ROSTRUCT (AFRICA) LTD v GEOSOND HOLDING AG

2015 SCJ 399

SCR No: 109801

THE SUPREME COURT OF MAURITIUS

In the matter of:

Rostruct (Africa) Ltd

Applicant

v.

Geosond Holding AG.

Respondent

JUDGMENT

This is an application made pursuant to Rule 15(7) of the Supreme Court (International Arbitration Claims) Rules 2013 (hereinafter referred to as the 2013 Rules) for the setting aside of provisions (i), (iii) and (iv) of a provisional order issued on 27 May 2014 and making executory in Mauritius an award of the Arbitral Tribunal of the Swiss Chambers' Arbitration Institution in Arbitration No 600323-2012 (hereinafter referred to as the Order).

Provisions (i), (iii) and (iv) of the Order form part of the award of the Arbitral Tribunal.

Under provision (i), the applicant (Rostruct) is ordered to deliver to the respondent (Geosond Holding) the share certificates representing 30% of the shares in Rodio Geotechnics (Pty) Ltd together with the share transfer forms in respect thereof signed by the applicant as transferor and blank as to the transferee. Geosond Holding is to hold such share certificates and share transfer forms in pledge for the payment of the amounts listed in paragraph (ii) of the order and shall redeliver same to Rostruct within 30 days after the full payment of the said amounts.

Under provision (iii), Rostruct is ordered to refrain from using the Rodio name and logo in South Africa.

Under provision (iv), Rostruct is ordered to introduce a new name and logo for Rodio Geotechnics (Pty) Ltd which is not confusingly similar to the Rodio name or

logo and, therefore, shows none of the following characteristics: (a) Black font in black frame with round corners against white blackground, (b) first letter 'R' followed by the letter 'O', (c) the red dot in the letter 'O'.

Before dealing with the application proper, we shall consider the contention of Rostruct to the effect that Geosond Holding, "*being a foreign company not owning any asset in Mauritius, cannot proceed with the present application, unless it has furnished security for costs and damages, which the applicant considers should be in the sum of Rs 500,000".*

Rule 28 of the 2013 Rules provides as follows:

"***28. Security for costs in arbitration claims***

(1) A defendant to any arbitration claim may apply for security for his costs of the proceedings.

(2) An application for security for costs shall be supported by written evidence either by way of affidavit or in the form of one or more witness statements accompanied by any supporting documents.

(3) Where the Court decides to make an order for security for costs, it shall –

(a) determine the amount of security;

(b) direct the manner in which and the time within which the security shall be given; and

(b) make an order specifying the consequences of a breach of the order for security for costs."

"*Arbitration claim"* is defined under Rule 2 of the 2013 Rules as "*any motion to the Supreme Court seeking relief under the Act or the Foreign Arbitral Awards Act".*

To the extent that the present application is incidental to a motion seeking relief under the Foreign Arbitral Awards Act, it comes within the definition of "*arbitration claim"* under Rule 2 and Rule 28 is applicable. Furthermore it may be argued that Rostruct is the defendant in the enforcement claim.

However Rule 28(2) sets out clearly the procedure to be followed in an application for security for costs. It is also clear from the wording of Rule 28(2) that

whether security for costs should be ordered by the Court constitutes a distinct question. An application for security for costs stands on its own and must be supported by written evidence. Rule 29 further provides that the Court may make an order for security for costs under Rule 28 if it is satisfied, having regard to all circumstances of the case, that it is just to make such an order and one or more conditions in Rule 29(2) applies. It stands to reason as well that if the application succeeds, the party ordered to provide security must do so. Failure to comply with such an order of the Court will preclude it from proceeding further.

Accordingly, the application for security for costs - albeit incidental to the application to set aside a provisional order granting recognition of a foreign arbitral award or authorising the enforcement of the award - should be dealt as a separate and preliminary issue. In the absence of a proper application for security for costs supported by written evidence, in the manner prescribed in rule 28(2), we consider that the objection taken by Counsel for Geosond Holding is well taken.

As regards the application for the setting aside of the Order, Counsel for Rostruct informs us that the application is grounded solely on Article V(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which reads as follows:

ARTICLE V

.....

(2) "*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country."

It is to be noted that Rostruct did not invoke Article V(2)(a) at the outset but only in its second affidavit dated 19 September 2014. In this respect, it is the contention of Rostruct that the Order is not capable of being executed in Mauritius. This is because Rostruct is no longer the holder of shares in Rodio Geotechnics (Pty) Ltd and does not have any control over the said company. By a board resolution dated 6 March 2013, the shares of Rostruct in Rodio Geotechnics (Pty) Ltd had been transferred to DTOS Trustees Ltd as trustee of Western Pacific Trust. Also Rodio Geotechnics (Pty) Ltd is a company incorporated under the laws of South Africa and the share certificates, share transfer forms, name and logo pertaining to Rodio

Geotechnics (Pty) Ltd under provisions (i), (iii) and (iv) of the Order are subject matters which are governed by the laws of South Africa. Furthermore, provision (iii) of the Order pertaining to the use of the Rodio name is restricted to the territory of South Africa and is not applicable in Mauritius. In conclusion, Rostruct contends that the Supreme Court of Mauritius does not have the jurisdiction to entertain the present application and that the appropriate forum for the execution of the Order would be in South Africa.

It is appropriate at this juncture to examine the remit of the ground set out in Article V(2)(a) of the New York Convention. Under Article V(2)(a), the Court of the forum State may refuse the recognition and enforcement of a foreign award if the subject matter of the dispute arbitrated upon is not capable of settlement by arbitration under its law. We agree with learned Counsel for Geosond Holding that this in fact refers to the arbitrability of the dispute and that the test to be applied is whether the subject matter of the arbitration was arbitrable.

With regard to the present case, we find that the application and the documents in support have utterly failed to establish how the subject matter of the dispute between the parties, which has led to the making of the award of the Swiss Arbitral Tribunal, is not capable of settlement by arbitration under Mauritian law.

As rightly pointed out by Counsel appearing for Geosond Holding, the reasons advanced by Rostruct pertain to the difficulties in enforcing the award and not to the arbitrability of the dispute between the parties. There is, accordingly, no valid ground for refusing the recognition and enforcement of the award of the Swiss Arbitral Tribunal in Mauritius.

For the reasons set out above, the present application is set aside.

A. F. Chui Yew Cheong
Judge

A. A. Caunhye
Judge

D. Chan Kan Cheong
Judge

9 November 2015

Judgment delivered by Hon A. F. Chui Yew Cheong, Judge

For Applicant	**:**	**Mr Attorney R. K. Ramdewar** **Mrs U. B. Boolell, of Counsel**
For Respondent	**:**	**Mr Attorney B. Sewraj** **Mr Y. Fok, of Counsel**