

THE HIGH COURT OF SWAZILAND

A G THOMAS (PTY) LTD

Applicant

And

GRINAKER LTA LTD

1st Respondent

W.L.L. (CCKT)

2nd Respondent

GOVERNMENT OF SWAZILAND

3rd Respondent

Civil Case No. 1453/2004

Coram: S.B. MAPHALALA-J

For the Applicant: MR. P. DUNSEITH

For 1st and 2nd Respondents: Advocate M. Van Der Walt (Instructed by Millin & Cnrrie)

JUDGMENT

(28/01/2005)

[1] The Applicant moved an urgent application on an ex parte basis before the Acting Chief Justice on the 27th May 2004, for an order inter alia, attaching the debt owing by the Swaziland Government to the 1st and 2nd Respondents, being the balance of the contract sum payable in respect of the Nhlangano - Lavumisa Road Project, to the extent of E6, 627, 884-95 ad fundandam et confirmandam jurisdictionem in an action which the Applicant intends to institute against the 1st and 2nd Respondents. Consequently an order was granted by the learned Acting Chief Justice for an order in terms of prayers 1, 2, 3, 4, 5, 5.1, 5.2, 5.3, 6 and 7 of the Applicant's Notice of Motion.

[2] On the 16th June 2004, again before the Acting Chief Justice a consent Order was recorded inter alia, that the Order granted on the 27th May 2004, be rescinded in view of the 1st and 2nd Applicants' submission to the jurisdiction of the High Court.

[3] For present purposes the parties have agreed that the only issue for determination is whether this court has jurisdiction to entertain the claim which the Applicant intends by way of action, or whether such claim must be referred to arbitration.

[4] If I find that the court has jurisdiction then I ought to grant prayer 3 of the Notice of Motion viz leave to institute proceedings by way of edictal citation with costs to the Applicant. Otherwise, the court is to dismiss prayer 3 of the Notice of Motion with costs to the 1st and 2nd Respondents.

[5] The Applicant intends to institute legal proceedings against the 1st and 2nd Respondents claiming rectification of the subcontract agreement to reflect the common intention of the parties that escalation would also be payable on work and materials other than bitumen; payment of E2, 294, 616-00 in respect of rise and fall (escalation) on bitumen products; payment of E985, 919-37 in respect of rise and fall (escalation) on work and materials other than bitumen; payment of E3 million in respect of "preliminary and generals" (P&G's) alternatively damages arising from the 1st and 2nd Respondents extension of the subcontract period and intempiion of the subcontract works for a period of 14 months; payment of E908, 512-49 in respect of the balance of the contract value arising from re-measurement on conclusion of the contract and mora interest and legal costs.

[6] These claims arise from the performance of a subcontract agreement (annexure "B" to the Founding affidavit) the 1st and 2nd Respondents ("the Respondents") assert that the jurisdiction of this court to entertain the legal proceedings and claims referred to above is ousted because the parties agreed in the subcontract that all disputes arising from the subcontract will be referred to arbitration.

[7] It is trite that the burden of proving that the jurisdiction of this court has been ousted by a submission Jo arbitration lies on the party which alleges this, namely the Respondents.

[8] The approach by the courts in resolving this vexed question was clearly enunciated in the South African case of Parekh vs Shah Jehan Cinema (Pty) Ltd and others 1980 (1) S.A. 301 (D) at 305 E - // where Didcott J made the following trenchant remarks; and 1 quote:

"An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the * disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's disputes straight to Court, and the other does not protest, the litigation follows its normal proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself Throughout, its jurisdiction, though sometimes latent, thus remains intact".

[9] Counsel in this matter Filed very comprehensive Heads of Argument for which I am most grateful in view of the complex nature of this dispute.

[10] Miss Van Der Walt who appeared on behalf of the Respondents commenced submissions in view of the fact that the question to be examined is in the nature of a point in limine. Her first salvo is that the Respondents in casu have not submitted to the jurisdiction of this court when they consented to the jurisdiction of this court. The legal effect of such consent by peregrines is consent to jurisdiction over the person of the party only. It is not and cannot in law be consent to jurisdiction over a cause of action. Such consent is a "voluntary submission by a Defendant to the court exercising jurisdiction over him, which it does not possess in law" by prorogation a Defendant subjects his person to the jurisdiction of the court (see Sonia (Pty) Ltd vs Wheeler 1958 (1) S.A. 555 at 563 C - F).

[11] Under heads 4, 5.1, 5.2, 5.3, 6, 6.1, 6.2 Counsel for the Respondents persists in her argument that in fact and in law, it is the position that the 1st and 2nd Respondents' consent in respect of the Applicant's proposed action against them, was and could be consent to jurisdiction over their persons only, and not over the subject matter of the dispute. The subject matter of the dispute is the very contract which contains the arbitration clause, ordinarily, on the basis of ratio contractus, the court would have had full jurisdiction, had it not been for the arbitration clause. Therefore, the 1st and 2nd Respondents, be it by way of consent to jurisdiction, appointing a local domicilium citandi et executandi, or otherwise, never waived or abandoned their right to dispute that the court has jurisdiction over the subject matter of the contractual dispute in view of the arbitration clause.

[12] It is argued on behalf of the Applicant an contraire that whether or not the subcontract provides for a submission to arbitration, the Respondents submitted and consented unconditionally to the jurisdiction of this court. In this regard the court was referred to annexure "GLTA5" of the Respondents' answering affidavit being a letter from Respondents attorneys Millin & Currie addressed to the Applicant's attorneys dated the 4th June 2004. This letter is crucial in the determination of whether or not the Respondents consented to the jurisdiction of this court.

[13] Annexure GLTA5" thereof reads in extenso as follows:

"4 June 2004

P. R. DUNSEITH ATTORNEY First Floor, Lansdowne House

Cnr. Cost & Johnstone Streets MBABANE

ATTENTION: MR. DUNSEIT1 Dear sir,

RE: CRINAKER I,TA LIMITED AND CONSOLIDATED CONTRACTORS COMPANY (KUWAIT)
W.L.L. (CCKT) - HIGH COURT CASE NO. 1453/2004.

1. As you know, we act for GRINAKER LTD LIMITED and CONSLIDATED CONTRACTORS COMPANY (KUWAIT) W.L.L (CCKT) and we represent them in the Kingdom of Swaziland. You are also aware of our clients' implicit submission to the jurisdiction of the Swaziland High Court by virtue of their application against the Government, on which you relied in the above application.
2. It is hereby formally confirmed that our client consents to the jurisdiction of the Swaziland High Court in respect of your client's proposed action against them, and our clients also appoint our offices as their chosen domicilium citandi et executandi for all purposes, at which they will accept all service and process.
3. There is accordingly no need for you to confirm the order obtained by you under the above High Court case number, nor is there any need for any writ of attachment which may have been issued by yourselves in respect thereof, to be executed by the Sheriff.
4. An attachment is now not necessary or competent under (he circumstances, and application shall be made for said order to be set aside.

Yours faithfully

MILLIN & CURRIE

Incorporating

R D Friedlander & Co.

'cc. Attorney General

Attorney General's Chambers Fax Number 4043533

[14] The Applicant contends that the argument by the Respondents that the consent to jurisdiction over the periods of the first and second Respondent only, and not to the jurisdiction to try the matter cannot be upheld for a number of reasons. First, in their letter of consent, the Respondents attorney states that "it is hereby formally confirmed that our client consents to the jurisdiction of the Swaziland High Court in respect of your client's proposed action against them". Secondly, to bolster their submission to the court's jurisdiction, the Respondents refer to their previous "implicit submission to the jurisdiction of the Swaziland High Court by virtue of their application against the Government". Further, that "GLTA5" goes further to appoint a domicilium citandi et executandi for purposes of such action

[15] The court was further referred to Section 3 of the Arbitration Act No. 24 of 1902 and the case of *Xenopolous vs Standard Bank* 2001 (3) S.A. 498 at 498 -499 on the general principles which governs a waiver.

[16] The Respondents', as regards annexure "GLTA5", argued that it is clear from paragraph 2 and 3 (that the consent to jurisdiction related to the attachment only. The words "in respect of your client's proposed action against them" merely identifies in respect of which proceedings such consent is given, and does not consent to jurisdiction "over", or to jurisdiction to "hear" a particular matter. As regards paragraph 1, the implied consent in respect of these Respondents' application against the Government was again in respect of their persons only. The court already had uncontested jurisdiction in that matter

over the subject matter of the dispute, by virtue of the fact that the cause of action arose wholly within, and the Government as Respondent is in Swaziland, as appears from the Respondents' Founding affidavit in (that application.

[17] Having considered all the facts on affidavits and the submissions by Counsel I am inclined to agree with Counsel for the Respondents on the authorities she has cited that Respondents consent as a peregrinus is consent to jurisdiction over the person of the party only. It is not and cannot in law be a consent to jurisdiction over a cause of action. The legal authorities in this regard makes this abundantly clear.

[18] In the case of Sonia (Ply) Ltd vs Wheeler (supra) at page 563 C -F Price AJA stated the following:

"Save for die principle of submission, that is, a voluntary submission by a Defendant to the court exercising jurisdiction over him which it does not possess in law, the basic principle of jurisdiction is effectiveness Schlimmer v Exetrix in Estate of Rising, 1904 T.H. 108 at page ///. This point is fully discussed by Mr. Pollak in his book on Jurisdiction from page 15 onwards. lie quotes several dicta, one from an American case - Mcdonald v Mabee, 243 U.S.' 90 (1917) - where Holmes J said: "The foundation of jurisdiction is physical power".

In Dicey, 6th Edition at page 22 it is said:

"The courts of any country are considered by English law to have jurisdiction over any matter with regard lo which they cannot give an effective judgment".

In the older editions of Dicey the words "are considered in English law" were not included, and I think this principle was expressed as one of private international law. It is to be observed that where Mr. Pollak quotes Dicey on this point, he omits these words. In any case it seems to be clear that this is the basis of jurisdiction in our law."

[19] Further in the case of Veneta Mineraria SPA vs Carolina Collieries (Pty) Ltd 1987(4) S.A. 883 at 894 A - B Vtlioen J A stated the following on the subject:

"This dictum again emphasizes the principle that in addition to the machinery of arrest (which, in the case of a local peregrinus, is dispensed with by law) something more is required before a court can take cognisance of a matter in its jurisdiction. By prorogation a Defendant subjects his person to the jurisdiction of the court, but that is not enough. One or more of the traditional grounds of jurisdiction must also be present".

[20] In the case of Rosenberg and another vs Mhanga and others (Azaminle Liquor (Pty) Ltd Interveni) 1992 (4) S.A. 331 the following appears in the headnote thereof:

"Where there is a submission or consent to jurisdiction by a foreign peregrinus before any order of attachment to confirm jurisdiction has been granted, a court will not grant an order of attachment, since jurisdiction would already have been secured and the court would not thereafter concern itself with whether any judgment which might be given will be effective or not. There is clear authority for the proposition that a submission to jurisdiction which comes after an order of attachment has already been

executed is too late, and that a court would not in such circumstances undo what has already been done. While there could possibly be a valid argument for not interfering with an order of attachment already granted, though not yet executed, where the submission to jurisdiction came after the order had been granted (as certain rights would already have flowed from the granting of the order), where the submission to jurisdiction comes shortly after the Respondent has become aware of the application and before any order of attachment has been granted, such submission to jurisdiction should have the same effect as if it had come before the application was launched. It should be noted, however, that only where a *causa jurisdictionis* apart from the attachment exists, i.e. only in the case of an attachment *ad confirmandam jurisdictionem*, can attachment become unnecessary as a result of a consent to jurisdiction".

[21] I agree in toto with the submissions made by Miss Van Der Walt that is clear from paragraph 2 and 3 of annexure "GLTA5" that the consent to jurisdiction related to the attachment only. The words "in respect of your client's proposed action against them" merely identifies in respect of which proceedings such consent is given, and not consent to jurisdiction "over", or to jurisdiction to "hear" a particular matter. As afore-stated, by consenting to jurisdiction, a Defendant subjects his person to the court's jurisdiction, but that is not enough (as per dicta in *Veneta Mineraria SPA* (supra) - one or more of the traditional grounds of jurisdiction over the subject matter of the dispute also has to be present. Save for jurisdiction over a person, a party cannot consent to an additional ground for jurisdiction where the court does not have jurisdiction on such a ground to begin with. The subject matter of the dispute // *casu* is the very contract which contains the arbitration clause. Ordinarily, on the basis of *ratio contractus*, the court would have full jurisdiction, had it not been for the arbitration clause.

[22] All in all therefore I am in total agreement with what was said on behalf of the Respondents' that the consent was to jurisdiction over their persons only, and not over the subject matter of the dispute following the decisions in *Sonia (Pty) Ltd vs Wheeler* (supra); *Veneta Mineraria* (supra) and *Rosenberg* (supra).

[z3] Having disposed of the issue of consent to jurisdiction what remains is the issue of the proof of contract. It appears to me that arbitration Clause 67 is the relevant provision. The Applicant denies any such clause on the basis that the entire agreement had not been placed before court. However, the affidavit evidence shows the contrary. Applicant at paragraph 17 of its Founding affidavit acknowledges the existence of such contract in the following terms:

"... to (lie best of my knowledge, this contract was drawn up according to the standard conditions of contract for works of civil engineering construction used by the Federation Internationale Des Ingenieurs - Conseils. I attach marker "C" a copy of the relevant clause of this standard contract, which sets out procedures to be followed in the event of a dispute between the Respondents as main contractor and employer respectively"

[24] As regards to proof of contract I agree with Respondents submissions as they appear in paragraph 14.2, 14.3, 15, 15.1, 16 and 17 of their Heads of Argument. I also agree with the Respondents on the enforceability of the contract (per Heads 18, 19,20,21 and 22 thereof).

[25] Finally, coming to the issue of costs it was argued for the Applicant that I ought to grant costs on

the attorney-client-scale. However, having considered the arguments on both sides it is my considered view that costs be levied on the ordinary scale and these to include costs of counsel to be certified in terms of High Court Rule 68 (2).

[26] In the result, the following order is accordingly recorded:

S.B. MAPHALALA

JUDGE