

DESBRO INTERNATIONAL LIMITED v MACSTEEL INTERNATIONAL FAR EAST LIMITED

2011 SCJ 385

IN CHAMBERS

Record No. 560/11

IN THE SUPREME COURT OF MAURITIUS
(COMMERCIAL DIVISION)

In the matter of:

Macsteel International Far East Limited

Attaching Party

v.

Desbro International Limited

Respondent

And in the presence of:

- 1. Misco (Mauritius) Ltd.**
- 2. Mauritius Commercial Bank Ltd.**

Garnishees

And in the matter of:

Desbro International Limited

Applicant

v.

Macsteel International Far East Limited

Respondent

In the presence of:

- 1. Misco (Mauritius) Ltd.**
- 2. Mauritius Commercial Bank Ltd.**

Co-Respondents

Judgment

On 22 July 2011 an attachment was lodged into the hands of garnishees Nos. 1 and 2 to secure the payment of an award (The Award) by an arbitrator duly appointed by the ICC

International Court of Arbitration against Desbro International Limited, the said award comprising damages in the sum of USD 967,423.85 together with interests and costs.

On 29th July 2011, upon the application of the respondent, a summons was issued by the Commercial Division of the Supreme Court of Mauritius calling upon the applicant and the co-respondents to appear before the Judge sitting at Chambers to show cause why the said attachment lodged by the respondent in the hands of the co-respondents should not be held good and valid and a '*jugement en validite*' be ordered.

The aforesaid application is resisted by the applicant inasmuch as:

- “(a) *It denies being indebted to the respondent in the sum claimed or in any sum whatsoever;*
- (b) *The award in virtue of which the attachment has been made is not executory in Mauritius until such time as the respondent has obtained an exequatur of the said award before the Supreme Court of Mauritius;*
- (c) *On or about the 16th February 2011, the respondent, purporting to act under the provisions of the International Arbitration Act and the Recognition and Enforcement of Foreign Arbitral Awards Act, applied to the Supreme Court of Mauritius for an exequatur of the arbitral award. The applicant has resisted this application and the matter is to be heard on the 3rd November 2011;*
- (d) *The alleged ‘creance’ of the respondent against the applicant does not rest on an executory title but solely on an arbitral award which is not executory;*
- (e) *Service of the attachment was not authorised by a Judge of the Supreme Court.”*

On the 14 September 2011 Desbro International Ltd made the present application to show cause as to why the first application should not be declared null and invalid or alternatively authorising a partial *mainlevée* of the said attachment for the sum of Rs 6,721,686, which sum it is stated is required by Desbro International Limited to enable it to continue operating until the financial year ending 30 September 2012.

The applicant has further averred that the application for the validity of the said attachment is null and void as the respondent has failed to serve its notice in denunciation upon the applicant within the prescribed delay of eight days. The validity of the attachment is seriously contested and the Judge in Chambers has no jurisdiction to decide the issue which must be referred to the competent court. Further the attachment is causing prejudice to the applicant's business activities and it cannot operate since its funds are being unlawfully withheld by the co-respondents.

In its affidavit in reply, Macsteel International Far East Limited has averred that Desbro International Limited's purported challenge to the application to render the arbitration award executory in Mauritius, is not relevant to the present application.

It has further averred that the attachment orders were served within statutory delays. It has pointed out that if Desbro International Limited cannot pay its debts, it is in a state of insolvency.

Macsteel International Far East Limited has averred that the documents produced by Desbro International Limited reveal that substantial payments are still being made. It has further averred that a *mainlevée* can be obtained upon Desbro International Limited offering adequate security in the form of a bank guarantee and no such security is proposed by Desbro International Limited.

A *saisie arrêt* falls under the heading "*Des saisies-arrêts ou oppositions*" "*Titre septieme*" of the Code de Procedure Civile. Article 557 and following, describe the circumstances in which such *saisies* can be effected and the procedural steps to be followed –

Under **Article 557** -

«Tout créancier peut, en vertu de titres authentiques ou privés, saisir-arrêter entre les mains d'un tiers les sommes et effets appartenant à son débiteur, ou s'opposer à leur remise.»

Article 558 -

«S'il n'y a pas de titre, le juge du domicile du débiteur, et même celui du domicile du tiers saisi, pourront, sur requête, permettre la saisie-arrêt et opposition.»

The first step to be accomplished by the creditor is the service of a notice of attachment upon the third party, the garnishee. The effect of this notice is to forbid the garnishee from paying the debt which he owes to the “*saisi*”.

The service to be effected depends on the nature of the creditor's title i.e. whether it is an executory title or not –

*“If the “créance” of the seizing creditor against the “saisi” does not rest on an executor title, a Judge's order must be obtained **ex parte** before the usher can effect the attachment.” – The Mauritius Commercial Bank Ltd v. P. Sibartie Fils and Cie [\[1988 MR 66\]](#)*

In the present case, Macsteel International Far East Limited is relying on an arbitral award from the ICC Arbitration handed down in Singapore in December 2010. It has lodged proceedings before the Supreme Court of Mauritius for registration/exequatur of the award and which are being resisted by Desbro International Limited.

It is the contention of Desbro International Limited that the title is not an executory one in Mauritius and that the award made in Singapore cannot be executed in Mauritius unless there has been an exequatur of the Supreme Court in Mauritius. According to Desbro International Limited, Macsteel International Far East Limited has no valid *titre* and in view of its failure to

obtain a Judge's order authorising the attachment; the exploits or notices of attachment are invalid. Whereas Macsteel International Far East Limited contends that the award is executory in itself and no such order was necessary to effect the attachment.

The validity of the original attachment depends *inter alia* upon whether the proper procedure has been followed in effecting the attachment and the procedure to be followed for the attachment depends upon the nature of the award i.e. whether it is executory or not.

It is to be noted that the present *saisie arrêt* has not been obtained pursuant to a Judge's order but purportedly by virtue of a "*titre authentique ou privé*" as provided for under Article 557 of the Code de Procédure Civile. The *titre* relied upon by the attaching party is an arbitral award made in Singapore. Whether such an award made in a foreign jurisdiction namely Singapore amounts to an actionable "*titre authentique ou privé*" in Mauritius for the purposes of Article 557 whilst an exequatur has not yet been obtained, must in the first place be determined.

The validity of the award and the nature thereof, are the very issues heard by the Supreme Court on 3 November 2011 and pending for determination before that forum. The purport of the present application being to show cause as to why the first application (attachment) should not be declared null and void or alternatively authorising a partial *mainlevée* of the said attachment, the outcome of the case before the Supreme Court must be awaited so that the nature of the award is determined.

In view of what I have stated above, it would not be in order for the Judge sitting in Chambers, at this juncture, to make any pronouncement on the issues which are being raised in the present application.

In the circumstances I order that the present proceedings be stayed pending a decision of the Supreme Court in the main case.

**R. Mungly-Gulbul
Judge**

15 November 2011

For Applicant: **Mr. I. Collendavelloo, SC
Mr. G. Rivalland, SA**

For Respondent: **Mr. E. Ribot, SC
Mr. T. Koenig, SA**