BEST CONSTRUCT CO. LTD v THE CENTRAL WATER AUTHORITY & ANOR
2023 SCJ 257

SUMMARY

Facts

This was an application made to the Judge in Chambers moving the Court for an interlocutory order in the nature of an injunction, restraining and prohibiting respondent No. 1, that is the Central Water Authority, from enforcing bank guarantees pending mediation between the parties.The issue of an interlocutory order in the nature of an injunction is also being prayed for in order to restrain and prohibit respondent No. 2, that is the SBM Bank (Mauritius) Ltd, from allowing payments of the said bank guarantees as enumerated above. No interim orders have been issued in the present matter and the application is resisted by both respondents Nos.1 and 2. The applicant is a job contractor who has been awarded a number of contracts by respondent No. 1 whereby three contracts are in issue, namely, Contract CWA/C2016/211, Contract CWA/C2016/212 and Contract CWA/C2013/78 (collectively referred to as "the three contracts"). The said contracts provided that the applicant had to submit performance security in the form of bank guarantees in the amount of 10% of the contract amounts, and which were furnished by the applicant. However, as per respondent No. 1, the applicant failed to fulfil its contractual obligations under the said three contracts amongst which the failure to complete the works within the agreed time frames causing damages and defects that required patching works. Following disputes which arose between the applicant and respondent No. 1, a Mediation Settlement Agreement (the MSA) was entered into between the said parties on 29 September 2020 with a view to resolving the disputes between parties. There was a revised programme of works as per the MSA. However, the applicant failed to complete the works and pursuant to a Board Resolution of respondent No. 1, notices of termination in relation to the said contracts were issued to the applicant. Respondent No. 1 claims that it is lawfully entitled to cash the Performance Security as well as the Advance Payment Bank guarantees for the applicant's non-performance of the main contract and non-compliance with the MSA. As regards the applicant, it has on 05 July 2021 submitted a claim for the sum of Rs 156,534,537.22 for the works it has carried out for respondent No. 1 inclusive of the works carried out with regard to the said three contracts. On 11 March 2022, the applicant was informed by respondent No. 2 that respondent No. 1 had called upon it to cash the said bank guarantees in relation to the said contracts.

Issue(s)

Respondent No. 1 has also raised 5 preliminary objections as follows:

A. The Applicant has not lodged the present application diligently and undue delay has lapsed before entering the present case. Hence the Applicant has not shown urgency in the present application;

B. The present Application does not comply with the mandatory requirements of prohibitive Injunctive relief inasmuch as there is no main case entered or contemplated so that the orders prayed for cannot be made interlocutory;

C. The present application is misconceived as the present issue is one of a pecuniary nature and damages, if any, which can adequately compensate the Applicant;

D. The Applicant has not complied with the Central Water Authority Act before lodging the present Application; and,

E. The Honourable Judge in Chambers has no jurisdiction to hear and determine the present Application inasmuch as, as per the contract Agreement entered into by the Applicant and the Respondent no. 1, it is the general conditions as per the FIDIC conditions of contract that governs the contract agreement. Section 20.2 and following of the general conditions of contract [FIDIC] clearly stipulates that "Disputes shall be adjudicated by a Dispute Adjudication Board".

Held

I. As regards preliminary objection A, it is trite law that in an application seeking injunctive relief, the applicant must act with utmost celerity. A reading of the letters of 21 April 2021 and 31 May 2021 do not expressly bring out that respondent No. 1 intended to call on the guarantees provided by the applicant. However, the applicant must have been aware of respondent No. 1's decision to apply liquidated damages and penalty once the contracts were terminated.From evidence on record, it is clear that once respondent No. 1 terminated the contracts, the logical consequence would be that respondent No. 2 would have no alternative than to enforce the Performance Security at some point in time which the applicant, being what can be termed as a "seasoned contractor", would have been fully aware of. The case of Aukbarally v Société Auckbarally & Cie and Anor and Aukbarally v Jankee (supra) would find its application in the present matter as submitted by learned Senior Counsel for respondent No. 1. The fact that the applicant entered the present application within five days of being informed by respondent No. 2 that the latter would enforce the Performance Security is of no consequence. Preliminary objection A must therefore succeed.

II. Preliminary objection C must also succeed as the arguments offered on behalf of respondent No. 1 that the present application ought to be considered in the context of the contractual obligations between the parties is subscribed to. The case of Lite Zone Co Ltd v Fromet De Rosnay J P (supra) is of relevance. Injunctions to restrain actionable wrongs for which damages are the proper remedy will not be obtained if the claimant can be fully compensated by an award of damages.

III. Preliminary objection D cannot succeed as, on this score, the arguments offered by learned Senior Counsel for the applicant should win the day as we are in the realm of injunctive relief being sought and section 37 of the Central Water Authority Act cannot be of application the more so as an application for injunctive relief is not a civil suit as contemplated under the said section of the Act.

IV. As regards to Preliminary objection E, it is not believed that an application for injunctive relief would oust the jurisdiction of the Judge in Chambers if the urgent intervention of the latter is required to prevent a misdeed from happening. However, if the parties have themselves subscribed to a dispute resolution mechanism to resolve issues of dispute, then it stands to reason that such avenue must be resorted to.

V. For the sake of completeness, the question as to whether there is a serious issue to be tried was also addressed. Learned Senior Counsel for respondent No. 1 was right to submit that once the contracts were terminated, the latter was entitled to lawfully avail itself of the penalty clause under the MSA

to seek enforcement of the bank guarantees. An injunction would not be issued to restrain payment unless there is an exceptional element of fraud involved as laid down in the case of Alternative Power Solution Limited v Central Electricity Board and Another [2013 PRV 35].

VI. In deciding on the balance of convenience, it is incumbent on the Judge in Chambers to see to it that a course of action should be adopted to cause the least irremediable prejudice to one party or the other as stated in Ramsurrun A. & Anor v Innodis Ltd [2018 SCJ 154]. It was held that respondent No. 1 would be prejudiced as regards its operations and also if the Performance Security and bank guarantees are not enforced especially given that there was also the stand of respondent No. 2 that it is obligated to enforce payment of the Performance Security and bank guarantees once claims are received by respondent No. 1.

VII. The question of unconscionability as argued by learned Senior Counsel for the applicant was also addressed. The doctrine of unconscionability is recognized in many common law jurisdictions; it precludes the enforcement of voluntary or consensual obligations unfairly exploiting the unequal power of the consenting parties. A reading of case-law on the matter shows that there are certain elements that need to be present before Courts will intervene, namely, one party has to be at a serious disadvantage to the other through poverty or ignorance, the weakness of one party has to have been exploited by the other party in some morally culpable manner and the resulting transaction should not be merely hard or improvident but overreaching and oppressive.

VIII. However, in so far as the law in Mauritius is concerned, this is a new doctrine that does not seem to have been applied as yet. Even if it were to be applied, then the facts in this application do not present features of unconscionability as discussed above so as to consist a ground for granting injunctive relief. It is clear that respondent No. 1 is lawfully entitled to cash the Performance Security as well as the Advance Payment Bank guarantees for the applicant's non-performance of the main contract and non-compliance with the MSA. This was not a case that falls in the realm of unconscionability.

This summary is provided to assist in understanding the Court's decision. The full judgment of the Court is the only authoritative document.

Short Summary

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