LIBERALIS LIMITED AND ANOR v GOLF DEVELOPMENT INTERNATIONAL HOLDINGS LTD. AND OTHERS

2013 SCJ 211

SCR No. 107600

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **Liberalis Limited**
2. **River Club Company Limited**

Applicants

v

1. **Golf Development International Holdings Ltd**
2. **Island Projects Ltd.**
3. **Massilia Limited (in voluntary liquidation)**

Respondents

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JUDGMENT

This is an application under section 20(7) of the International Arbitration Act (No. 37 of 2008) for an order setting aside the ruling of an arbitrator – Mr. Eric Ribot S.C. - and declaring the relevant arbitration agreement null and void. The application falls under the ambit of the Act inasmuch as the parties to the arbitration agreement had, at the time of the conclusion of that agreement, their places of business in different states within the meaning of section 3(2)(b)(i) of the Act.

Section 20(1) of the Act provides that an arbitral tribunal (defined in section 2 of the Act as "*a sole arbitrator or a panel of arbitrators*") may rule on its own jurisdiction, including on an objection with respect to the existence or validity of the arbitration agreement. Section 20(7) provides that where the arbitral tribunal rules, on a plea challenging its jurisdiction as a preliminary question, any party may, within 30 days after having received notice of that ruling,

"request the Supreme Court to decide the matter". And section 42(1) provides that for the purpose of such an application the Court shall be constituted by a panel of 3 Judges.

The role of the Supreme Court, upon a request under section 20(7), is therefore to determine the question of jurisdiction. Although, in doing so, it may take into account the ruling of the arbitral tribunal and express its agreement or disagreement with any views expressed therein, it is not sitting on appeal as such against the said ruling, such that the normal appellate perspective focussing on errors and misdirections on the part of the arbitral tribunal is not in point.

Respondents Nos. 1 and 2 are resisting the application whereas respondent No. 3 is supporting it.

On 19 June 2012, the applicants and respondents executed a "*compromis*" and referred for arbitration certain disputes in relation to an Integrated Resorts Scheme (IRS) project. By letter dated 5 November 2012, the applicants gave notice to the arbitrator of a motion which in effect challenged his jurisdiction. Their contention was essentially to the effect that –

(1) the respondent No. 1 was between 23 August 2011 and 27 July 2012 under a provisional order of liquidation;

(2) this state of affairs had not been revealed to the applicants, whose consent to the arbitration agreement had consequently been vitiated;

(3) since the respondent No. 1 was under a provisional order of liquidation, it had no capacity to enter into the arbitration agreement nor could its purported representatives do so;

(4) the arbitration agreement, which was the basis of the arbitrator's jurisdiction, was therefore null and void.

After hearing evidence adduced in relation to the motion, and considering the submissions of Counsel on both sides, the arbitrator held that the arbitration agreement was not null and void and that the arbitration proceedings should be continued. He subsequently granted a motion to stay proceedings before him pending the present application.

Four points were raised before the arbitrator and reiterated before us in support of the above contention of the applicants and we shall now deal with the four issues raised.

THE ALLEGED WRONGFUL RECOURSE TO DOMESTIC LAW

Section 3(9) of the Act makes provisions as to the sources of law applicable to international arbitration in Mauritius and section 3(10) prohibits the application of the local law practices and procedure relating to domestic arbitration. In our view, this does not mean that appropriate local law relating to the particular fields, for example, company law, will not be applicable. It only means that the law, practices and procedure "relating to domestic arbitration" should not be resorted to in applying and interpreting the Act and in developing the law applicable to international arbitration in Mauritius. Looking at things in this perspective we may incidentally state that we have found nothing in the ruling of the arbitrator which would indicate that he acted in breach of section 3(10) of the Act.

THE ALLEGED FAILURE TO APPLY SOUTH AFRICAN LAW

The second point raised in this application is that the arbitrator failed to apply South African law in deciding whether the directors of the respondent No. 1, a company incorporated

in South Africa, and under provisional liquidation at the time of the arbitration agreement, had the required capacity to enter in that agreement without the proper authorisation of the provisional liquidator or the South African Court. That complaint appears to us to be a non issue as it was indisputable, on the basis of the evidence of Mr. Grant Ford, the expert witness on South African law, that –

(a) in South Africa, when a company is under provisional liquidation only the provisional liquidator can, with the leave of the Court, bind that company;

(b) at the time of the arbitration agreement, Mr. Attorney Mardemootoo could not sign the agreement on behalf of the respondent No. 1 upon any mandate from Mr. Bruyns, its director.

THE CRUCIAL ISSUE : THE RATIFICATION

We accordingly turn to what we consider to be the crucial issue in this application, namely whether the defect in the representation of the respondent No. 1 at the time of the signature of the arbitration agreement was cured when its provisional liquidation was discharged and when by a resolution of its board of directors dated 16 October 2012, the agreement was ratified. In this connection, the evidence of Mr. Ford, the expert witness on the South African law applicable in insolvency matters, established that –

(a) when a provisional liquidation is discharged it is as if the liquidation never happened;

(b) the company which is no longer in provisional liquidation is entitled to ratify any decision by anybody on behalf of the company while it was in provisional liquidation;

(c) the resolution of the Board of Directors of the respondent No. 1 on 16 October 2012 ratified the acts done by Messrs Bruyns and Mardemootoo during the provisional liquidation, hence validating those acts;

(d) under the laws of South Africa, considering the ratification by the Board Resolution, the arbitration agreement was valid and binding.

Counsel for the applicants submitted that the first respondent had no power to ratify "an act which it had no power to do at first". We however agree with the submission of Mr. Chetty S.C., Counsel for the respondent No. 2, with whom Counsel for respondent No. 1 concurred, that a distinction should be made between the capacity of a company albeit under liquidation and the capacity of its purported representatives to actually represent it at a given point in time. Indeed the respondent No. 1, albeit under provisional liquidation, was a company having capacity to act under the law, but had to do so through its liquidator with the leave of the Court. So the argument of Counsel for the applicants cannot hold.

In the light of the evidence of Mr. Ford, the correct conclusion is indeed that the arbitration agreement was lawfully ratified by the resolution of the Board of Directors of the respondent No. 1.

WAS THE CONSENT OF THE APPLICANTS VITIATED BY "DOL"?

Another contention of Counsel for the applicants before the arbitrator and before us was that the applicants' consent to the arbitration agreement had been vitiated by "*dol*". However, we consider that in the light of the clear findings of fact of the arbitrator believing Mr. Bruyns's testimony and accepting his explanations for not disclosing at the relevant time that the respondent No. 1 was under provisional liquidation, the contention of Counsel for the applicants cannot hold. In an appeal, it is a well established principle that findings of fact are not lightly

interfered with. We consider that this principle applies "*a fortiori*" in an application like the present one.

For the above reasons, we set aside the application. With costs.

E. Balancy
Ag. Senior Puisne Judge

N. Matadeen
Judge

D. Chan Kan Cheong
Judge

21 May 2013

Judgment delivered by Hon. E. Balancy, Ag. Senior Puisne Judge

For Applicants:	**Mr. T. Koenig S.A.** **Mr. M. Sauzier S.C./Mr. Hervé Duval Jr., of Counsel**
For Respondents Nos. 1 & 2:	**Mr. Attorney S. Mardemootoo** **Mr. I. Collendavelloo S.C together with Mr. R. Chetty S.C.**
For Respondent No. 3 :	**Mr. Attorney J. Gujadhur** **Mr. M. King Fat, of Counsel**