

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 145 & 146 OF 2000

MOTION

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag)

BETWEEN SOCIETÁ INDUSTRIALE MONTAGGI APPELLANT
ELETTRICI S.P.A.

A N D JAMAICA PUBLIC SERVICE COMPANY LTD. RESPONDENT

Allan Wood and Ransford Braham instructed by Livingston,
Alexander and Levy for the respondent.

Dennis Goffe, Q. C. and Manley Nicholson, instructed by
Lorna Phillips of Nicholson Phillips for the appellant.

June 12, 13, October 8, 2001 and December 20, 2004

WALKER, J.A.:

On October 8, 2001 we granted this motion to strike out the substantive appeals herein and promised then to put our reasons for so doing in writing at a later date. I now record hereunder my reasons for concurring in the decision of the court.

The substantive appeals relative to which this motion is brought arise out of a judgment given by Reckord J on December 6, 2000 whereby it was ordered as follows:

" I (i) ...

(iii) The Applicant and Respondent having previously agreed that disputes or differences shall be settled by one Arbitrator, the Respondent's contention that the arbitral Tribunal should be comprised of three arbitrators and the UNCITRAL Arbitration Rules relating to the appointment of three arbitrators should apply is untenable and invalid.

(iv) If the Applicant and Respondent fail or neglect to agree on the person to be appointed sole arbitrator, the sole arbitrator shall be nominated by the President for the time being of the Jamaica Institute of Engineers.

2. That the Respondent by itself, its agents or servants or howsoever otherwise be restrained and that an injunction be granted restraining Società Industriale Montaggi Elettrici from commencing, embarking upon and/or continuing arbitration contrary to the Order set out at paragraph 1 hereof.

3. That the Respondent, by itself, its agents or servants or howsoever otherwise be restrained and that an injunction be granted restraining Società Industriale Montaggi Elettrici from:

(a) appointing Avv. Prof. Antonio Briggulio as one of the arbitrators; and

(b) requesting the Secretary General of the Permanent Court of Arbitration at the Hague to designate the appointing authority who shall appoint the second Arbitrator."

This judgment relates to proceedings commenced by way of originating summonses by Jamaica Public Service Company Limited (the respondent company) against Società Industriale Montaggi Elettrici S.P.A. ("SIME"). These proceedings raised questions as to the proper construction of similar clauses in two contracts entered into between the parties and which provided for the resolution by arbitration of disputes arising between the contracting parties. Nowhere are the facts in dispute. The present motion seeks to strike out these appeals as being an abuse of the process of the court. It is supported by an affidavit of Michalene Latore which reads, inter alia, as follows:

"20. By its Statements of Claim, Sime has rejected the Respondent's request by letter of the 12th July 2001 to suspend prosecution of the arbitration proceedings pending the hearing of the appeals to the Jamaican Court of appeal and further it has been asserted on behalf of Sime inter alia;-

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- (a) That the Respondent's attorney has corresponded privately with the arbitral tribunal for which behaviour the Respondent ought to be censured and all correspondence from the Respondent ought to be treated as invalid and void and consequently ignored.
 - (b) That Sime has been pursuing the appeals to Jamaican Court of Appeal. "In order to ease the enforcement of the Arbitral Tribunal award, if successful taking into account that the enforcement of award maybe carried out on assets belonging to JPS but located in other countries".

- (c) That the Respondent has not submitted to the jurisdiction of the Arbitral Tribunal nor has it complied with the Constitution Order and the Order for Directions of the Arbitral Tribunal and therefore the arbitrators should declare that the Respondent has lost its rights to produce documents and the communications from the Respondent's attorneys should not be taken into consideration.

21. The aforesaid conduct of Sime in continuing to prosecute the arbitration proceedings in breach of the orders of the Supreme Court from which it is pursuing appeals to the Court of Appeal amounts to a flagrant breach of the Orders of the Supreme Court and a contempt of court. Sime's conduct and correspondence further reveals that Sime has no intention of complying with the orders of the Jamaican Court of Appeal should the outcome be unfavourable and renders the appeal proceedings an abuse of the process of the Court of Appeal as Sime is merely pursuing such appeals to the Jamaican Court of Appeal in order to place the Respondent at a disadvantage while it attempts to pursue the arbitration proceedings in breach of the orders of the Supreme Court.

22. By facsimile transmission dated 13th August, 2001, from Sime's Counsel, Mr. Dennis Goffe, Q.C. to the Respondent's Attorneys, a copy of which is exhibited '**ML18**' hereto, it was advised that the letter of 12th July 2001, exhibit '**ML 14**', had been forwarded to his instructing attorney, Lorna Phillips, of Nicholson Phillips, that she was awaiting correspondence from Sime's lawyer in Italy, that she had expressed surprise that the letter of 12th July 2001 had been written to Mr. Goffe and an apology was invited for making such communication to Sime's Counsel.

23. Further the prosecution by Sime of the appeals before the Jamaican Court of Appeal while at the same time pursuing proceedings before the Arbitral Tribunal constitutes an abuse of the process of the Court of Appeal as the Appellant has demonstrated by its conduct and correspondence that it has no intention of complying with the orders of the Jamaican Court, if such orders are adverse to the Appellant and as revealed by its Statements of Claim filed in the arbitration proceedings the appeals to the Jamaican Court of Appeal is merely being pursued to place Sime at an advantage over the Respondent for the purpose of enforcing an arbitration award in respect of the Respondent's assets outside of the jurisdiction which the Appellant has invited the Arbitral Tribunal to award in default, while the Respondent objects to the jurisdiction of that Tribunal.

24. Further, if the Respondent does not submit to the jurisdiction of the Arbitral Tribunal while the orders of the Supreme Court subsist and the appeals to the Jamaican Court of Appeal are being pursued, Sime will continue to prosecute the arbitral proceedings in default of the Respondent and in breach of the Orders of the Jamaican Court and by so doing Sime would have gained the advantage of having appointed the arbitrators over the objection of the Respondent and proceeding with the arbitration in breach of the orders of the Jamaican Supreme Court and irrespective of the outcome of the appeals from those orders to the Jamaican Court of Appeal particularly if the appeals are dismissed and the orders of the Supreme Court affirmed. Further, in event of Sime succeeding in the appeals, the arbitration would have proceeded in default so that the Respondent would have had no proper opportunity of contesting and defending same.

25. Having regard to the fact that Sime has proceeded in breach of the orders of the Supreme Court by continuing arbitration proceedings in breach of those orders despite its Appeals to the Jamaican Court of Appeal which remain pending, the Respondent seeks orders from the Jamaican Court of Appeal to strike out the Appeals on the basis that Sime has deliberately breached the orders of the Supreme Court and is in contempt of Court and that the continuation of the Appeals would in any event be an abuse of the process of the Court of Appeal having regard to the steps taken by Sime to prosecute the arbitration proceedings irrespective of the Orders of the Supreme Court and of the proceedings before the Court of Appeal and for an improper purpose of gaining an advantage over the Respondent."

To this affidavit there was no reply.

On June 12, 2001 hearing of these proceedings commenced before this court, and, despite being advised of this development, SIME proceeded to pursue arbitral proceedings and to file therein Statements of Claim in which it pleaded, inter alia, as follows:

"SIME contests the content of letter dated July 26, 2001 drafted by Mr. Braham where he affirms that SIME would have accepted Jamaican jurisdiction by defending before the Supreme Court and by appealing its decision. This is not true.

Indeed, it must be noted that SIME appeared in the suit contesting that the national Court 'only has jurisdiction to hear matters of disputes amongst the parties with respect to clause GC.67 and/or clause SC.67a and any order granted in relation to the interpretation, application or operation of clause SC. 67b would be ineffective, void and not binding on SIME'

and asking for

'an injunction restraining the applicant from instituting or continuing proceedings in the Supreme Court of Judicature in Jamaica or any other court in Jamaica with regard to matters arising out of the interpretation and application of clauses SC.67 and GC.67 as they apply to the procedure to be employed for arbitrators;

or an order that all further proceedings instituted in any court in Jamaica with regard to matters arising out of the interpretation and application of the said clauses SC 67 and GC 67 as they apply to the procedure to be employed for arbitrators, be stayed by reason of the principle of forum non conveniens'

Lastly, SIME appealed...the Jamaican Court decision in order to ease the enforcement of the Arbitral Tribunal award, if successful, taking into account that the enforcement of award may be carried out on assets belonging to JPS but located in other countries.

Moreover, it is worth noting that the Jamaican Court 'orders' do not involve the merit of the case but are exclusively aimed at obtaining a declaration on the proper interpretation of the Arbitration Clause, contained in Clause SC.67 and GC. 67. It follows that in no case SIME accepted the Jamaican jurisdiction on the merit of the case."

Lastly, in reply to the respondent company's request to postpone the arbitral proceedings pending the determination of the present appeals before this court SIME by its said Statements of Claim responded thus:

"Anyway, SIME refers to:

Article 21 of UNCITRAL Arbitration Rules which affirms the principles of 'Competence/Competence' providing that 'the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement'.

Article 186 of the December 18, 1987 Swiss Private International Law Act, which provides that 'the arbitral tribunal shall decide on its own jurisdiction'.

In light of that, we can affirm that only the Arbitral Tribunal has the power to rule on his jurisdiction, on the procedures applicable to his composition and on the interpretation of the Arbitration clause, whilst orders issued by the national Jamaican Court are ineffective and not binding to the Arbitral Tribunal and to the parties.

On this ground JPS request to stay the proceedings pending the determination of Jamaican Court of Appeal must be rejected."

The principle of law that is applicable here was stated in ***X Ltd and***

Another v Morgan – Grampian (Publishers) Ltd. and Others [1990] 2 All

E.R.1, a decision of the English House of Lords. In that case it was held,

inter alia, that:

"The court had a discretion whether to hear a contemnor who had not purged his contempt and in deciding whether to bar a litigant the court should adopt a flexible approach. Accordingly, where a contemnor not only failed to comply with an order of the court but, for example, made it clear that he would continue to defy the courts' authority whatever the outcome of an appeal, the court was entitled to

exercise its discretion to decline to entertain his appeal."

At pages 11-12 of his judgment Lord Bridge said:

"Certainly in a case where a contemnor not only fails wilfully and contumaciously to comply with an order of the court but makes it clear that he will continue to defy the court's authority if the order should be affirmed on appeal, the court must, in my opinion, have a discretion to decline to entertain his appeal against the order. ...to put one party in a position of having to resist an appeal against an order made in his favour with which the other party has in any event no intention of complying is an abuse of the process of the court."

In the instant case it is clear that although at the very outset SIME submitted to the jurisdiction of the Jamaican court in the proceedings before Reckord J it does not consider itself bound by the orders of that court. Indeed, by its subsequent conduct SIME has been openly defiant of those orders to which it contemptuously referred in italicized form in its Statements of Claim above referred to. Furthermore, SIME has demonstrated unequivocally its intention not to abide by any order that this court might make on the present appeals. It explicitly disavows the jurisdiction of the Jamaican courts and proceeds, undaunted, with the arbitration process. Such conduct renders the pending appeals a flagrant abuse of the process of this court. Small wonder then that before us counsel announced that he had no submission to make on SIME'S

behalf. In the circumstances, this court should decline to entertain the present appeals.

Accordingly, I agreed that these appeals should be struck out with costs to the respondent company.

DOWNER, JA:

I agree.

SMITH JA:

I agree.