reason that in such cases involving a factual issue as to the validity of an arbitration agreement, the issue should be decided by the arbitrator subject to review by the Court. In the present case, the question of whether the signature of a sole director to the lease agreement in circumstances as set out by the plaintiff company binds the plaintiff company as to the existence of an arbitration agreement should, in our view, be referred to the arbitral tribunal. We do so pursuant to section 5(2) and also because at this stage the arbitral tribunal is in a better position to deal with such a question involving factual evidence.

For the reasons set out above, we grant the present application and order that the proceedings before the Commercial Division be stayed.

A. F. Chui Yew Cheong
Judge

N. Devat
Judge

D. Chan Kan Cheong
Judge

19 January, 2015

Judgment delivered by Hon. A. F. Chui Yew Cheong, Judge

For Plaintiff : Mr Attorney A. Robert
Mr A Moollan of Counsel

For Defendants: Mr T. Koenig, SA
Mr M Sauzier, SC