NATIONAL BANK OF CANADA v IBL LTD & ORS

2022 SCJ 416

Record No. 119702

THE SUPREME COURT OF MAURITIUS

In the matter of:

National Bank of Canada

Applicant

v.

1. **IBL Ltd**
2. **Intrasia Capital Pte Lte**
3. **Mon Loisir Ltée**

Respondents

In the presence of:

Afrasia Bank Ltd

Co-respondent

And in the matter of

Ex parte

THE NATIONAL BANK OF CANADA

JUDGMENT

The only issues for our consideration in this judgment are the awarding of costs and in what manner this court should exercise its discretion on the specific circumstances of the present application and its withdrawal by the applicant.

In the case at hand, neither party has "succumbed" which is the premise on which the court usually bases itself to decide who should be awarded costs. It is therefore incumbent on this court to consider whether the applicant was of good faith, reasonable, and seized the arbitration promptly. The chronology of the present application as well as the timing of the seizing of the arbitral tribunal is therefore pertinent.

The relationship between the applicant and respondents for the purposes of the present matter is found in a shareholders' agreement entered into on the 1st of December 2014. Under this agreement the applicant and respondents are shareholders in the co-respondent Afrasia Bank. A notice of termination of the shareholders agreement was sent by the respective respondents to the applicant on 7, 8 and 12 August 2019, giving three months' notice for the said termination.

It is interesting to note that the applicant was aware of its option to "go for international arbitration in London or litigation in Mauritius", (paragraph 11 of the applicant's affidavit, "the affidavit"). It nonetheless applied for an injunction before the judge in Chambers of the Commercial Division on 22 August 2019. The respondents raised a preliminary objection challenging the jurisdiction of the said Judge with arguments heard on this issue on the 17th of September 2019. The applicant, it seems, was of the view that it could avail itself of both options and "make its mind up" as to which course it would adopt.

A reading of paragraphs 11 to 18 of the applicant's affidavit reveals that by the 4th of February 2020, the applicant had already decided to lodge an action by way of International Arbitration (which had in fact been lodged on the 3rd of February 2020).

The following chronology is set out and has been agreed upon by all counsel (prepared by counsel for the applicants), with some editing from us.

- September 2019, the applicant enters an application for an injunction to prevent the respondents' termination notices from taking effect.
- 03 February 2020, the applicant entered an application for the issue of interim measures under section 23(3) of the International Arbitration Act 2008 to stay and suspend the Notices of Termination of the Shareholders' Agreement issued by the Respondents pending the final determination of the dispute between the parties by way of arbitration before an Arbitral Tribunal in London.
- 04 February 2020, the applicant lodged the Interim Application before the Supreme Court on an *ex parte* basis for the issue of an injunction to stay and suspend the Notices of Termination of the Shareholders' Agreement.
- 10 February 2020, the applicant made a request for arbitration before the International Chamber of Commerce.
- 13 February 2020, respondents & co-respondent were called upon to show cause why the interlocutory order should not be granted (the interim application having been declined by Hon. Mrs. Devat).
- 13 February 2020, the present interim application was first called before the panel of 3 designated Judges.

There then followed no less than 8 occasions between 25 February 2020 and 28 July 2020 when the matter was called variously for the filing of affidavits, recording of stand and filing of written submissions. This period also encompassed the national lockdown because of Covid-19.

On 28 July 2020 the applicant was granted a postponement to take a stand on the *"raison d'etre*" of the present interim application. The applicant decided to pursue with the present application and the chronology continues:

- 03 August 2020, applicant communicated its stand to proceed with the present Interim Application to support the Arbitration proceedings in London; the purpose being to preserve the applicant's rights under the shareholders' agreement.
- 14 October 2020, applicant agreed to expunge paragraph 33 of applicant's 3rd witness statement.
- 21 October 2020, matter fixed for Mention for applicant to take a stand on the necessity to continue with the present application in light of the constitution of Arbitration proceedings. Applicant maintained that it is proceeding and filed written submissions on respondents' preliminary objection regarding the jurisdiction of the designated Judges to hear the present Interim Application.
- 03 November 2020, matter fixed for Mention for respondents to file written submissions. Applicant expressed its intention to file written submissions in reply to respondents' submissions.
- 05 November 2020, written submissions filed by applicant.
- 11 November 2020, matter fixed for Mention.
- 11 February 2021, letter of acknowledgment from the International Court of Arbitration (ICC) regarding request for arbitration by applicant.
- April 2021, Arbitration proceedings fixed before ICC in London.
- April 2021, the main case which was entered by way of arbitration before ICC, was already heard.
- 30 April 2021, the applicant moved to withdraw the present interim application- to which the respondents had no objection but they insisted on costs whilst the co-respondent did not insist on costs.
- 30 April 2021, letter from applicant's legal adviser moving to withdraw present interim application.
- 10 May 2021, Case fixed for Mention.
- 10 May 2021, motion to withdraw made no objections, however respondents insisted on costs.

The applicant despite having taken steps to seize arbitration (it obtained acknowledgment from the ICC regarding the request on 11 February 2021) has maintained the present application until the arbitration proceedings were both fixed and heard within the month of April 2021. It is only by way of a letter dated 30th of April 2021 that the applicant moved to withdraw the present application after stating therein that the matter had been heard on 21 and 22 April 2021.

We have duly considered the written submissions provided to us by learned counsel for all parties.

In this matter it is agreed that rule 19 of the Supreme Court (International Arbitration Claims) Rules 2013 provides that it is within the discretion of the court to decide whether to make an order for costs. Rule 19(3) specifically provides that the court should have regard to the conduct of all the parties; whether the party has succeeded on part of the case and whether any admissible offer to settle was made.

We find it relevant to refer to the following extract of **Dalloz Code de Procédure Civil, Chapitre 2 "Frais et Dépens" Section 1er** as reproduced in the judgment of **Jitsing S. & Anor v Consortium d'Études et de Réalisation Immobilières Ltée [2016 SCJ 143]:**

> ***"223.** Désistement. Transaction. Radiation. - La perte de la qualité de partie au litige en cours de procédure nécessairement une incidence sur les frais et dépens qui ont pu être engagés avant l'extinction de l'instance. Le désistement qui, aux termes de l'article 398 du code de procédure civile, entraîne l'extinction de l'instance, comme de la procédure d'opposition ou d'appel (C. pr. civ., art. 403 et 404) ou de celle suivie sur pourvoi en cassation (C. pr. civ., art. 1025), « sauf convention contraire », met son auteur, selon l'article 399, dans l'obligation de supporter les dépens, qui ne peuvent être laissés à la charge du défendeur : l'instance s'éteint par le fait du désistement, et celui-ci emporte, sauf convention contraire, soumission de payer les frais de l'instance éteinte (Soc. 27 mai 1983, no 81-40.785, Bull. civ. V, no 289). La raison en est que le désistement, consacrant la renonciation à l'action, vaut présomption que celle-ci a été engagée à tort, sans motif légitime."*

It is important to underline that at no point in time was the applicant favoured with an interim order during the whole period of September 2019 till February 2021.

The applicant is relying on the judgments of **Barnwell Enterprises Ltd & Ors v ECP Africa FII Investments LLC [2013 SCJ 327]** and **Africore Energy Ltd v Mogs Storage (Mauritius) Ltd & Ors [2020 SCJ 320]** where costs were not awarded against the applicant upon the court exercising its discretion. These two cases are easily distinguishable from the

matter at hand as in both cases interim orders had been granted. Furthermore, in the case of Africore, the issue of granting of costs was not the main purport of the judgment nor submitted upon.

As to the case of **Barnwell**, the arbitral tribunal was already seized but there was a matter of urgency as there were attempts "to enforce a share pledge agreement which would have defeated the raison d'être of the arbitral proceedings". It was also the stand of the respondent before the arbitral tribunal that it was the court in Mauritius which had jurisdiction under the share pledge agreement. Finally, there was a new event of a notice of enforcement which was served by the respondent on the applicants. In that case, it cannot be said from a reading of the judgment that the issue of awarding of costs was made a live issue before the court as it has before us.

We note that on the sitting of 3rd August 2020 there was a statement by learned Counsel for the applicant that it wished "to proceed with the case before the panel of judges, notwithstanding the proceedings before the arbitral tribunal in England". Upon being queried by the court, learned Counsel for the applicant stated that at the time of the interim measures before the Mauritian court, the arbitral tribunal had not been constituted in the United Kingdom (the UK). She also stated that the merits before the tribunal in the UK would be in April 2021. It is therefore clear from the record that the applicant was already aware that the tribunal would sit in April 2021 as far back as 3rd August 2020. The applicant chose not to pursue the interim relief before the arbitration tribunal for reasons which have not been made clear to this panel.

After taking all the above facts into account, the conduct of the applicant in choosing to ride two horses at the same time, we are of the view that our discretion should be exercised in favour of the respondents. The applicant was not reasonable in maintaining its application before the Supreme Court, especially as there was no indication that the applicant would not have obtained interim measures before the arbitration tribunal.

It is of note that the respondents from the outset have been challenging the jurisdiction of the Mauritian courts and had raised objections in law and that they were, as such, unwilling but forced participants to the present proceedings. Proceedings which have not only taken up time and effort on their behalf, as illustrated from the chronology, but have also involved the time of no less than 6 judges of the Supreme Court since the 22nd August 2019 before the Commercial Division until the present day.

Costs are consequently awarded to the three respondents under rules 21(1), 22(1)(a) and (2) on the standard basis. We make no order as to costs with respect to the co-respondent as it did not move for costs.

Under rule 23 of the Supreme Court (International Arbitration Claims) Rules 2013 the matter is now to be fixed for a hearing for a summary assessment of the order for costs.

R. Teelock
Judge

N. F. Oh San-Bellepeau
Judge

D. C. N. D. Mootoo
Judge

16 December 2022

Judgment delivered by Hon. R. Teelock, Puisne Judge

For Applicant:	Mr S. Mardemootoo, Attorney at Law Mr G. Glover, Senior Counsel Mrs P. Balgobin-Bhoyrul, of Counsel Ms S.N. Mukoon, of Counsel Ms J. Desai, of Counsel
For Respondent No. 1:	Mr A. Robert, Senior Attorney Mr M. Sauzier, Senior Counsel Ms N. Behary-Paray
For Respondent No. 2:	Ms A. Ghose, Attorney at Law Mr R. Pursem, Senior Counsel Ms M. Jeetah, of Counsel
For Respondent No. 3:	Mr B. Sewraj, Senior Attorney Mr R. Pursem, Senior Counsel Ms M. Jeetah, of Counsel
For Co-Respondents:	Ms Z. I. Salajee, Senior Attorney Mr R. Chetty, Senior Counsel