

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E156 OF 2000

BETWEEN JAMAICA PUBLIC SERVICE COMPANY LIMITED PLAINTIFF

AND SOCIETA INDUSTRIALE MONTAGGI ELECTTRICI DEFENDANT

Mr. Allan Wood and Mr. R. Braham, Attorneys-at-law, for the applicant instructed by Livingston Alexander and Levy.

Mr. Manley Nicholson and Miss Lorna Phillips, Attorneys-at-Law for the Respondent, instructed by Nicholson Phillips & Company.

HEARD: June 20, 21, 22, 2000 and December 6, 2000

RECKORD J.

This is an application by the applicant for interlocutory injunctions to restrain the respondent from (i) commencing embarking upon and/or continuing arbitration contrary to order:

- (ii) from appointing Avv. Prof. Antonio Briguglio as one of the arbitrators
- (iii) from requesting the Secretary General of the Permanent Court of Arbitration at the Hague to designate the appointing authority who shall appoint the second arbitrator.

The issue arose out of a contract between these parties where by the respondent agreed to carry out certain works on behalf of the plaintiff viz Parnassus – Spur Tree – Kendal 138 K.V. Steel Town Transmission Lines, Supply of materials and execution of works.

In furtherance of this agreement the respondent Societa Industriale Montaggi Elettrici (S.I.M.E) duly embarked upon the performance of the contract. However in February 1999, S.I.M.E claimed from J.P.S.Co. additional sums of US\$322,567.33 and J\$8,276,663.83 which were later increased to US\$486,609.78 and J\$13,509,478.71. These claims were rejected by J.P.S.Co. On the 12th of August, 1999, S.I.M.E wrote to the Engineer appointed under the agreement to decide the claim. The engineer rejected S.I.M.E'S claim save for one item.

S.I.M.I was not satisfied. By notice dated 26th January, 2000, it purported to initiate arbitration proceedings against Jamaica Public Service Company and appointed Prof. Antonio Briguglio of Rome, Italy as one of three arbitrators in accordance with Articles 5 and 7 of Uncitral Arbitration Rules; requested J.P.S.Co. to appoint an arbitrator within thirty days of the service of the said notice on J.P.S.Co. and threatened that in 'accordance with Article 7.2 of the Uncitral Arbitration Rules, if JPS.Co. fails to appoint the second Arbitrator, S.I.M.E will then request the Secretary-General of the Permanent Court of Arbitration at the Hague to designate the appointing authority who shall appoint the second arbitrator'.

Jamaica Public Service Company believes that this notice of arbitration and the initiation of arbitration proceedings are unlawful invalid, void and of no effect. It regarded the decision of the engineer as conclusive final and binding as S.I.M.I. had failed to notify the engineer of its claim to arbitration within 90 days as required by clause 67 of the general conditions of contract.

It was the contention of the J.P.S.Co. that on a proper construction of the agreement, that arbitration proceedings between the parties ought to be embarked upon in the following manner:-

- (a) The parties are required to attempt to agree the appointment of a sole arbitrator.
- (b) If the parties fail to agree upon a sole arbitrator, an application ought to be made to the President of the Jamaica Institution of Engineers, who would then appoint the sole arbitrators.

S.I.M.E has failed and or neglected to proceed in accordance with the above and is insisting on embarking on a procedure which is contrary to the agreement.

S.I.M.E'S reliance on an interpretation and application of the Uncitral Arbitration Rules are in the circumstances, invalid and wrong.

The J.P.S.Co. therefore ask the court to make orders in terms of its originating summons.

In response to the plaintiff claims, the respondent through its president who resides in Rome, Italy, admitted the contract made between the parties; did reject the engineers' findings, did appoint Prof. Briguglio as one of three arbitrators; did request J.P.S. Co. to appoint a second arbitrator failing which, that S.I.M.E would request the Secretary General of the Permanent Court of Arbitration at the Hague to designate the appointing authority to appoint the second Arbitrator. S.I.M.E. believes that all such actions were conducted quite properly and in compliance with the terms of the contract.

S.I.M.E believes that J.P.S.Co. has erroneously relied on an interpretation of the agreement which could only be correct if S.I.M.E. were a national of Jamaica as provided by Clause SC. 67a of the Special Conditions of Contract. With regard to the composition of the arbitral tribunal, the true interpretation of the contract means that clause SC 67b of the Special Conditions of Contract must be applied.

Save and except the declarations sought at paragraphs 1(1) and 2(1) of the originating summons, the respondent rejects and opposes all the orders and declarations requested by the applicant. Further S.I.M.E. believes that the Supreme Court of Jamaica has no jurisdiction to grant any or all such orders and or declarations sought at paragraphs 2(ii), (iii), (iv) 3 and 4 of the said summons and that any such orders or declarations, if granted, would be ineffective and void.

S.I.M.E. has asked this court to make a number of declarations, orders, and an injunction restraining the J.P.S. Co. from instituting or continuing proceedings in this court with regards to matters arising out of the interpretation and application of clauses SC 67 of the Special Conditions of the contract and GC.67 of the General Conditions of the contract as they apply to the procedure to be employed for arbitration.

One such declaration sought is for the court to say that SC. 67a along with GC. 67 provide an arbitration procedure for contractors who are nationals of the employers country, while SC. 67b applies to non-nationals. Also that a Notice of Arbitration forwarded to J.P.S. Co. was sufficient and good communication to the engineer and that arbitration proceedings were correctly commenced against

J.P.S. Co. If the court finds otherwise, then S.I.M.E. was asking for an extension of time to communicate to the engineer its dissatisfaction with his decision and of S.I.M.E.'S intention to arbitrate.

S.I.M.E. was also seeking an order that all further proceedings with regard to interpretation and application of SC.67 and GC. 67 as they apply to the procedure to be employed for arbitrations be stayed by reason of the principle of forum non conveniens.

CONCLUSIONS

Clause 67.1 of the contract provides for the settlement of disputes. It provides, inter alia, that if any disputes arise between the parties the dispute should be referred in writing to the Engineer. If either party is dissatisfied with the Engineer's decision, either may give notice to the other party with a copy to the engineer of its intention to commence arbitration as to the matter in dispute. If the engineer has given notice of his decision to the parties and no notice of intention to commence arbitration has been given by either party, then the said decision shall become final and binding upon the employer and the contractor.

It has been admitted by the defendant that it gave no notice of its intention to arbitrate to the engineer as is required by the contract, however, that notice to the J.P.S.Co. was tantamount to notice to the engineer. If not, it applies for extension of time to notify the engineer. The defendant has determined that it will not be abiding the decision of the engineer as final and binding and has 'embarked on a frolic of its own'. The defendant has decided that the Uncitral Arbitration Rules are the ones that it will be following and has appointed an arbitrator and has

called upon the applicant to name its arbitrator, failing which it will ask the Secretary-General of the Permanent Court of Arbitration to designate who shall appoint the second arbitrator.

From the tone of the defendant's affidavit, it is clear that this defendant, which is a non-national of Jamaica, has no regard for the Supreme Court of Jamaica. It claims that this court has no jurisdiction to adjudicate on some issues arising from this contract; that the court has no jurisdiction to grant any orders or declarations requested by the plaintiff on paragraph 2, 3 and 4 of the summons.

Notwithstanding these, this defendant in an unprecedented move, without filing any suit against the plaintiff, has asked the court to make a number of declarations, orders to stay, request for extension of time, and even an injunction to restrain the plaintiff from continuing these proceedings in this or any other court in Jamaica with regard to the interpretation or application of certain clauses.

In his submissions, counsel for the applicant commented, "amazingly, at paragraph 20, the document seeks orders in circumstances when the respondent has not instituted proceedings for such reliefs. He applied to have the offensive paragraphs 12 to 20 of the affidavit of the defendant to be struck out.

While it is not expected that foreigners should know the Laws of Jamaica and the practices in our courts, it most certainly is to be expected that Jamaican lawyers would be so aware and be able to advise their clients accordingly.

The law in relation to injunctions is found in the well known case of the *American Cyanamid Co. v. Ethican Ltd. (1975) 1 A.E.R. 504*. I am satisfied that there are serious issues to be tried; that the balance of convenience lies in favour

of the granting of the injunction; that damages will not suffice and that in the event that the applicant is not successful at the trial, that the company will be in a position to honour any damages that the court may award.

Accordingly, there will be orders in terms of paragraphs 1,2,3 and 4 of the Originating Summons dated 20th of April, 2000.

Cost to be costs in the cause.