RED SEA GULF LIMITED v ARMA LIMITED & ORS

2023 SCJ 309

SC/COM/WRT/000020/2022

IN THE SUPREME COURT OF MAURITIUS
(BEFORE THE JUDGE IN CHAMBERS)
(COMMERCIAL DIVISION)

In the matter of:-

Red Sea Gulf Limited

Applicant

v

1. **Arma Limited**
2. **Saeed Mahfouz Ali Mohamed**
3. **Saeed Ali Mahfouz Ali Mohamed**
4. **Saeed Nabil Mahfouz Ali Mohamed**
5. **Saeed Nagib Mahfouz Ali Mohamed**

Respondents

In the presence of:

The Registrar of Companies

Co-Respondent

RULING

The applicant has prayed for an interim order following the failure of the respondents nos. 2-5 to transfer the shares and trademark rights of the respondent no.1 to it pursuant to an Exit Agreement. On 19 January 2022, the applicant was issued an interim order as per items (i) – (iv) as listed out below:

(i) restraining and prohibiting the Respondents and/or their agents and/or their *préposés* and/or their servants, either directly or indirectly, from transferring and/or selling the trademarks held in the respondent no.1 in any manner whatsoever to any third party other than the Applicant;

(ii) restraining and prohibiting the respondents nos. 2-5 and/or their agents and/or their *préposés* and/or their servants, either directly or indirectly, from transferring and/or selling the shares held in the

respondent no.1 in any manner whatsoever to any third party other than the Applicant;

(iii) restraining and prohibiting the respondent no.1 from allowing, approving and/or proceeding with the transfer and/or the sale of shares and/or the Trademarks of the company in any manner whatsoever to any third party other than the Applicant;

(iv) restraining and prohibiting the Co-Respondent from giving effect to any transfer of shares in respondent no.1 (Arma Ltd) by the respondents nos. 2-5 to any third party other than the Applicant;

Preliminary objections have been raised by the respondents as set out below –

(a) the applicant has no locus standi to bring the present proceedings as -

(i) it is based on an alleged breach of the Exit Agreement dated 14 January 2021 to which the applicant is not a party; and

(ii) even in its capacity as shareholder of Arma Food Industries S.A.E ("AFI"), it is not a party to the said Exit Agreement, as well as to the present proceedings;

(b) this Court has no jurisdiction to entertain the present application as the Exit Agreement dated 14 January 2021 relates to disputes arising between non-citizens and regarding the business in the Arab Republic of Egypt;

(c) the applicant has failed to put all interested parties into cause; and

(d) the applicant, being a foreign entity, is required to furnish security for costs in the amount of USD 35,000 and a fortification of its undertaking for damages in the sum of USD 100,000.

Preliminary Objection (a) – Locus Standi

I have considered the submissions of both counsel as regards the preliminary objections raised by the respondents. In relation to the preliminary objection (a) as to whether the applicant has the locus standi to enter the present application, counsel for the applicant submitted that the action is grounded on Appendix 2 of the Exit Agreement whereas counsel for the respondents relied on Appendix 1 of the Exit Agreement in support of its preliminary objections. As of note, Appendix 1 is as regards the transfer of shares of the respondent no.1 and Appendix 2 is in relation to the trademark rights of the respondent no.1

The Exit Agreement dated 14 January 2021 was made between the Hayel Saeed Anam & Co Group (HSA Group) and the respondents nos. 2-5 whereby the latter will exit the group by –

(i) the transfer of the shares held in ARMA LIMITED (respondent no.1) to any entity or entities specified by the HSA Group;

(ii) their resignation as directors of ARMA LIMITED; and

(iii) the transfer of the trademark rights of the respondent no.1 to the applicant.

The HSA Group is a family-run enterprise and is a conglomerate of over 90 active companies spread in several countries in the world and owned by the Saeed Anam family. Arma Food Industries S.A.E (AFI) is a private company set up in Egypt and forms part of the HSA Group.

The applicant is a company incorporated in Jersey and having as beneficial owner, the Saeed Anam family. It is also the controlling shareholder of AFI and AFI forms part of the HSA Group. The applicant is also a shareholder of ARMA Limited, the respondent no.1. ARMA Limited is a private company limited by shares and holder of the then Global Business Licence Category 2 with respondents nos. 2-5 as directors and ultimate beneficial owners.

In order to determine whether the applicant has locus standi, I have closely examined the Exit Agreement signed between the HSA Group and respondents nos. 2-5. The preamble of the Exit Agreement provides that –

- since 1990, the respondents nos. 2-5 have been managing the business of the HSA Group;
- disputes arose between the parties regarding the business of HSA Group located in Egypt;
- the HSA Group and the respondents nos. 2-5 acknowledge the maintenance of rights and its non-infringement;
- the respondents nos. 2-5 agreed to exit from the business of the HSA Group;
- the parties accordingly entered into terms and conditions for the settlement of disputes and for the respondents nos. 2-5 to exit from the group.

The HSA Group is referred to as the First Party and the respondents nos. 2-5 are referred to as the Second Party in the Exit Agreement of 14 January 2021 which was drawn up for the settlement of disputes between the HSA Group and the respondents nos. 2-5.

True it is that the applicant was not privy to the Exit Agreement made between the HSA Group and the respondents nos. 2-5. According to counsel for the applicant, it is the breach of the duties and obligations of the respondents nos. 2-5 to transfer the shares and trademark rights of the respondent no.1 into the applicant which led to the present application.

In reliance of Article 1121 of the *Code Civil* and the cases of **Gobin H. v Daby P. and Tabernacle Construction Co Ltd [2013 SCJ 250]** and **Seebah and Ors v Bruneau and Ors [1952 MR 335]** which considered what is a contract for "*stipulation pour autrui*", the applicant satisfies the attributes required so that he has the locus standi to enter the action against the respondents.

As for counsel for the respondents, insofar that the applicant was not a party to the Exit Agreement, it cannot enter the present cause of action to make it enforceable. It is only parties to the agreement who can ask for the enforcement of the terms and conditions of the contract. At any rate, in spite of the fact that the applicant is a company set up in Jersey and holds the major shareholding of AFI, it has no locus standi to enter the present application as AFI was also not a party to the Exit Agreement.

Therefore, I need to decide if the applicant has the locus standi to enter the present application for an injunction and whether the principle of contract for "*stipulation pour autrui*" is applicable to the facts of the case on the basis of Article 1121 of the *Code Civil.* Conditions need to be satisfied for Article 1121 of the *Code Civil* to be applicable.

Article 1121 provides –

> *"**1121.** On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi- même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation, ne peut plus la révoquer si le tiers a déclaré vouloir en profiter."*

For that matter, I find it relevant to quote the main characteristics for *stipulation d'autrui* and paragraphs 178, 197 and 198 from **JurisClasseur Civil Code -Art. 1205 à 1209, Date du fascicule: 28 Mars 2022, Date de la dernière mise à jour: 28 Mars 2022, Fasc. Unique Contrat, Effets du contrat à l'égard des tiers, Stipulation pour autrui, Marc Mignot - Professeur à l'université de Strasbourg** –

« *Points-clés*

- *La stipulation pour autrui est l'attribution d'une créance par un acte unilatéral du stipulant au bénéficiaire. Cet acte est accessoire du contrat à l'origine de la créance attribuée.*
- *L'acte unilatéral attributif du stipulant relève des conditions de formation de tout acte juridique. Le stipulant doit avoir l'intention d'attribuer une créance au bénéficiaire.*

- *L'acte unilatéral attributif du stipulant n'est soumis à aucune condition de forme. La preuve de cet acte par le stipulant est littérale lorsque la créance dépasse une somme fixée par décret.*
- *L'attribution de la créance par le stipulant au bénéficiaire peut servir à réaliser une dation aux fins de paiement dans leurs relations.*
- *L'attribution est immédiate mais provisoire tant qu'elle n'a pas été acceptée par le bénéficiaire. Le stipulant peut la révoquer par un acte unilatéral réceptice.*
- *L'acceptation de l'attribution la rend irrévocable. L'acceptation n'obéit à aucune condition de forme et est réceptice.*
- *Par l'effet de l'attribution, le bénéficiaire devient créancier du promettant. Il peut se prévaloir de tous les pouvoirs et droits d'un créancier.*
- *Le promettant est débiteur du bénéficiaire. Il peut se prévaloir de tous les pouvoirs et droits tirés de sa qualité.*
- *Le stipulant conserve certains pouvoirs ou droits contre le promettant bien qu'il ne soit plus créancier à son égard. Le stipulant peut contraindre le promettant à s'exécuter à l'égard du bénéficiaire. »*

« 178. Source du droit

Le bénéficiaire bénéficie d'un droit de créance contre le promettant. La loi prévoit d'une façon imprécise qu'il est attributaire d'un « droit direct à la prestation contre le promettant… » Il aurait été préférable de considérer plus simplement qu'il devient créancier du promettant. Ce droit de créance est assorti des sanctions habituelles de tout droit de créance. La jurisprudence admet que le bénéficiaire exerce un contrôle sur les modalités de calcul de ce droit (Cass. soc., 4 févr. 1981, n° 78-41.008 : Bull. civ. V, n° 103 ; D. 1981, IR p. 427, obs. Ph. Langlois). Le droit direct du bénéficiaire trouve sa source dans le contrat conclu entre le stipulant et le promettant. Du caractère accessoire de l'attribution par rapport à ce contrat support, il résulte que sa validité dépend de celle du contrat support et que les moyens de défense tirés de ce contrat sont invocables contre le bénéficiaire (en ce sens : Cass. 1re civ., 4 mai 1955, n° 5.318 : Bull. civ. I, n° 182 ; D. 1956, p. 249, note A. Besson. – H. de Page, Traité élémentaire de droit civil belge, t. II, Les incapables, Les obligations (1re partie) : Bruylant, 3e éd., 1964, n° 663, 696 et 697). La jurisprudence décide que les conditions et charges tirées de ce contrat s'imposent au bénéficiaire (Cass. com., 22 févr. 1950, n° 37.874 : Bull. civ. II, n° 73). Plus spécialement, la validité de l'attribution est naturellement subordonnée à celle du contrat principal. Si ce contrat est nul, l'attribution est dénuée d'effet (Cass. com., 25 mars 1969, n° 66-14.054 : Bull. civ. IV, n° 118, la validité d'une stipulation pour autrui greffée sur un contrat de vente d'un fonds de commerce dépend de celle de ce contrat. – T. civ. Seine, 7 juill. 1931 : DH 1931, p. 452, qui relève également l'absence d'engagement du prétendu promettant). En cas de nullité prononcée du contrat support et de l'attribution, le promettant pourra répéter du bénéficiaire ce qu'il lui a versé le cas échéant sur le fondement du droit direct (C. civ., art. 1178, al. 3, 1303 et 1302. – H. de Page, Traité élémentaire de droit civil belge, t. II, Les incapables, Les obligations (1re partie) : Bruylant, 3e éd., 1964, n° 705. – Contra : R. Demogue, Traité des obligations en général, II, Effets des obligations, t. VII : Lib. A. Rousseau 1933., n° 846 et 848). »

« 197. – Exécution en nature et responsabilité du promettant –

> *L'action directe permet au bénéficiaire d'exiger l'exécution de la créance dont il est titulaire et, si cela est impossible, des dommages et intérêts conformément aux articles 1221 et 1231-1 du Code Civil (Cass. com., 19 déc. 1960, n° 58-11.141 : Bull. civ. III,…… »*

« 198. Caractère personnel de l'action directe –

> *L'action directe appartient personnellement au bénéficiaire et se distingue de celle dont dispose le stipulant contre le promettant. Chacun peut faire réparer le préjudice dont il est victime…… ».*

In light of the above, I have examined the terms and conditions of the Exit Agreement on which the applicant is relying to argue that it has locus standi and that there exists *stipulation d'autrui*.

The terms and conditions of the Exit Agreement, inter alia, are as follows –

> *"**First: General Framework of Exit***
> ***The Parties agree** that **the exit** would be made on the basis that the ownership of the soap and detergent manufacturing business **in** Arab Republic of Egypt would be transferred to the Second Party **in exchange** for the **Second Party's** **transfer of all its shares** and **shareholdings** in all the companies, businesses and properties of the First Party in Arab Republic of Egypt, all countries in which the Group has companies and/or businesses, and in the Republic of Yemen (except for the Second Party's shares in Yemen Company for Ghee & Soap Industry).*
>
> ***Second: The companies that are transferred by the Second Party***
> *The Second Party transfers all the shares registered in their names in the companies affiliated to the First Party as shown in Appendix (1) of this Agreement in all its parts.*
> ***……..***
>
> ***Fifth: Trademarks***
> ***The Second Party** shall **transfer the trademarks** registered in Arab Republic of Egypt and other countries to **the First Party**, as mentioned in Appendix (2) of this Agreement." (emphasis is mine)*

Appendix 2 provides-

> "*1. The Second Party shall transfer Arma Company Limited registered in Mauritius to Red Sea Gulf Limited or any other entity to be specified by the First Party.*
>
> *2. All trademarks registered in the name of any of the First Party's companies, including the two companies whose ownership will be transferred to the Second Party, whether inside or outside Arab*

Republic of Egypt or Mauritius, in all fields of trademark registration and services, shall belong to the First Party, taking into account the following clause.

3. *The trademarks registered in category 3 (soap and detergents) and other categories required for the practice of soap and detergent activity, including but not limited to the following trademarks, shall belong to the Second Party:*
Oxi, Zeal, Bahi, Zahi, Oxi Clean, Oxo Clean, Oxi Plus, Oxi Action, Oxi Bright, Olio Douche, Douche, Rainbow, Oxo, Oxy gen, Oxi Fresh, Rivoli, Prix, Paroclean, Oxim, Bright, Bono, Cash, Yaso, Tuf, Hunter, Oleo Silk, Duo, Oxi Spring Breeze, Oxy gen, Zeal Plus, Zeal Action, Power Zeal, Super Zeal, Oxi Softener, and Oxi Black.

4. *Notwithstanding the provisions of 3 above, neither the Second Party nor any party affiliated thereto may use any mark/name/word owned by the First Party anywhere around the world, whether now or in the future, whether in Arabic, English or any other language, whatever the method of writing these words, in terms of form or pronunciation.*

5. *Without prejudice to the generality of (4) above, the Second Party in particular may not use any marks/names bearing the following words, whether in Arabic, English or any other language, regardless of how they are written, and in any color, shape or way of pronunciation*:…"

The applicant's name is not mentioned in Appendix (1) so that for all intents and purposes, the applicant cannot claim for protection of its rights regarding the undertaking of the Second Party to transfer shares to the First Party when the applicant is neither the First Party nor the Second Party. As far as the transfer of shares is concerned pursuant to the Exit Agreement, the applicant cannot therefore rely on same to claim a right to be protected by entering the present application for an injunction. ARMA Limited, the respondent no.1, is mentioned in Appendix (1) which means that the shares of the respondent no.1 need to be transferred to the First Party and not to the applicant. The "*stipulation d'autrui*" principle is clearly not applicable as far as the transfer of shares is concerned. I accordingly discharge the interim order as far as the shares are concerned, namely at items (ii), (iii) and (iv) above. Accordingly, item (v), as per prayer sought, that is, "*directing the respondents nos.2 to 5 to transfer their shares held in the respondent no.1 to the Applicant and to resign from the directorship of the respondent no.1, as per the terms and conditions of the Exit Agreement dated 14 January 2021*" has therefore no *raison d'être*.

In relation to the trademark rights, Appendix (2) speaks of the transfer of Arma Company Limited registered in Mauritius to Red Sea Gulf Limited or any other entity to be specified by the First Party. This is in relation to trademarks held by the respondent no.1 be it in Mauritius or Egypt. As regards trademark rights, the facts are such that I find that Article

1121 of the *Code Civil* finds its application. The fact that the applicant will become beneficiary of the trademark rights which the respondent no.1 holds, it shows that there is "*stipulation d'autrui"*. As such the applicant is entitled to enter the present cause of action for trademark rights and has the requisite locus standi.

As regards the submission of senior learned counsel for the respondents that it is fatal to the case of the applicant that in the Exit Agreement, Arma Company Limited is mentioned in Appendix (2) whereas in the present application, it is Arma Limited, I do not find this to be an issue as I am satisfied that for all intents and purposes, Arma Limited, Arma Ltd and Arma Company Limited refer to the same legal entity in the present case.

Being satisfied that the applicant has an interest in the matter for trademark rights, the interim order issued for the protection of the trademark rights is maintained.

Preliminary Objection (b)- Jurisdiction

It is agreed by senior learned counsel for the respondents that pursuant to Article 19 of the *Code Civil*, the present action can be brought in Mauritius. However, his submission is that the Mauritian jurisdiction is not the most appropriate *forum conveniens* to decide on the issue.

According to senior learned counsel for the respondents, the trademark rights held by the respondent no.1 are in Egypt. This will involve having evidence from Egypt to be presented in Mauritius which would result in expenses to be incurred. According to senior learned counsel for the respondents, it would therefore be preferable that this matter be adjudicated in Egypt. Senior learned counsel for the respondents added that, as such, the ends of justice would be properly met. For senior learned counsel for the respondents, the only reason that this matter has been brought in Mauritius is in relation to the respondent no.1. Senior learned counsel for the respondents submitted that considering that the respondent no.1 has been incorporated in Mauritius but is conducting business outside Mauritius and coupled with the fact that the Exit Agreement does not provide the governing law and jurisdiction clause, the most appropriate forum would be in Egypt. Senior learned counsel for the respondents then referred to the various authorities where the issue of *forum conveniens* had been dealt with, namely, **Spiliada Maritime Corp v Cansulex Ltd [1986] 3 All ER 843**, **Connelly v RTZ Corporation Plc and Others [1997] UKHL 30**, **Peeroo A.K v Peeroo M.J** [2003 SCJ 132], **Kardec L.E v Kardec M.M.Y** [2003 SCJ 199], **Hofman P.F.R. v Hofman P.M.G.G** [2008 SCJ

107], **First Global Funds Limited PCC & Anor v Financial Services Commission of Mauritius & Anor** [2016 SCJ 14].

I fail to agree with senior learned counsel for the respondents that Mauritius is not the appropriate *forum conveniens*. The respondent no.1 being a company registered in Mauritius and now commonly known as an authorised company, I find that I have the required jurisdiction to entertain the present application as submitted by learned counsel for the applicant. The respondent no.1 is owner of trademark rights in Egypt and the respondents nos. 2-5 have undertaken to transfer those rights to the applicant as per Appendix 2 of the Exit Agreement. Since it is a "*contrat pour stipulation d'autrui"* which is being relied upon in the present matter, I find that this Court is the appropriate forum. Besides, the respondents have failed to show how cumbersome it would be to resist an application for an injunction which the applicant is praying for in Mauritius. Affidavit evidence with relevant documents will be annexed which I shall consider in determining if the applicant is entitled to the injunction that it is praying for.

Preliminary Objection (c) – Not all interested parties have been put into cause.

Insofar that I have found that the Exit Agreement for the trademark rights is a contract for "*stipulation d'autrui*," the question of having other interested parties do not arise in the light of paragraphs 197 and 198 as mentioned above, from **JurisClasseur Civil Code -Art. 1205 à 1209, Date du fascicule: 28 Mars 2022, Date de la dernière mise à jour: 28 Mars 2022, Fasc. unique:Contrat, Effets du contrat à l'égard des tiers, Stipulation pour autrui, Marc Mignot - Professeur à l'université de Strasbourg.**

Preliminary Objection (d) - security for costs and a fortification of its undertaking for damages

As regards the issue of security for costs, I have considered the submissions of both learned counsel. According to counsel for the applicant, there is no necessity for security for costs as the matter results from a commercial dispute on the basis of article 21 of the *Code Civil.*

Senior learned counsel for the respondents submitted that the issue of security for costs is not only based on Article 21 of the *Code Civil* but that Article 166 of the *Code de Procédure Civile* and section 110 of the Courts Act need to be considered as well as what was held in **Al-Rawas I.S.A.A. v Al Tani & Ors** [2013 SCJ 447], **Vestalane Investments**

(Pty) Ltd. v Federal Trust (Mauritius) Ltd. [2007 SCJ 84]. Senior learned counsel for the respondents put forward that security for costs should be in the amount of USD 35,000 and the moreso as the applicant is a foreign entity and has no realisable assets in Mauritius.

The applicant is a foreign company and the security for costs is linked to the costs which need to be met in defending the present action. In determining whether security for costs should be ordered and the amount thereof, I have considered –

(i) the nature of the dispute between the parties;

(ii) the evidence which will need to be adduced; and

(iii) the expenses to be met thereof.

Having regards to the authorities referred to above and the facts of the case, I find that it is just to order the applicant to furnish security for costs in the amount of USD 15,000.

As regards the fortification of undertaking in damages in the amount of USD 100,000 by the applicant, this is also within the discretion of the Court to order same and to fix the amount thereof. However, the burden is on the respondents to show the risk of a significant loss in the event that an injunction is granted but they have failed to do so. Furthermore, the respondents have also not proved that the undertaking given by the applicant in damages is inadequate and insufficient. It was for the respondents to show the sound basis on which they are putting forward that the undertaking in damages is not adequate and sufficient. In consideration of what was held for fortification of damages in **The Polo/Lauren Company L.P V Hossen F (Optical Supplies) Ltd & Anor** [2010 SCJ 433], the respondents have not succeeded in showing that even if the applicant is a foreign company with no realisable assets in Mauritius, it will be unable to pay any damages in connection with the injunction. I accordingly do not order any fortification of undertaking in damages in the present case.

The case is otherwise sent back to the e-filing for same to be in shape for it to be heard as to why the interim order issued in relation to item (i) should not be made interlocutory.

M J Lau Yuk Poon
Judge

31 July, 2023

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FOR APPLICANT	**:**	**Mr S. Mardemootoo, Attorney-at-Law**
	:	**Mrs P. Balgobin-Bhoyrul, of Counsel**
	:	**Mr R. Doomun, of Counsel**
FOR RESPONDENTS	**:**	**Mr J. Gujadhur, Senior Attorney**
	:	**Mr A. Moollan, Senior Counsel**
	:	**Mrs A.R. Ramburuth-Seesurn of Counsel**
FOR CO-RESPONDENT	**:**	**Ms A. Ghose, State Attorney**
	:	**Mr R. Chineah, State Counsel**