

**AMANA MIDDLE EAST HOLDINGS LIMITED & ANOR v AL CHURAIR
ABDUL AZIZ ABDULLA & ORS**

2015 SCJ 401

Record No: 111491

THE SUPREME COURT OF MAURITIUS

In the matter of:

- (1) Amana Middle East Holdings Limited**
- (2) Buharia Holdings International Limited**

Applicants

v.

- (1) Abdul Aziz Abdulla Al Ghurair**
- (2) Eta Ascon Holdings LLC**
- (3) Al-Ghurair International LLC**
- (4) Emirates Trading Agency Limited**
- (5) Eta Mauritius Ltd**
- (6) Dynamic Investments Limited**
- (7) Eta West Asia Shipping Company**
- (8) Electromechanical Technical Associates Ltd**
- (9) Ascon Constructions Ltd**
- (10) Areola Ltd**
- (11) Abis Ltd**

Respondents

JUDGMENT

On an *ex parte* application made by the present applicants (Amana Middle East Holdings and Buharia Holdings) pursuant to section 23 of the International Arbitration Act (IAA), an *interim* order was granted in Chambers on 26 March 2015 in the following terms:

(a) Respondent no.1 (Mr Abdul Aziz Abdulla Al Ghurair) was restrained and prohibited from taking any step or doing or omitting any act or implementing any course of action in relation to respondents nos 5 to 11 pursuant to the power of attorney purportedly given to him at the shareholders' meeting of respondent no. 2 (ETA Ascon Holdings LLC) held on 25 September 2014; and

(b) Respondents nos 5,6,7,8,9,10 and 11 (the Mauritian subsidiaries and global companies) were restrained and prohibited

from doing or omitting any act or taking any step or implementing any course of action in compliance or purported compliance with any exercise of the purported power of attorney given to respondent no.1 at the shareholders' meeting of respondent no.2 held on 25 September 2014.

The above order is to be in force “*pending any order which may be made by the Arbitral Tribunal set up for the determination of arbitration No. 20/15 commenced by the applicants against Al Ghurair International LLC and ETA Ascon Holdings LLC under the auspices of the Dubai International Arbitration Centre (DIAC) on 26 February 2015.*”

Pursuant to section 42(1A) of the IAA, the order was made returnable before us and the respondents ordered to show cause why the *interim* order should not be converted into an interlocutory injunction.

Before us, despite the wider ambit of the original application in Chambers, the stand of the applicants is that the application for the interlocutory injunction be confined and restricted to the conversion of the interim order save for the addition of the words “*directly and indirectly*” after the words “*Respondent no. 1 is restrained and prohibited from taking any step or omitting any act or implementing any course of action....*” in (a) above.

Furthermore, there is no prayer against respondents nos 2 and 4 and respondents nos 5 to 11 (the Mauritian subsidiaries and global companies) will abide by the decision of the Court.

It is not disputed that the applicants have commenced arbitration proceedings against respondent no. 2, ETA Ascon Holdings (ETA Ascon) and respondent no. 3, Al Ghurair International LLC (AGI) pursuant to an arbitration clause in the memorandum of association of ETA Ascon. ETA Ascon is a joint venture between on the one hand Amana Middle East Holdings (Amana) and Buharia Holdings (Buharia) and on the other hand AGI. Amana and Buharia are both offshore limited liability companies registered in the Jebel Ali Free Zone in the United Arab Emirates ('UAE'). Together, they own 48% of the shares in ETA Ascon, a holding company incorporated in the UAE. The remaining 52% of the shares in ETA Ascon is owned

by AGI, another company incorporated in the UAE. The memorandum of association of ETA Ascon (the MOA) was executed on 12 December 2006.

ETA Ascon is the 99.998 % shareholder of respondent no.4 (Emirates Trading Agency Limited (ETA)), another UAE company. ETA is in turn the majority shareholder of six Mauritian companies which are holders of category 1 global business licences i.e respondents nos 5 to 11. The Mauritian companies hold shares in companies incorporated in the Republic of India.

The dispute which has arisen among the parties and which has been referred by Amana and Buharia to arbitration concerns powers given under a power of attorney (POA) by a resolution passed at a meeting of ETA Ascon on 25 September 2014. In the contention of Amana and Buharia, in September 2014, AGI used a colourable device to have resolutions passed in favour of AGI at a shareholders' meeting of ETA Ascon. The resolutions were secured at a lower voting threshold than should lawfully have applied and in defiance of the protest of Amana and Buharia. Under the POA, Mr Abdul Aziz Al Ghurair was given wide ranging powers. The powers are set out in no fewer than 40 paragraphs of the minutes of the meeting. (See Exhibit SB 23 annexed to the affidavit in support of the application).

Mr I Rajahballee SC for the applicants drew our attention to a sample of the wide ranging powers given under the POA to Mr Abdul Aziz Al Ghurair. The powers range from administrative matters such as *"to sign any documents relating to the assignment of any right or benefits (including receivables) arising from contracts, agreements or other arrangements entered into by the Company or a Subsidiary Company in respect of any aspect of the business of the Company or a Subsidiary Company"* to more significant ones such as to *"sell, transfer, assign, sub lease or dispose of such business, property or assets (whether movable or immovable) as the Attorney deems necessary on behalf of the Company or a Subsidiary Company"*. The powers also include one *"to sell, deal in, transfer, mortgage or otherwise dispose of all (or any) of the shares held, directly or indirectly, (through entities, agents, nominees or otherwise) by the Company (shares) in the capital of any other company that is registered in the UAE or abroad (a Subsidiary Company)"*. Mr Rajahballee SC stressed the fact that the very substantial powers are also extended to the subsidiary companies of ETA Ascon including the Mauritian companies. Furthermore, the powers have the net effect of usurping all the powers of not only the directors but also of the shareholders.

Indeed, it is further submitted, the purported POA was resorted to at the end of last year when ETA Ascon decided to sell its stake in a joint venture in the elevator business in India with a Japanese multinational. According to Amana and Buharia, the transaction was negotiated and executed under the powers conferred under the POA, without their involvement.

It is urged on behalf of Amana and Buharia that the powers granted under the POA can potentially disrupt, deconstruct and pull down the structures of ETA Ascon and also of the Mauritian subsidiary companies, thereby harming their interests. Furthermore, the powers, if resorted to, will also destroy the objective of the arbitration proceedings initiated before the DIAC.

Mr R Pursem SC for Mr Abdul Aziz Abdulla Al Ghurair and AGI submits that the fear of abuse of the POA is misconceived to the extent that the Mauritian subsidiaries have and are governed by their boards of directors. Furthermore in the submission of Mr Pursem SC, the fear of Amana and Buharia is not substantiated and there is sufficient safeguard under the Companies Act against an usurpation of the powers of the directors.

Section 23 of the International Arbitration Act deals with the powers of the Supreme Court to issue interim measures. Section 23 reads as follows:

“23. Powers of Supreme Court to issue interim measures

(1) (a) The Supreme Court shall have the same power to issue an interim measure in relation to arbitration proceedings as it has in relation to proceedings in Court, whether the juridical seat of the arbitration is in Mauritius or not, and whether that power is usually exercised by a Judge in Chambers or otherwise.

(b) In exercising a power referred to in paragraph (a), the Court shall have regard to the specific features of international arbitration.

(2) Unless the parties otherwise agree, the power referred to in subsection (1) (a) shall be exercised in accordance with subsections (2A) to (6).

(2A) The Court shall exercise the power referred to in subsection (1) (a) in such a manner as to support, and not to disrupt, the existing or contemplated arbitration proceedings.

(3) Where the case is one of urgency, the Court may, on the ex parte application of a party or proposed party to the arbitral proceedings, make such order as it thinks necessary.

(4) Where the case is not one of urgency, the Court shall act only on the application of a party to the arbitral proceedings made –

- (a) on notice to the other parties and to the arbitral tribunal;*
- and*
- (b) with the permission of the arbitral tribunal or the agreement in writing of the other parties.*

(5) The Court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) Where the Court so orders, an order made by it under this section shall cease to have effect on the order of the arbitral tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.”

In the submission of Mr Rajahbalee, section 23 grants to the Court a substantive jurisdiction of supervision in matters of international arbitration, which jurisdiction is not akin to the jurisdiction of the Supreme Court in applications for injunctive relief under section 73 of the Courts Act.

Section 23(1)(a) is a recall of the powers of the Court to grant injunctive relief in equity and under section 73 of the Courts Act. However, paragraph (b) also specifically enjoins the Court to have regard to the specific features of international arbitration. Furthermore, pursuant to subsections (2A) to (6), the powers are to be exercised when the arbitral tribunal has no power or is unable for the time being to act effectively (subsection (5)). Secondly, the Court shall exercise its power in such a manner as to support, and not to disrupt, the existing or contemplated arbitration proceedings (subsection (2A)). Thirdly, the order given by the Court shall have effect until the arbitral tribunal pronounces on it (subsection (6)).

Turning to the present application, having regard to the extensive powers granted under the POA and the dispute that has arisen among the shareholders of ATA Ascon, Amana and Buharia are justified in apprehending that potential harm may be caused to their interests. In terms of section 23 of the Act, the matter is one of urgency and must be attended to pending the effective setting up of the Arbitral Tribunal.

For the reasons set out above, we grant the application and order that

(a) *Respondent no.1 (Mr Abdul Aziz Abdulla Al Ghurair) be restrained and prohibited from taking any step or doing or omitting any act or implementing any course of action directly and indirectly in relation to respondents nos 5 to 11 pursuant to the power of attorney purportedly given to him at the shareholders' meeting of respondent no. 2 (ETA Ascon Holdings LLC) held on 25 September 2014; and*

(b) *Respondents nos 5,6,7,8,9,10 and 11 (the Mauritian subsidiaries and global companies) be restrained and prohibited from doing or omitting any act or taking any step or implementing any course of action in compliance or purported compliance with any exercise of the purported power of attorney given to respondent no.1 at the shareholders' meeting of respondent no.2 held on 25 September 2014.*

Our order shall cease to have effect on the order of the Arbitral Tribunal.

Respondents nos 1 and 3 will bear the costs of the present application.

A. F. Chui Yew Cheong
Judge

A. A. Caunhye
Judge

D. Chan Kan Cheong
Judge

10 November 2015

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

For Applicants	:	Mr Attorney S. Sookia Mr I Rajahbalee SC Mr M Namdarkhan, of Counsel Mr M Meetarbhan, of Counsel
For Respondents Nos 1 & 3	:	Mr Attorney T. Jhoty Mr D Pursem, SC
For Respondents Nos 2 & 4	:	Mr G Huet de Froberville, of Counsel Mr M Hein, of Counsel Mr B François, of Counsel

For Respondents Nos 5,6,7,8 &10 :	Mr Attorney J Gujadhur Mr L Nuckchady, of Counsel
For Respondents Nos 9 & 11 :	Mr Attorney A Rajah Mrs S Carrim, of Counsel