MAZARS S.A v GALAKHA ENTREPRISE LTD

2023 SCJ 310

Record No. SC/COM/PWS/000491/2022

THE SUPREME COURT OF MAURITIUS
(Commercial Division)

In the matter of:

MAZARS S.A

Plaintiff

v

Galakha Entreprise Ltd

Defendant

INTERLOCUTORY JUDGMENT

The plaintiff, a French Société, has filed a plaint with summons against the defendant, an offshore company registered under the laws of the Republic of Mauritius, seeking a judgment condemning and ordering the latter company to pay to the plaintiff the sum of Euros 130,392/- together with interests at legal rate representing fees for alleged services rendered by the plaintiff to it in connection with an eventual purchase of shares of a company known as "Thunnus Overseas Group".

The defendant has, by way of notice, raised preliminary objections regarding security for costs and the jurisdiction of the court in Mauritius to hear and determine the present matter, and this without submitting to the jurisdiction of the Court in Mauritius.

A. ISSUE OF JURISDICTION

The preliminary objection regarding jurisdiction of the Court in Mauritius to hear the present matter reads as follows-

"(ii) <u>Jurisdiction of the Mauritian Court</u>

4. According to clause 15.4 of the terms and conditions of the engagement letter dated 31 October 2019 between Plaintiff and Defendant (the "Engagement Letter"), the Tribunal de Commerce de Paris has exclusive jurisdiction to hear and determine any dispute arising out of the Engagement Letter.

5. Since ex-facie the Plaint with Summons, the dispute subject matter of the present matter arises out of the Engagement Letter, the Mauritian Court, in particular, the Commercial Division of the Supreme Court of Mauritius, does not have jurisdiction to hear and determine the present matter in view of clause 15.4 of the Engagement Letter."

Defendant's contention

For the purposes of the preliminary objections raised by the defendant, Mrs. M. Gungah, the representative of the defendant, has produced the "Conditions générales du contrat" (hereinafter referred to as the "General Conditions of Contract) and the signed agreement (Document D2). The proposal from French counsel for his fees as well as the reservation for his air ticket and that of Mr. B. Nokour, a director of the defendant, have also been produced.

Defendant is relying on clause 15.4 of the General Conditions of Contract signed between the parties which states *inter alia* that any disagreement or dispute in relation to the contract is one which relates to the exclusive jurisdiction of the *tribunaux du ressort de la Cour d'Appel de Paris.* It has been submitted on behalf of the defendant that the parties have irrevocably undertaken under that said clause to submit their dispute to the *Tribunal de Commerce de Paris* regardless of the place where the work has been performed. Consequently, it has also been submitted that since the subject matter of the present case arises out of the contract, the Commercial Division of the Supreme Court of Mauritius does not have jurisdiction to hear same.

Plaintiff's contention

On the other hand, learned Counsel for the plaintiff has argued that "*compétence exclusive de juridiction"* can only come into play if there is a *"renvoi"* to the General Conditions of Contract.

The representative of the defendant was cross examined on this issue and admitted that there also existed clause 15.3 on that issue which provided that the parties could seize any competent tribunal. She also conceded that she was not aware whether there had been any "*renvoi*" in the conditions agreed upon by the parties to the General Conditions of Contract.

In that regard, it has been submitted by the learned Counsel for the plaintiff that Mauritian case law relies exclusively on French case law on the issue of private international law. The following extract from the case of the Court of Civil Appeal in **IMMOBILIEN DEVELOPMENT INDIEN I GMBH & CO KG & ANOR v KALRA A (Mr) & ORS [2016 SCJ 463]** will be relied upon as authority for that proposition –

> *"It is common ground that in matters raising questions of conflict of laws and for that matter conflict of jurisdictions, our Courts have been consistently guided by the French rules of private international law. This is because as was authoritatively stated in Austin v Bailey [1962 MR 113] at page 115, "since the rules of private international law in any country must necessarily have their foundation on the internal law of that country, those which are applicable must be based substantially on the provisions of our laws regarding civil rights and obligations. Those laws are basically and almost entirely French, so that, subject to any exceptions which may arise through certain different statutory enactments and treaty obligations, we must be guided by the French rules of private international law."*

Learned Counsel for the plaintiff has equally referred to what the Court had to say with regard to Articles 19 and 20 of the *Code Civil Mauricien* –

> *"The trial Court referred to Articles 19 and 20 of our Civil Code which are in similar terms to articles 14 and 15 of the French Civil Code.*
>
> *……*

Furthermore, articles 19 and 20 confer jurisdiction on the Mauritian Courts in cases where either the plaintiff or the defendant is domiciled or resident in Mauritius."

It has been submitted that the validity of clause 15.4 of the General Conditions of Contract would have to be examined in the light of French case law. It has been argued that article 20 is inspired from article 15 of the French *Code Civil*, and that in France, it has been held that any derogation to the provisions of article 15 should be precise and unequivocal. Thus, in the event that the jurisdiction of the French or Mauritian Courts would be ousted in the presence of a clause "*d'attribution de juridiction*", same would have to be devoid of any ambiguity and be unequivocal. In clause 15.4, there is a "*condition suspensive*" to the effect that *"Si une solution à l'amiable ne peut être trouvée, tout différend ou litige relatif au présent engagement sera de la compétence exclusive des tribunaux du ressort de la Cour d'Appel de Paris".*

It is clear that the "*clause attributive de juridiction*" is dependent upon the condition that a "*solution à l'amiable*" has not been found and that "*solution à l'amiable"* is set down in clause 15.2 of the General Conditions of Contract which puts the onus upon the parties to attempt to find an amicable solution in the case of a "*différend*" between parties relating to the *"réalisation, l'interprétation, la validité ou la résiliation du present accord"*.

It is clear that the "*clause attributive de juridiction*" is "*suspensive*" inasmuch as the parties must attempt to find an amicable solution failing which the exclusivity jurisdiction clause will be triggered. In view of the fact that the defendant has chosen not to adduce any evidence on the "*condition suspensive*", this cannot deprive the Mauritian jurisdiction of its "*compétence*" in view of the ambiguous nature of that clause. The "*mise en demeure*" served cannot be construed to be "*une solution à l'amiable"*.

Plaintiff has sought reliance for this proposition from the judgment of **Malaysian Airline System Berhad v Airworld Limited & Ors** [2010 SCJ 352] where the Court stated the following –

"*Article 20 of our Code Civil is inspired by article 15 of the French Civil Code. In France, it has been decided that any derogation to the provisions of article 15 should be precise and unequivocal. I read from Dalloz Méga Code Civil Edition 2003 article 15 at note 15:*

15. …… renonciation par une clause attributive. Si l'acceptation, dans un contrat international, d'une clause attributive de juridiction à un tribunal étranger emporte en principe renonciation au privilège de juridiction, il cesse d'en être ainsi lorsque le caractère imprécis, équivoque ou ambigu de la clause ne permet pas d'affirmer qu'il existe une volonté certaine de l'intéressé de renoncer au bénéfice de ce privilège. . Civ. 1er, 18 oct. 1988: Bull. civ. 1, no 292; Rev. crit. DIP 1989, 537, note Lagarde.

Clause 28 of the GSA agreement contains no such derogation to the jurisdiction of the present Court."

It has been submitted that although the parties have agreed that the Engagement Letter is to be governed by French law, there is an ambiguity as to the alleged "*exclusivité de juridiction*" of the French courts. Indeed clause 15.3 provides that either of the parties, without any prejudice to their rights to seize any competent tribunal, may choose to opt for conciliation.

It has been argued that whilst clause 15.3 provides for the choice of jurisdiction of the parties, clause 15.4 comes into operation to confer exclusivity of jurisdiction to the *tribunaux du ressort de la Cour d'Appel de Paris* but subject to the amicable attempts to solve the matter having been made and these having failed. The defendant has not been able to sustain that such has been the case.

The plaintiff has also submitted that for a "*clause exclusivité de juridiction*" to be held valid, a number of conditions have to be met and same have been expatiated upon in a "*jugement de principe*" of the first *Chambre Civile de la Cour de Cassation* bearing facts similar to the present case.

The Court has been referred to what the **Cour de cassation, civile, Chambre civile 1, 15 mai 2018, 17-12.044**, had to say –

"*Sur le moyen unique, pris en ses deux premières branches:*

Attendu que l'acheteur fait grief à l'arrêt d'écarter la compétence de la juridiction française alors, selon le moyen:

1°/ que pour être valable et opposable la clause attributive de juridiction doit avoir été connue et acceptée par la partie à qui elle est opposée; qu'ainsi, lorsqu'une clause attributive de juridiction est stipulée dans les conditions générales d'une partie, elle n'est valable et opposable à l'autre partie que si dans le texte même du contrat signé par les deux parties, un renvoi explicite est fait à ces conditions générales, que ce renvoi est susceptible d'être contrôlé par une partie faisant preuve d'une diligence normale et s'il est établi que lesdites conditions générales ont été effectivement communiquées à l'autre partie contractante; qu'en l'espèce, la cour d'appel ne pouvait retenir que la mention en français «regarder nos conditions de vente et de livraison!», figurant tout en bas en petits caractères au recto de la confirmation de commande, du bon de livraison et de la facture, rendait valable et opposable à l'acheteur - dont il n'était pas contesté qu'elle ne comprenait pas l'allemand - la clause attributive de juridiction rédigée en allemand figurant à l'article 11 des conditions générales de vente du vendeur imprimées au «verso» de ces documents, quand cette mention figurait dans des documents non signés par l'acheteur, ne constituait pas un renvoi explicite aux conditions générales au «verso» comportant la clause litigieuse et n'était pas susceptible d'être contrôlée par l'acheteur en appliquant une diligence normale; qu'en statuant ainsi, la cour d'appel a violé l'article 23 du règlement communautaire n° 44/2001 du 22 décembre 2000 dit «Bruxelles I»;

2°/ qu'en principe, le silence ne vaut pas acceptation; que si par exception le silence gardé par une partie sur les conditions générales de l'autre partie peut, dans certaines circonstances, être considéré comme une acceptation tacite de ces conditions générales et de la clause attributive de juridiction qu'elles contiennent, ce n'est que dans le cas où il existe un courant d'affaires habituel entre les parties; qu'en l'espèce, la cour d'appel ne pouvait considérer que «dans la mesure où la clause [attributive de juridiction litigieuse] figure à la fois sur les trois documents servant de base à la relation contractuelle – bon de commande, bon de livraison et facture -, ce qui manifeste le fait qu'elle ait été portée plusieurs fois à la connaissance de [la société Dumont], celle-ci est censée en avoir accepté tacitement l'application, peu important dès lors que les conditions générales de vente dans lesquelles

elle est insérée soient rédigées en langue allemande», après avoir elle-même constateé qu'il n'existait aucun courant d'affaires habituel entre les parties puisqu'il s'agissait d'une première commande; qu'en statuant comme elle l'a fait, la cour d'appel n'a pas tiré les conséquences légales de ses propres constatations et a derechef violé l'article 23 du règlement «Bruxelles I».”

It has been submitted that the clause "*attributive de juridiction*" which appears in the General Conditions of Contract would have to appear in the text signed by both parties and there would have to be a "*renvo*i" to these General Conditions for the clause to be considered valid.

Findings

I have given due consideration to the oral and written submissions of Counsel.

Clause 15 of the General Conditions of Contract should be read in its entirety. It reads as follows -

"*15. Loi applicable*

15.1. Indépendamment de la localisation géographique des travaux réalisés par Mazars, les termes de la Lettre d'Engagement sont régis par le droit français.

15.2. Dans l'hypothèse d'un différend entre Vous et Mazars relatif, en particulier, à la réalisation, l'interprétation, la validité ou la résiliation du present accord, les Parties s'engagent à s'efforcer de résoudre le différend à l'amiable.

15.3. Sans préjudice quant aux droits de chacune des Parties de saisir les tribunaux compétents, les litiges qui pourraient éventuellement survenir entre Mazars et le Client pourront être portés, avant toute action judiciaire, devant le Président, ou son représentant, du conseil régional de l'ordre des experts comptables compétent aux fins de conciliation.

15.4. Si une solution à l'amiable ne peut pas être trouvée, tout différend ou litige relatif au présent engagement sera de la compétence exclusive des tribunaux du ressort de la Cour d'Appel de Paris. À cet égard, les Parties s'engagent irrévocablement à soumettre leurs différends au Tribunal de Commerce de Paris indépendamment du lieu de réalisation de la mission et du domicile du Client. Les Parties reconnaissent accepter que cette clause s'applique également en cas de procédures en référé, de présence de multiples demandeurs ou défenderesses ou en cas d'appels.

15.5. Les dispositions de la présente clause continueront à s'appliquer après la fourniture des Services aussi longtemps que les Parties auront des obligations au regard du Contrat."

It is clear that the *tribunaux du ressort de la Cour d'Appel de Paris* would only come into play if an amicable solution is not reached between the parties. The Court has not been apprised whether there has been any such endeavour to reach an amicable solution so that in the absence of any averment to this effect, the Court should reach a conclusion that there have not been negotiations between the parties for clause 15.4 to come into play. It is also apposite to note that clause 15.3 of the contract states that *"Sans préjudice quant aux droits de chacune des Parties de saisir les tribunaux compétents, les litiges qui pourraient éventuellement survenir……";* this clause in itself shows that the jurisdiction of the Court in Mauritius cannot have been ousted.

In the light of the foregoing, the preliminary objection on the question of jurisdiction fails.

B. ISSUE OF SECURITY FOR COSTS

Defendant's contention

The preliminary objection raised by the defendant reads as follows -

"(i) <u>Security for costs</u>

2. Plaintiff is a foreign national which does not own any immoveable property of sufficient value in Mauritius to guarantee payment of any

eventual costs which may result from the present matter with regards to Defendant.

3. *Therefore, before Plaintiff is allowed to proceed with the present matter, Defendant intends to and does hereby move that security for costs be furnished by Plaintiff at the cashier of the Supreme Court of Mauritius, pursuant to article 21 of the Civil Code and/or articles 166 and 167 of the Code de Procédure Civile and/or section 110 of the Courts Act and/or the exercise of the Court's equitable powers, in an aggregate amount of EUR 13,050/- for the necessary costs and expenses directly incurred or to be incurred by Defendant in resisting the present matter, which is particularised as follows –*

No.	***Details***	***Total (EUR)***
1.	***Local lawyers' fees*** *(Attorney and Counsel)*	*500*
2.	***Foreign lawyer – French lawyer***	
	(i) Fees	*6,100*
	(ii) Travelling expenses (from France to Mauritius + return)	*1,435*
	(iii) Accommodation expenses (3 nights at Labourdonnais Hotel)	*1,030*
3.	***Attendance of Mr. Brahim Nokour, director of Defendant, before the Court on day of hearing***	
	(i) Travelling expenses	
	(from Tchad to France + return)	*1,520*
	(from France to Mauritius + return)	*1,435*
	(ii) Accommodation expenses (3 nights at Labourdonnais Hotel)	*1,030*
	Total	***13,050***

Learned Counsel for the defendant has submitted that the Court in Mauritius has the power to order a foreign plaintiff to provide security for costs in a civil action. The Court has been referred to article 21 of the *Code Civil Mauricien*, article 166 of the *Code de Procédure*

Civile as well as section 110 of the Courts Act. The Court has also been referred to the case of **D'Agostini v Pipon, Adam & Co. and Pons v Others** [1880 MR 31] in support of the contention that whether an action is of a civil or commercial character, security for costs may be ordered.

It has been further submitted that it is not disputed that the plaintiff is a French Société registered under French laws at the *Registre de Commerce et des Sociétés* in France and that the present matter is a civil action and that the plaintiff, not being the owner of any immoveable property in Mauritius, must furnish security for costs to the defendant before proceeding with the present matter. Mrs. M. Gungah, the representative of the defendant, has for the purposes of both preliminary objections taken, deposed to the effect that the services of a foreign French lawyer would amount to Euros 6,100/- and there would be travelling and accommodation expenses that would need to be met to the tune of Euros 2,465/-. The attendance of a director of the defendant, namely that of Mr. Brahim Nokour would also have to be secured and this will cost Euros 3,985/-. Learned Counsel for the defendant has submitted that the sum of Euros 13,050/- is reasonable as security for costs in the circumstances inclusive of the fees as would be taxed by the Master and Registrar and not actually the fees for the local legal representatives under the Legal Fees and Costs Rules 2000.

Plaintiff's contention

Learned Counsel for the plaintiff has submitted that the latter should not be required to furnish any security for costs since the present action is of a commercial nature which is governed by article 21 of the *Code Civil Mauricien.*

It has been submitted on behalf of the plaintiff that the present action is between a "*société commerciale*" which is a "*société anonyme*" and the defendant, an offshore entity with respect to the drafting of a report with regard to an eventual purchase of the shares of a company, namely "Thunnus Overseas Group" by the defendant. It has been argued that the prospective purchase of shares by the defendant for which plaintiff's services had been retained for a due diligence is an "*acte de commerce*" since the main purpose of the due diligence was for the defendant to carry out "*une activité commerciale*". It has been submitted that consequently the matter falls within the exception applicable to any "*matière de commerce*" as laid down under article 21 of the *Code Civil Mauricien* and is, therefore, of a commercial nature. Reliance has been sought from the cases of **M1 Auto Ltd v**

Autoworld Ltd & Ors [2003 SCJ 166] and **Banque Pictet & Cie SA v Pignato R.** [2022 SCJ 73] in support of such contention.

However, learned Counsel for the plaintiff has submitted that the Court retains the discretion to order security for costs having regard to all the circumstances of the case.

The Court has also been referred to the case of **Al-Rawas I.S.A.A. v Pegasus Energy Limited & Ors** [2006 SCJ 274] where the term "*frai*s" was defined as including all necessary expenses that need to be incurred such as lawyers' fees, registration fees if any for documents which have to be produced, travelling and accommodation expenses of witnesses who have to travel from abroad to swear an affidavit and instruct legal advisers in Mauritius. It has been submitted that the Court also held that the furnishing of costs should be restricted to reasonable costs.

Findings

As stated in the case of **Al-Rawas I.S.A.A v Al Tani HH.S.K.B.H. & Ors** [2013 SCJ 447], the requirement to furnish security does not arise solely by virtue of Article 21 of the *Code Civil Mauricien* but there are imperative provisions imbedded in Article 166 of the *Code de Procédure Civile* for the furnishing of security by foreign litigants -

> *"Tous étrangers, demandeurs principaux ou intervenants, seront tenus, si le défendeur le requiert, avant toute exception de fournir caution de payer les frais et dommages-intérêts auxquels ils pourraient être condamnés."*

Further, the Court is empowered under section 110 of the Courts Act to order the plaintiff to provide security for costs upon application by the defendant in any cause or matter where security may be required to be given under the *Code Civil Mauricien* or where the plaintiff is known to be insolvent. Consequently, in view of the wording of Article 21 of the *Code Civil Mauricien* and Article 166 of the *Code de Procédure Civile,* the plaintiff who is a foreign national will be bound to provide security for costs if he does not own immovable property in Mauritius of sufficient value to guarantee the payment of any eventual costs in relation to his case.

Having said so, the next question for determination of the Court is the quantum of security for costs which the plaintiff may be called upon to furnish. As stated in the case of **Al-Rawas I.S.A.A. v Pegasus Energy Limited & Ors (supra)**, the furnishing of security for

costs must be restricted to reasonable costs. The case of **Al-Rawas I.S.A.A v Al Tani HH.S.K.B.H. & Ors (supra)** whilst referring to relevant case-law on the matter, provides guidelines for the calculation of security for costs that should be reasonable. Whilst the amount of security may relate to the totality of the costs likely to be incurred, it is not always the practice to order security on a full indemnity basis. It has to be borne in mind that the amount ordered should neither be illusory nor oppressive. As held in the case of **Al-Rawas I.S.A.A v Al Tani HH. S.K.B.H & Ors (supra)**, an order which requires a litigant to pay a sum the latter cannot afford, may amount to an impairment of his right of access to the courts which is disproportionate to the need to protect the opposing party's interest to obtain security for costs.

In the light of the above, the preliminary objection with regard to security for costs is upheld and I consider that a sum of Euros 13,050/- is reasonable and be provided by the plaintiff as security for costs in order to allow it to pursue its action.

The matter is referred back to the e-filing system for common dates to be uploaded at latest by 15 August 2023 for the case to be fixed for hearing. No order is being made as to costs.

P. D. R. Goordyal-Chittoo
Judge

01 August 2023

For Plaintiff	**:**	**Ms. B. R. Venkatasamy, Attorney-at-Law**
	:	**Mrs. M. D. Luchman, of Counsel**
For Defendant	**:**	**Ms. R. Jaunbacus, Attorney-at-Law**
	:	**Mr. R. Uteem, of Counsel**