Alphamix Ltd v The District Council of Rivière du Rempart (Mauritius)

2022 PRV 75

Trinity Term
[2023] UKPC 20

Privy Council Appeal No 0075 of 2022

JUDGMENT

Alphamix Ltd (Appellant)

V

The District Council of Rivière du Rempart (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kitchin
Lord Hamblen
Lord Leggatt
Lord Burrows
Sir Kim Lewison

JUDGMENT GIVEN ON
5 June 2023

Heard on 26 April 2023

Appellant
Anne-Sophie Jullienne
Jacob Grierson

Thomas Granier

(Instructed by Sheridans (London))

Respondent

Patrice Doger De Speville SC

Imtihaz Mamoojee

Adila Noushreen Luttoo

(Instructed by Etude Guy Rivalland (Mauritius))

LORD LEGGATT:

1. Under the provisions of the Mauritian Civil Procedure Code ("the Code") which govern domestic arbitrations in Mauritius, the mandate of an arbitrator - if no time limit is fixed by the arbitration agreement - lasts for six months from the date of appointment (article 1015). This period may be extended by agreement of the parties. One of the grounds (set out in article 1027-3 of the Code) on which an arbitration award may be annulled is if the arbitrator's decision is not within the mandate conferred on him by the parties ("l'arbitre a statué sans se conformer à la mission qui lui avait été conférée").

2. The issue on this appeal is whether the Supreme Court of Mauritius was wrong to annul an award on the ground that it was delivered after the arbitrator's mandate had expired.

The procedural history

3. The dispute referred to arbitration arose out of a contract for the construction of the Rivière du Rempart market. The contractor ("Alphamix") claimed to be owed substantial sums under the contract by the employer ("the District Council"). An arbitrator was originally appointed in May 2009. He made three interim awards but then resigned. A new arbitrator (Mr Justice Benjamin Marie Joseph) was appointed on the terms of an agreement made in April 2015 to decide the remaining issues. The proceedings were protracted. The period of the arbitrator's mandate (initially six months) was extended on several occasions by agreement of the parties. On 29 November 2018 a "final extension" was agreed to 31 December 2018.

4. Arrangements were made for the arbitrator to deliver his award in person to the parties on 27 December 2018. However, because of illness (he was suffering from bad flu) the arbitrator postponed the appointment - first to 28 December and then to 31 December 2018 (at 10am). The parties attended the arbitrator's chambers at 10am, and again at 12pm, on 31 December 2018 but on each occasion they were told that the award was not ready.

5. Eventually, at 1.10pm, a hearing took place before the arbitrator in his chambers, attended by the parties, their attorneys and counsel. It will be

necessary to return in more detail to what occurred at and following this hearing. But, in outline, the arbitrator read out the operative part of his award, which assessed the amount of interest payable by the District Council on sums previously awarded to Alphamix, and told the parties that they would only be provided at that stage with an unedited version of the award; an edited version, which would not change the substance of the findings, would be provided "later on". Both counsel stated that they had no objection. Immediately after the hearing, at 1.56pm, the unedited (and unsigned) version of the award which the arbitrator had read out was sent by email to the parties.

6. On 3 January 2019 (which was the next working day) at 1.28pm the arbitrator's secretary informed the parties' lawyers by email that "a copy of the formatted, edited and signed version of the award delivered on 31 December 2018" was now ready for collection. A copy of this version of the award, which was signed by the arbitrator and dated 31 December 2018, was attached to the email.

7. On 22 January 2019 the District Council applied to the Supreme Court for an order annulling "the purported award dated 31 December 2018" (a reference to the unedited and unsigned version provided on 31 December 2018) and "the signed award delivered on 3 January 2019". The judgment of the Supreme Court was given almost three years later, on 14 January 2022. The Supreme Court granted the application and annulled the award on the ground that it was delivered after the arbitrator's mandate had expired. The unedited and unsigned version provided on 31 December 2018 was held not to be a valid award because under articles 1026-4 and 1026-5 of the Code it is a mandatory requirement that an award is signed by the arbitrator(s), failing which it is a nullity.

8. From the order of the Supreme Court, Alphamix appeals as of right to the Board.

Issues in the appeal

9. Before the Board Alphamix has not sought to argue, as it did in the court below, that the unsigned document provided to the parties on 31 December

2018 was a valid award - a hopeless contention given the clear terms of articles 1026-4 and 1026-5 of the Code. Although, confusingly, the grounds of appeal have been formulated and reformulated in slightly different (and over-elaborate) ways at different stages of the appeal, in substance two arguments are made:

(i) The Supreme Court ought to have decided that the award delivered on 3 January 2019 was valid because: (a) as a matter of law it is sufficient that the award is signed, even if it is not communicated to the parties, before the mandate expires; and (b) as the award communicated to the parties on 3 January 2019 was dated 31 December 2018, the court should have found that the award was signed on that date unless the contrary was proved, which it was not.

(ii) In any event the Supreme Court ought to have held that the parties agreed to extend the arbitrator's mandate beyond 31 December 2018, with the result that the award delivered on 3 January 2019 was within the scope of the mandate even if it was not signed until that day; alternatively, the District Council waived the right to contend otherwise.

Was time extended?

10. Although presented as an alternative case, the Board finds it convenient to consider first the argument that there was an agreed extension of the arbitrator's mandate. Before the Supreme Court this argument was not advanced by Alphamix, but it was advanced by counsel representing the arbitrator who submitted that it was open to the court to find that there had been a "tacit prorogation" of the arbitrator's mandate with the result that delivery of the award on 3 January 2019 was within the mandate.

11. Although the Supreme Court heard oral argument on this question, it was not mentioned in the judgment. This may be because, before the judgment was given, the arbitrator was released from the proceedings and ceased to be a party. The court may have considered that in these circumstances, as the point had not been raised by Alphamix, it was unnecessary to deal with it. Be

that as it may, the Board is satisfied that the issue is properly raised by Alphamix on this appeal. The contention that there had been a "tacit prorogation" of the arbitrator's mandate was made and counsel representing the District Council made submissions in response to it in the proceedings before the Supreme Court; it was included in the grounds for which Alphamix was granted permission to appeal; and there is no unfairness in allowing Alphamix to advance the argument before the Board.

Tacit prorogation: the law

12. It is common ground that the mandate of an arbitrator may be extended by the express or implied consent of the parties. No formalities are required and the necessary consent may be implied from conduct. The latter point is illustrated by a number of decisions of the French courts, including the Cour de Cassation, which are cited in the commentary of Christophe Seraglini and Jerome Ortscheidt, *Droit de l'Arbitrage Interne et International*, 2nd ed (2019), para 329, in support of the following propositions (as translated):

> "**Extension through tacit consent of the parties.** Given that the parties' agreement to extend the mandate of the arbitrators is not subject to any specific formality, it can be tacit and result from the circumstances of the case. Case law is particularly liberal on this point. Courts seized of an application to annul an award on the ground that it was rendered out of time, widely accept that an extension of the term of the arbitration may result from a tacit agreement of the parties. It is sufficient to show an unequivocal intention of both parties on this point."

The Board accepts that this is the correct approach under the law of Mauritius.

13. It is also common ground that, as generally under the Mauritian law of contract, the common intention ("volonté commune") of the parties must be

assessed having regard to the context and surrounding circumstances, and that to give effect to the "volonté commune" of the parties the court may draw appropriate inferences: see *Gem Management Ltd v Firefox Ltd and 21 others* [2022] UKPC 17, para 16, approving the statement of the law by Mungly-Gulbul J in *Bahemia MH & Partner Ltd v Production Menuiseries Industrielles Ltd* [2016] SCJ 66, at p 6.

Tacit prorogation: the facts

14. As the Supreme Court did not address the question whether the facts and circumstances gave rise to a tacit extension of the arbitrator's mandate, the role of the Board in deciding this question is effectively that of "juge du fond".

15. The context in which the hearing in the arbitrator's chambers on 31 December 2018 took place was that, as the parties knew: (1) his mandate was due to expire at midnight on that day (New Year's Eve); (2) the arbitrator was ill, suffering from bad flu, and clearly struggling to complete his award; (3) the next working day was 3 January 2019 (as 1 and 2 January were public holidays); and (4) although the arbitrator had managed to prepare a draft award, it had not yet been properly formatted and still required editing.

16. It was in this context that the following oral exchanges between the arbitrator and the parties' counsel took place, as recorded in formal minutes of the hearing which are agreed to be accurate:

> "At this stage, the Arbitrator asks both Counsel whether they have no objection that the Arbitrator reads only the introductive and operative part of the Award and both Counsel state that they have no objection to same.
>
> At this stage, the Arbitrator intimates to the parties that they will be provided with an unedited version of the Award as it has not yet been formatted and that an edited version will be provided later on. Assurance is also given that the final version will

not change anything in the findings set out in the Award.

Both Counsel state that they have no objection.

The Arbitrator then reads the introductive and operative part of the Award."

17. After the arbitrator had finished reading his award, the following further exchange took place:

"Mr Arbitrator: OK, you need a copy?

Mr A Domingue SC [representing Alphamix]: Well, issue it when it is edited.

Mr I Mamoojee [representing the District Council]: Non, nous, on aura besoin d'une copie.

Mr Arbitrator: OK. It is my undertaking that any editing would not affect the substance of the findings.

Mr I Mamoojee: Thank you."

18. In stating through their counsel that they had no objection to the course of action proposed by the arbitrator, the parties consented to receiving at that stage an unedited version of the award on the understanding that the final version would be provided "later on" and would not change anything of substance in the findings.

19. In what must be attributed to an excess of enthusiasm Mr Patrice De Speville SC, appearing for the District Council, suggested in his oral submissions on this appeal that the statements made by counsel at the hearing were not

binding on the parties as only attorneys, and not counsel, have authority to bind their clients in matters relating to the conduct of proceedings. It is necessary to dispel that misconception. In England and Wales, while it has been questioned whether counsel can be called the agent of his or her client, it has never been doubted that counsel "is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it": *Matthews v Munster* (1887) 20 QBD 141, 144-145 (Bowen LJ). Nothing was cited to the Board to indicate that the position is different in Mauritius, and indeed it is difficult to see how justice could be administered effectively, whether by courts or arbitrators, in any jurisdiction if advocates could not be treated as speaking for their clients.

20. There is a dispute about what was meant by the arbitrator's statement that the final version of the award would be provided "later on". On behalf of the District Council, Mr De Speville SC submits that this meant later during the course of the day. Had it been intended that any extension of the mandate beyond midnight on 31 December 2018 would be necessary, a written agreement would have been prepared or this would at least have been spelt out in the minutes of the hearing, as had happened on all previous occasions when an extension of the arbitrator's mandate had been agreed. Alternatively, Mr De Speville SC submits that the phrase "later on" was at the very least ambiguous so that it is not possible to infer an unequivocal common intention to extend the mandate.

21. It is right that, as Mr De Speville SC emphasised, the minutes of the hearing on 31 December 2018 do not record, as minutes of previous hearings had done, an agreement to extend the mandate of the arbitrator until a specified later date. However, the circumstances were entirely different. At previous hearings an extension of the mandate for a significant and defined period of time had been needed to enable the arbitration to continue and the arbitrator to reach a decision on the remaining issues in dispute. The circumstances on this occasion were that the arbitrator had decided on all the issues in the arbitration and had communicated his decision to the parties. The only outstanding matter was the formality of providing the parties with a formatted, edited and signed copy of the award. Ascertaining and recording that the parties had no objection to the arbitrator providing this document after the time when the mandate was due to expire was an appropriate way of

ensuring that no technical objection could legitimately be taken to the award on the ground that the final version was not provided on that day.

22. The Board agrees that the phrase “later on” was ambiguous insofar as those words did not make clear exactly when the final version of the award was to be provided. The Board considers, however, that, having regard to the surrounding circumstances, it must have been understood by everyone present at the hearing on 31 December 2018 that the final version of the award would not be provided later that day and therefore not before (at the earliest) the next working day, which was 3 January 2019. This was clear from the context described above: in particular, that it was New Year’s Eve, that there was little of the working day left and that the arbitrator was ill. Furthermore, there would have been no need for the arbitrator to ensure that the parties did not object to him providing the final version of the award later on if his intention had been to provide it that day - a course of action for which the parties’ consent would not have been required. Nor in that event would there have been any point in asking the parties whether they needed a copy of the unedited version of the award. The exchange which took place at the end of the hearing (quoted at para 17 above) shows that both parties’ counsel must have understood that the final version of the award would not be issued that day.

23. There was a further significant communication on 31 December 2018. The email sent by the arbitrator’s secretary to the parties’ lawyers following the hearing, at 1.56pm, attaching the unedited version of the award (as Mr Mamoojee, counsel representing the District Council, had requested) stated:

> “Dear All,
>
> Please find attached an unedited copy of the award delivered today in the above arbitration.
>
> Kind regards and Happy New Year 2019.”

It was clear from the final words of this message that there would be no further communication from the arbitrator before the New Year. Had either

party understood before receiving this message that the arbitrator had intended to finalise his award on that day, it is reasonable to infer that they would have responded to the email to query the arbitrator's intention. Indeed, if those representing the District Council had believed that the award would only be valid if signed on that day, they could not in good faith have stayed silent when it was made plain that the arbitrator was proceeding on the understanding that the parties had no objection to him providing the final, signed version of the award in the New Year. The fact that they did not reply to the email confirms that they shared that understanding of what had been agreed.

24. A subsequent document provides yet further evidence of that agreement. On 3 January 2019 the arbitrator sat at 1.15pm (without the parties in attendance). His secretary prepared minutes of this sitting, which record:

> "The Arbitrator observes that following the sitting of 31st December 2018 and with agreement of parties, a formatted, edited and signed version of the Final Award is now being filed.
>
> Each party will be handed over a signed copy of the final award accordingly."

This shows that the production and delivery of the final signed award on 3 January 2019 was in accordance with what, as the arbitrator understood, the parties had agreed at the hearing on 31 December 2018.

25. It may finally be noted that when the final version of the award was made available on 3 January 2019 the District Council did not assert that the award had been issued out of time. That contention was made for the first time when the District Council applied to annul the award after instructing leading counsel who had not been present on 31 December 2018 and had no first-hand knowledge of what took place at that hearing.

26. On these facts the Board is satisfied that the communications and conduct described above, viewed as a whole, demonstrate an unequivocal common

intention of the parties formed and manifested on 31 December 2019 that delay until 3 January 2023 in providing the final, signed version of the award would not result in the award being invalid. That amounted to a tacit agreement to extend the time limit for rendering the award until (at the earliest) 3 January 2019. The award provided on that day was therefore within the arbitrator's mandate.

Date of signature

27. In light of this conclusion it is immaterial whether the award was signed on 3 January 2019, or whether it had in fact already been signed by the arbitrator on 31 December 2018 (the date shown on the award), as Alphamix has sought to argue on this appeal.

Conclusion

28. For these reasons, the appeal is allowed and the Board will make a declaration that the signed award delivered on 3 January 2019 is valid and enforceable in accordance with article 1027-9 of the Civil Procedure Code.