

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 25 (29 April 2022)
SCA 52/2019
(Appeal from MA 101/2019 -
Arising in CC 02/2019)

In the matter between

Eastern European Engineering Ltd
(rep. by Miss Alexandra Madeleine)

Appellant

and

SJ (Seychelles) Ltd
(rep. by Mr. Bernard Georges)

Respondent

Neutral Citation: *Eastern European Engineering Ltd v SJ (Seychelles) Ltd* (SCA 52/2019) [2022] (Arising in CC 02/2019) (29 April 2022)

Before: Fernando President, Robinson JA, Tibatemwa-Ekirikubinza JA
Summary: Contract - claim for damages for breach of contract - Commercial Code - arbitration agreement - stay of proceedings - Respondent conceding that the arbitration agreement is not null and void - arbitration agreement is valid and subsisting - no argument before the Supreme Court that the dispute did not fall within the scope of the arbitration agreement. Appeal allowed. With costs. *Whether or not a foreign arbitral award (a Convention Award) is enforceable in Seychelles does not arise for the determination of this Court in the context of the present appeal.*

Heard: 12 April 2022

Delivered: 29 April 2022

ORDER

1. The appeal is allowed in its entirety.
 2. The order of the learned Judge refusing the application for stay of proceedings is quashed.
 3. For the order of the learned Judge, an order allowing the application for stay of proceedings in CC2/2019 is substituted.
 4. With costs in favour of the Appellant.
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JUDGMENT

ROBINSON JA (FERNANDO, PRESIDENT, TIBATEMWA-EKIRIKUBINZA JA)

Proceedings before the Supreme Court

1. The Appellant is Eastern European Engineering Limited. The Appellant is the Applicant in MA101/2019 and the Defendant in CC2/2019, the head suit. The Respondent is S.J. (Seychelles) Limited. The Respondent is the Plaintiff in CC2/2019 and the Respondent in MA101/2019.
2. The Respondent/Plaintiff sued the Appellant/Defendant for damages for breach of contract in a plaint CC2/2019 filed on the 28 January 2019.
3. The contract contains an arbitration clause in terms of which the Appellant and the Respondent agreed to refer any dispute, controversy or claim arising out of or in connection with the contract to the International Chamber of Commerce Institute of Arbitration (ICC Arbitration).
4. An application for stay of proceedings avails the Appellant. The Appellant basing itself on the arbitration clause, applied to the Supreme Court to stay the Respondent's suit under the Commercial Code on the ground that the Supreme Court has no jurisdiction to hear the suit. The Appellant asked the Supreme Court to give effect to the parties' clear intention of resolving their dispute by arbitration.
5. The Respondent conceded before the Supreme Court that the Appellant has not submitted to the jurisdiction of the Supreme Court as it has filed the stay application at the earliest opportunity. The Respondent also conceded that the arbitration clause is not null and void.
6. The Respondent submitted in essence that the application for stay of proceedings should be refused since the arbitration agreement is incapable of being performed because of the Court of Appeal judgment in *Vijay Construction (Pty) Ltd v Eastern European Engineering*

Limited CA15 & 18 of 2017. Overall, Counsel argued that it must be a matter of public policy for a national court to prevent parties in its jurisdiction from legislating or arbitrating in vain.

7. The learned Judge framed the issue for determination as follows —

"[26] Largely, Mr Georges' submissions can be conflated into the single question as to whether the impact of the Court of Appeal's decision rendering international arbitration awards made in terms of the current contract unenforceable invalidates the present arbitral clause on the ground that it is void".

I defer discussion of the issue framed by the learned Judge below.

8. The learned Judge, having considered some authorities which she claimed are not on all fours with the issues arising for consideration, concluded that the Court must deny the stay of proceedings on the basis that the arbitration agreement is void due to any foreign arbitral award arising out of the arbitration being unenforceable. Hence, the learned Judge stated that the Court can exercise jurisdiction in the dispute as provided under the Commercial Code. She refused the application for stay of proceedings and ordered the suit to proceed to a hearing on the merits.

The appeal proceedings

9. The Appellant has appealed the ruling on the following grounds —

"(i) The learned trial judge erred in law and on the facts in failing to exercise the Arbitration Clause in the Agreement between the parties.

(ii) The learned trial judge erred in law and on the facts in holding that Clause 20.2 of the Agreement was not applicable."

Analysis of the parties' contentions

10. In its skeleton heads of argument, the Appellant argued that the learned Judge erred in concluding that the arbitration agreement is void due to any awards arising out of the

arbitration being unenforceable. The Appellant submitted that the Respondent did not argue that the arbitration agreement is not valid. The Respondent had argued that following the case of *Vijay Construction (Pty) Ltd* [supra], any foreign arbitral award is incapable of being enforced in Seychelles since the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was not in force in Seychelles.

11. On the other hand, the Respondent by Counsel supported the learned Judge's decision in *toto*, for the reasons given by the learned Judge. Counsel submitted that at the time when a foreign arbitral award could not be enforced in Seychelles by virtue of the decision of the Court of Appeal in *Vijay Construction (Pty) Ltd* [supra], it made no sense for arbitral proceedings to be resorted to – despite the decision of the parties to the contract that this would be their chosen dispute resolution process – simply for a paper award to be received, incapable of enforcement.
12. Counsel for the Respondent also submitted that the situation has changed, and that a foreign arbitral award, provided it is a Convention Award, can now be enforced in Seychelles, which has since 2019 acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
13. We have considered the submissions of the parties with care. The learned Judge considered whether or not the arbitration agreement was null and void. Counsel for the Respondent had conceded that the arbitration agreement was not null and void. Counsel for the Appellant submitted that the Respondent's position on its pleadings was that any foreign arbitral award was unenforceable in Seychelles based on *Vijay Construction (Pty) Ltd* [supra].
14. We state that by admitting that the arbitration agreement is not null and void, Counsel for the Respondent has admitted that the arbitration agreement is capable of being performed and is thus valid and enforceable. In light of our finding, we accept the submission of the Appellant. Hence, we find the approach of the learned Judge, in this case, to be erroneous.

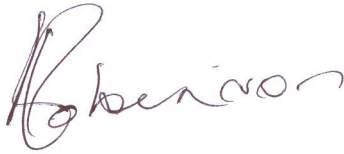
15. Further, we hold that the effect of a foreign arbitral award (a Convention Award), not capable of being enforced in Seychelles, would not render the arbitration agreement null and void; it would result in a foreign arbitral award (a Convention Award) that would be unenforceable in Seychelles.
16. We hold that the arbitration agreement is valid and enforceable for the reasons stated above. We note that there was no argument before the Supreme Court that the dispute did not fall within the scope of the arbitration agreement.
17. We allow both grounds of appeal.

Miscellaneous matter

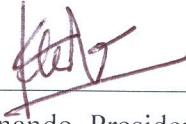
18. Counsel for the Respondent submitted that the situation had changed since 2019 when Seychelles acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Be that as it may, we state that whether or not a foreign arbitral award (a Convention Award) is enforceable in Seychelles does not arise for the determination of this Court in the context of the present appeal.

Decision

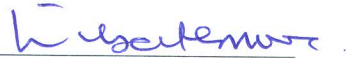
19. For the reasons stated above, we allow the appeal in its entirety and quash the learned Judge's order refusing the application for stay of proceedings. We substitute for the order of the learned Judge an order allowing the application for stay of proceedings in the head suit, CC2/2019.
20. With costs in favour of the Appellant.



I concur:



Fernando, President



I concur:

Dr. L.Tibatemwa-Ekirikubinza JA

Signed, dated and delivered at Ile du Port on 29 April 2022.