AFRICORE ENERGY LIMITED v. MOGS STORAGE (MAURITIUS) LTD & ORS

2020 SCJ 320

Record No. 120723 – 5A/223/20

THE SUPREME COURT OF MAURITIUS

In the matter of:

Africore Energy Limited

Applicant

v.

1. **MOGS Storage (Mauritius) Ltd**
2. **MOGS International Proprietary Limited**
3. **GMG Trust Ltd**

Respondents

Judgment

The applicant (Africore) is an investment holding company registered in the United Arab Emirates (UAE). The first respondent, MOGS Storage (Mauritius) Ltd [MOGS Storage] is a private company registered in Mauritius. The third respondent, GMG Trust Ltd (GMG) is the registered agent of MOGS Storage.

The applicant holds 30% of the share capital of MOGS Storage and the remaining 70% is held by the second respondent, MOGS International Proprietary Limited (MOGS International).

The rights and obligations of the applicant and MOGS International as shareholders of MOGS Storage, are governed by a Shareholders' Agreement dated 6 June 2017 (Shareholders' Agreement) (Exhibit 4) of the applicant's affidavit. Pursuant to this agreement, the board of MOGS Storage shall consist of only 6 directors, each shareholder is entitled to appoint a director for every 15% shareholding held in MOGS Storage so that Africore is entitled to and has appointed two directors on the board.

It is averred in the application that the first respondent (MOGS Storage) has since its incorporation, persistently held board meetings dealing with matters which, pursuant to clause 12.5.2 of the Shareholders' Agreement are expressly reserved for consideration at a shareholders' meeting.

As a result of the said alleged breaches by MOGS Storage, the Applicant has applied for and obtained injunctions, notably before the Supreme Court in Mauritius on 28 April 2020 and 21 August 2020 as well as before a court in Ghana on 19 May 2020, prohibiting and restraining MOGS Storage and GMG from engaging further in such conduct.

On 14 April 2020 MOGS International has made a written request for arbitration to the London Court of International Arbitration pursuant to Clause II of the Subscription Agreement. It has *inter alia* prayed for a rescission of the Subscription Agreement or alternatively, an award to the effect that the Subscription Agreement is void *ab initio*. This request was acknowledged by the London Court on 27 April 2020. All the parties to the present case are parties to the arbitration proceedings save for GMG which is the registered agent of MOGS Storage. The parties have put up an appearance before the arbitral tribunal. MOGS International has already filed its statement of case before the Tribunal since 6 October 2020. According to its affidavit, the applicant was due to file its statement of defence and cross claim (if any) on 3 November 2020.

On 16 October 2020 Africore applied for an *ex parte* injunction before a designated Judge of the Supreme Court pursuant to sections 6 and 23 of the International Arbitration Act ("The Act") and Rule 14 of the Supreme Court (International Arbitration Claims) Rules 2013. It had prayed for an order in the following terms:

> *"(i) restraining and prohibiting: the Respondents either by themselves, their representatives or "préposés" from diluting or assisting in any manner with the dilution of the shareholding of the Applicant in the First Respondent;*
>
> *(ii) maintaining the status quo in the shareholding of the Applicant and the Second Respondent in the First Respondent;*
>
> *(iii) restraining and prohibiting: the Respondents either by themselves, their representatives or "préposés" from directly or indirectly removing any director or appointing new directors to the board of the First Respondent or from assisting in any manner with modifying or interfering with the composition of the board of the First Respondent as at the date of the*

acknowledgment of the request for arbitration by the London Court of International Arbitration i.e. the 27th April 2020;

(iv) maintaining the status quo in the composition of the board of the First Respondent as at the date of the acknowledgment of the request for arbitration by the London Court of International Arbitration i.e. the 27th April 2020;

(v) for an Order pursuant to Rule 14(4) of Supreme Court (International Arbitration Claims) Rules 2013 granting the Applicant leave to serve the summons and any process outside the jurisdiction of Mauritius upon the Second Respondent upon such terms and conditions that the Honourable Designated Judge may deem fit and proper in the circumstances; and

(vi) for any other Order/s which the circumstances of this application require

And these pending the final resolution of the arbitration bearing LCIA Arbitration No. 204718 and/or contemplated arbitration proceedings and at the applicant's own risks and perils, and upon applicant's undertaking to abide by any order which the Court or Judge may thereafter make as to damages to the Respondents by the granting of these interim orders in the nature of injunction." (Underlining ours)

On 20 October 2020 the designated Judge granted prayers (ii) and (iv) above and issued the following interim orders:

"(a) maintaining the status quo in the shareholding of the applicant and second respondent in the first respondent [prayer (ii) of the motion paper]; and

(b) maintaining the status quo in the composition of the board of the first respondent as the date of the acknowledgement of the request for arbitration by the London Court of International Arbitration, that is, the 27th April 2020 [prayer (iv) of the motion paper]"

The matter was made returnable before the Supreme Court on 28 October 2020.

When the case was called before the present panel of three designated Judges, the respondents put in an appearance and informed the court that they were resisting the application and prayed for time to put in objections.

The matter was made returnable to 16 November 2020 and the injunction enlarged to that date.

On 16 November 2020 all three respondents moved, *ex facie* the motion paper and supporting affidavit, that the injunction be discharged.

The court heard arguments on the issue.

MOGS Storage has raised the following grounds in support of its motion:

> *"1. The application is made in breach of article [25.3] of the [LCIA] Arbitration Rules 2014.*
>
> *2. There was no urgency and further no reason for the application to be made on an ex-parte basis.*
>
> *3. The applicant has failed to comply with [its] obligation of full and frank disclosure in making the application."*

MOGS International has also raised the following objections to the application. MOGS Storage has further joined in the objections formulated by MOGS International and which are set out below:

> *"The injunction is misconceived inasmuch as there is no basis upon which Africore can reasonably rely to conclude that there would be an issue of shares or a change in the board compositions when such matters were never tabled from the agenda exhibit 14.*

> *… Africore confirms in paragraph 51(1) of its affidavit that the arbitral tribunal has already been set up and the reasons advanced by Africore to seize the Mauritian Court under section 23(5) of the International Arbitration Act do not satisfy the legal test set out in section 23(5) of the Act and are misconceived."*

The third respondent is moving for the discharge of the injunction against it on the following ground:

> *"Respondent No. 3 is neither a director, shareholder or company secretary of Respondent No. 1"*

The provisions of section 23 of the Act which have a bearing upon the determination of the present application, are set out below:

> *"**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."
(Underlining ours)

Once arbitration proceedings have been instituted, the Supreme Court is only empowered to intervene for the issue of interim measures to the extent provided by and in conformity with, the above provisions of section 23 (supra).

The court may only issue interim measures *"to support, and not to disrupt the existing or contemplated arbitration proceedings"* [section 23 (2A)] and that, too only where the arbitral tribunal *"has no power or is unable for the time being to act effectively".*

The application before the Designated Judge in Chambers was based on the following premise:

(i) as a matter of extreme urgency to maintain the applicant's rights as a shareholder of MOGS Storage and prevent a dilution and/or irretrievable

loss of such rights by the passing of shareholder resolutions by MOGS International;

(ii) to maintain the status quo of the shareholding and directorship structure of MOGS Storage pending the determination of the arbitration proceedings;

(iii) the tribunal is unable for the time being to act effectively in view of a disagreement which has arisen between the parties as to the juridical seat of the arbitration.

The designated Judge only issued the two abovementioned orders (supra) both of which were to preserve the status quo in the shareholding and the composition of the board of MOGS Storage, pending the determination of the arbitral tribunal as per the application.

There is no dispute that the arbitral tribunal has already been constituted and the parties have so far submitted themselves to the tribunal for a determination of the issues already raised by them. MOGS International has filed its statement of case since 6 October 2020 and the applicant was to file its defence on 3 November 2020.

MOGS International has raised an objection before the tribunal with respect to the juridical seat of the tribunal. The applicant has already put in written submissions on the issue since 12 October 2020 and according to the evidence, the first and second respondents *"were expected to file theirs on 19 October 2020"* (*vide* paragraph 51.1 of the applicant's supporting affidavit).

The Judge in Chambers was entitled, on the basis of the evidence which was adduced before her, to issue the interim measures as a matter of extreme urgency in respect of the shareholding and composition of the board of MOGS Storage.

As already highlighted in the judgment, this court is bound to exercise its powers with regard to the interim measures in such a manner as to support and not to disrupt, existing arbitration proceedings.

It is accordingly not for this court at this juncture, to determine the issues raised in the application as these are matters which fall within the province of the arbitral tribunal.

In view of what we have stated above and in conformity with section 23(6) of the Act, the interim injunction granted by the Judge in Chambers on 20 October 2020, is enlarged pending any order which the arbitral tribunal may deem fit to make with respect to the present matter.

For all the above reasons and in order not to disrupt the arbitral proceedings, we refer the matter to the arbitral tribunal for determination. The interim injunction is enlarged pending the tribunal's determination.

In the circumstances of this case and in the exercise of our discretion under rule 19 of the Supreme Court (International Arbitration Claims) Rules 2013, we shall not make any order for costs.

B. R. Mungly-Gulbul
Judge

R. Teelock
Judge

N. F. Oh San-Bellepeau
Judge

10 December 2020

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Judgment delivered by Hon. B. R. Mungly-Gulbul, Judge

For Applicant:	**Mr. J. Peeroo, of Counsel** **Ms Attorney Y. Hurnaurn-Calcuteea**
For Respondent No.1:	**Mr. A. Sunassee, together with** **Ms J. Somar, both of Counsel** **Mr. Attorney F. Hajee Abdoula**
For Respondent No. 2:	**Mr. D. Basset, SC, together with** **Messrs. J. G. Basset, H. Dhanjee and P. Seenauth, all of Counsel** **Mr. B. Sewraj, SA**
For Respondent No. 3:	**Mr. V. Reddi, of Counsel** **Mr. R. Bucktowonsing, SA**