NOUVELLES TECHNOLOGIES ET SYSTEMES LTEE & ORS
v AIRPORTS OF MAURITIUS CO LTD

2014 SCJ 111

RECORD NO. 84734

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

1. **Nouvelles Technologies et Systèmes Ltée**
2. **Agence Professionnelle de Recrutement et de Publicité Ltée**
3. **Investors and Consultants Limited**
4. **Société de Gestion Hôtelière et Touristique s.a.r.l.**

Plaintiffs

v.

Airports of Mauritius Co. Ltd.

Defendant

JUDGMENT

The present claim arises from a tender for the construction and operation of a business class hotel at Sir Seewoosagur Ramgoolam International Airport (SSR International Airport) launched in June/July 2001 by Airports of Mauritius Co. Ltd. (AML), the defendant and the concession of land on which the hotel is to be built. The tender documents referred to the project as the Concession Project (the Project). The four plaintiffs grouped into a consortium (the Consortium) tendered for the project and was informed on 1 March 2002 that it was the selected tenderer. In 2002, AML informed the Consortium that the Project was put in abeyance. In 2003 the Consortium entered the present claim for damages in the amount of Rs 11,714,250 for the loss and prejudice which it suffered as a result of the alleged "*faute*" of AML.

In the contention of the Consortium, AML committed a "*faute*" when it terminated the negotiations which were ongoing between the parties, suddenly, brutally, unilaterally and without reason or without valid reason, when it failed to give any notice to the Consortium of its intention not to proceed further and when it failed to act in good faith.

AML denies liability. Firstly, it relies on an exemption from liability. The exemption is based on paragraph 14.2 of the Terms of Reference of the tender (TOR) which states that AML is not liable to refund or compensate tenderers for any loss or expenses or even alleged prejudice that they may have suffered in making their submission. Under the same paragraph, tenderers are deemed to have waived their rights to seek explanation or compensation from AML in respect of the tender exercise. Secondly, AML also pleads that the negotiations were lawfully suspended in good faith and for good and valid reason in the lawful exercise of its rights and duties. Furthermore, the Consortium should have been aware of the element of business risk involved in the tender exercise.

The factual background to the claim is as follows: following the launch of the tender of the Project by AML, the Consortium submitted its bid on 17 August 2001. On 30 October 2001, representatives of the Consortium and AML met at the premises of AML to discuss questions in relation with the Project. By a letter dated 19 November 2001, the Consortium informed AML that further to the meeting of 30 October 2001, it was not possible for the Consortium to revise the "*concession fee*" and the "*minimum guaranteed payment*", which were presumably by the tone of the letter, among questions which were discussed at the meeting of 30 October 2011. By a letter of intent dated 1 March 2002, AML informed the Consortium that the proposal put in by the Consortium met the strategic and business needs of AML and SSR International Airport. (Doc. P refers). As a result, AML also expressed its intention to award the concession to the Consortium which became therefore the selected tenderer.

In conformity with the TOR of the tender, the Consortium was required to communicate acceptance by 18 March 2002. By a letter dated 18 March 2002, the Consortium confirmed acceptance of the offer of AML. (Doc. Q refers). The acceptance of the Consortium was subject to two conditions. The first condition was that an agreement had to be reached by the parties on the eventual renewal of the concession after the initial period of twenty years or in case of non renewal, a fair compensation was to be paid to the Consortium. The other condition was that agreement had to be reached on issues raised previously by the Consortium viz. a direct link to the terminal building, the possibility of tapping in to airport services and facilities and access to the airport car park.

Again in conformity with the TOR, the letter of intent also reminded the Consortium that after acceptance of the offer, it would be invited to sign a

Memorandum of Understanding (MOU). The draft MOU was attached to the Tender Documents and was subject to review by the parties. After the signature of the MOU, AML would issue a formal letter of award and then grant the concession to the Consortium.

The above facts are not disputed. In any event, they cannot be disputed as all are supported by documents exchanged between the parties and produced in the course of the trial.

On 27 March 2002, at the request of AML, Mr. Soobarah, the Chairman of AML and other officers of AML met with Mr. Clensy Appavoo and Mr. Jean Paul Octave who represented the Consortium. It is not disputed by the parties that such a meeting took place. However no official minutes of the meeting were taken and kept. It is the case of the plaintiffs that in the course of the meeting of 27 March 2002, certain representations were made to them and in reliance of such representations, the Consortium made expenses which now form the basis of the claim of the plaintiffs.

Mr. Clensy Appavoo who represented the Consortium in Court, related at great length the meeting of 27 March 2002. Mr. Sahadeven Thancanamootoo who gave evidence on behalf of AML, was examined as regards the meeting but admitted that he had no reliable recollection of what was discussed. I am therefore left with the account of Mr. Appavoo.

According to Mr. Appavou, at the meeting, Mr. Soobarah and the other representatives of AML insisted upon knowing the type of hotel which the Consortium had in mind and was planning. Mr. Soobarah asked about the hotel concept. Mr. Appavoo then stated clearly that if the Consortium were to give an idea of the hotel concept, then there would be costs as a project management team would have to be involved. To this, Mr. Soobarah replied "*On ne peut faire une omelette sans casser les œufs*". Other issues pertaining to the Project were also discussed at that meeting. On the issue of the renewal of the land concession on its expiry, Mr. Soobarah stated that it was probable that Government would renew the concession for two successive periods after an upfront payment of Rs 15 million. On the issue of the costs of the relocation and construction of the existing police station, it was agreed that should the amount of Rs 15 million be exceeded, then Government would pay the additional costs. On the other hand, should the costs be less, then the Consortium would benefit from the gain. On the issue of tapping in into the airport facilities such as sewerage,

electricity, water supply and standby generator, Mr. Soobarah confirmed the possibility of doing so and paying for same like other users of airport facilities viz. the duty free shop. However there remained the issue of access to the terminal which raised security concerns and which had to be looked into.

In the words of Mr. Appavoo, Mr. Octave and he left the meeting of 27 March with the belief that the Consortium had won the tender and that the issue of use of the facilities of the airport had been resolved. Mr. Appavou conceded however there were still questions pending the signature of the MOU.

After the meeting of 27 March 2002, the Consortium promptly retained the services of DPV Architecture, a firm of architects based in Paris with an office in Reunion Island. DPV Architecture was to come up with a conceptual and architectural plan of the airport hotel. A project management team was also set up. On 5 April 2002, Mr. Appavou went to Paris and met with Mr. Marc Despeysse, the main architect of DPV Architecture. This visit was followed by a meeting on 25 April 2002 in Réunion Island with Mr. Despeysse. All the meetings were arranged promptly as the Consortium had a delay of one month to show the hotel concept to AML together with plans.

At the beginning of April 2002, Mr. Appavoo left a message with the secretary of Mr. Soobarah when he did not succeed in speaking to the latter. The message was to the effect that the plans of the Project would not be ready by the end of April as requested by Mr. Soobarah but that same would be available in the first or second week of May.

Indeed and in fact by a letter dated 15 May 2002, the Consortium informed AML that "*further to the meeting ..... in late March ..... (it was enclosing) a project concept for the hotel which has been designed by (its) firm of architect. The concept which is of course not contractual is intended to give (AML) an idea of the high standard, modern design and state-of-art architecture (the Consortium) shall input in the realization of the hotel*". A copy of the Project Concept together with a technical and descriptive brief (fiche technique et descriptive) was annexed to the letter. (Docs S and T).

The letter of 15 May 2002 also refers to five points which according to Mr. Appavoo, were discussed at the meeting of 27 March 2002 and the comments of

the Consortium thereon. The five points related to the renewal of the concession, the financial budget for the construction of the new police complex, the tapping in into the airport facilities, disturbance of airport operations during the construction period and access to the terminal. The comments of the Consortium on the five points as stated in the letter were in line with the testimony of Mr. Appavoo as seen above. On access to the Terminal, the Consortium confirmed that access to the Terminal would be from the first floor of the hotel, "*subject of course to security issues being resolved with the Authorities concerned*".

Mr. Appavoo also explained that as a result of the request of AML for a hotel concept, the Consortium retained the services of Belico Conseil, a firm of consultants based in Paris and specialized in corporate finance negotiation and in structuring corporate finance with pension funds and insurance companies.

As no reply to the letter of the Consortium dated 15 May 2002 was forthcoming, by a letter dated 11 June 2002, the Consortium wrote to AML. The Consortium expressed its regret that no reply was made yet and "*earnestly request(ed) a written communication of (its) stand in the present project to enable (it) to take relevant decisions*". The Consortium also informed AML that ever since the acceptance of its tender, it has set up a team of professionals to work on the Project which had reached an advance stage. Mr. Appavoo stated in Court that in the meantime, work on the Project continued.

On 19 September 2002, Mr. Appavoo and four representatives of AML including Mr. Soobarah met. At the meeting, Mr. Soobarah announced that following the decision of Government to review the plan of the whole Airport and also of certain issues, the Airport Project was being kept in abeyance. Upon being asked by Mr. Appavoo about the length of time the Project would be in abeyance, Mr. Soobarah replied that such period would not exceed six months. Mr. Appavoo drew the attention of the representatives of AML to the fact that the Consortium had incurred expenses. Mr. Bhagwan of AML then asked Mr. Appavoo to send the amount of expenses. Mr. Appavoo wanted confirmation that the Project was being put of abeyance and the length of the abeyance period before communicating the amount of expenses.

The meeting of 19 September 2002 was followed by a letter dated 11 October 2002 from AML. In the letter, AML referred to the meeting of 19 September 2002 and confirmed that "*because of the need to review the airport development plan, Airports of*

Mauritius (was) compelled to keep the Airport Hotel Project in abeyance". The Consortium was also strongly advised not to incur any cost and/or manpower resources other than that which was input so far.

By a letter dated 8 November 2002, the Consortium replied to the letter of 11 October of AML. The Consortium reminded AML of the extensive discussions between the parties and "*more particularly (of) the advanced stage (they) had reached in (their) negotiations and the expenses which (the Consortium has) already incurred*". The Consortium urged AML to indicate to it a definite time frame within which it is expected to implement the project. (Doc. W refers). Since no response was forthcoming from AML, the Consortium caused a notice to be served upon AML, rejecting the reasons invoked by AML as being "*without foundation*" and requesting AML *"to indicate a definite time frame within which it is expected to implement the Project*". And in April 2004, the Consortium entered the present claim for damages i.e. expenses in the amount of Rs 8,714,250 in retaining the services of DPV Architecture and Bellico Conseil and a sum of Rs 3 million as compensation for prejudice suffered, trouble and annoyance and moral damages.

However after the service of the notice and before the entry of the present plaint by the Consortium, by a letter dated 27 March 2003 and under the signature of Mr. J. Soobarah, the then chief executive, AML rebutted the charge that the reason for postponing the Project viz. the review of the Airport Master Plan, was unfounded. AML also informed the Consortium that the updating of the Master Plan was being pursued and that a review would be undertaken around May 2003. AML also informed the Consortium that a study to reassess the passenger traffic had been commissioned. AML assured the Consortium of its good faith.

Messrs. Sahadeven Thancanamootoo and Sarasagur Nemchand deponed in support of the defence put up by AML.

The transcript of evidence of 23 April 2011 shows that the testimony of Mr. Thancanamootoo was not under solemn affirmation. However much that was deponed to by Mr. Thancanamootoo on that day was repeated at the sitting of 24 April 2011, on which day Mr. Thancanamootoo gave evidence under solemn affirmation. Due consideration can therefore be given to the testimony given under solemn affirmation on that day.

Mr. Thancanamootoo stated that he was involved in the technical aspects of the different stages of the tender of the Project and confirmed that the question of access between the terminal and projected hotel raised security issues which could not be resolved solely by and were never resolved by AML and the Consortium. As regards the meeting of 27 March 2002 between AML and the Consortium, Mr. Thancanamootoo did not recollect whether Mr. Soobarah asked for a design concept of the hotel or that Mr. Soobarah stated that "*il faut casser les oeufs pour faire les omelettes*".

Mr. Thancanamootoo also explained the circumstances in which the Project was put in abeyance. He explained that in 2001 when the tender Project was launched, the British Airports Authority (BAA) was acting as management consultants to AML. BAA advised the putting up of an airport hotel and drew the configuration of a proposed new terminal. Accordingly, the tender of the Project was launched. Then in 2002, it was found that there was a mismatch between the then traffic and the traffic forecast in the 2000 Master Plan. Government then decided on a study and the update of the traffic forecast by the Aeroport de Paris. It was also decided to update the 2000 master plan. This decision was triggered by three factors viz. (1) an urgent need to have an emergency runway, (2) the necessity of taking a long term view of the passenger terminal, and (3) to reconsider the provisions for the cargo handling zone. The update of the Master Plan was done in 2003 and approved by Government in 2004.

Indeed, according to the updated Master Plan, the airport hotel was moved away from the terminal, making room for the terminal itself. Mr. Thancanamootoo added that had the Project been carried out, it would have hindered further expansion and development of the terminal.

Learned Counsel for the Consortium when cross-examining Mr. Thancanamootoo referred to Appendix 1 to the tender documents. Appendix 1 entitled Airports of Mauritius gave to the potential tenderers background information on AML and among other matters the long term development proposals. Paragraph 6.1 of Appendix 1 starts by stating that "*It is expected that Government would be requested to approve the Master Plan for Mauritius Airports developed by Aeroport de Paris*". Paragraph 6.1 also stated that in 1994, it was recommended that the 1982 Master Plan was outdated and that a fresh Airport Master Plan should be produced, given the greater role that air traffic and tourism was playing in the nation's economy. Paragraph

6.1 informed tenderers that Aeroport de Paris had been selected to undertake a major study of the air traffic growth potential, it was understood that Aeroport de Paris had submitted its report and a formal publication of the forecast of Aeroport de Paris was being awaited. Paragraph 6.2 of the Appendix speaks of the runway capacity to be improved through among other possibilities of a new parallel runway and that AML/ Government would have to agree on whether to opt for an emergency runway or construct a replacement runway. And in paragraph 6.3, AML states that it believes that the terminal building would have to be extended to accommodate the anticipated traffic. And in paragraph 6.3, AML states that "*the growth of cargo would impose a new Cargo stand*".

Under cross-examination, Mr. Thancanamootoo explained that at the time of the launch of the tender of the Project, the second phase of the improvement of the airport facilities was being contemplated. Subsequently, it was decided that the development of the terminal could not be proceeded upon on a piece meal basis and that it was important to have a new Master Plan.

The claim of the Consortium for expenses incurred in producing the design concept arises to a great extent from the discussions between Mr. Appavoo for the Consortium and Mr. Soobarah of the AML on 27 March 2002. I believe Mr. Appavoo when he said that he was asked about the design concept of the hotel by Mr. Soobarah and that he replied that there would be costs incurred. Indeed no evidence was adduced by the defence to rebut the testimony of Mr. Appavoo on this issue. But then, it is a different matter whether at the stage the negotiations had reached between the parties, the Consortium should have yielded to the pressure, if any, from AML or should have gone to such great expenses. I shall further come back to this aspect of the case.

Also, in my view, paragraph 14.2 of the TOR does not exempt AML from liability for the alleged expenses claimed by the Consortium. This is because paragraph 14.2 deals with any loss or expenses or prejudice that tenderers might have suffered in making initial submissions for the tender. However, the Consortium is not claiming for such loss or expenses. The claim of the Consortium arises from events which took place after the completion of the submission of the tenders and is one for expenses made in the course of the negotiations for the award of the Concession.

Indeed, after the issue of the letter of intent by AML and the acceptance of the Consortium of the offer made by AML, the parties had entered into negotiations with a view to enter into a final contract for the Concession Project. The parties had therefore an agreement to negotiate "*un accord de negotiation*". Such agreements are governed in our law by article 1134 of the Code Civil which provides as follows:

> ***1134.*** *Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.*
>
> *Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.*
>
> *Elles doivent être exécutées de bonne foi.*

However, French courts have consistently held that parties to such pre-contractual agreements "*avant contrats*" still retain their freedom to contract. The parties have however an obligation to act in good faith. (See Article 1134 alinéa 3 above). The party which withdraws from the negotiations in an abusive manner and in bad faith is liable in damages for "*faute*" under article 1382 of the Code Civil.

The learned authors of **Droit Civil Les Obligations 5e Edition François Terré, Philippe Simler, Yves Lequette** at paragraph 177 explain the obligations of the parties as follows:

> ***177.*** *Obligations des négociateurs. Le droit commun. La période précontractuelle est placée sous le double signe de la liberté et de la bonne foi.*
>
> *La liberté. Chacun doit pouvoir mettre fin librement aux pourparlers. Ainsi le veut la conception traditionnelle du contrat. Pièce essentielle du bon fonctionnement d'une économie de marché, la liberté contractuelle suppose qu'on puisse mener des pourparlers parallèles, comparer diverses propositions, choisir les plus avantageuses et donc rompre avec ceux qui ont émis celles qui le sont moins.*
>
> *La bonne foi. Elle préside à l'exécution du contrat (art. 1134, al. 3) mais aussi à sa formation. Les parties doivent négocier loyalement.*
>
> *Aussi bien la jurisprudence conjugue-t-elle ces deux directives sur le mode suivant. En principe libre d'interrompre les pourparlers, chacun de ceux qui y participent engage néanmoins sa responsabilité lorsque la rupture dont il prend l'initiative présente un caractère abusif.*
> *……...*

> *En pratique, la mauvaise foi consistera à prendre l'initiative de la négociation sans intention sérieuse de contracter, à seule fin de dissuader le partenaire de négocier avec autrui ou pour obtenir la révélation de certains secrets, à prolonger une négociation qu'on sait ne plus pouvoir conclure, ou encore à rompre « sans raison légitime, brutalement et unilatéralement des pourparlers avancés ». Soucieux de ne pas compromettre à l'excès la liberté contractuelle, les tribunaux exigent une faute patente, indiscutable.*

The following commentary by **Professeur Jacques Mestre** on a decision of Cour d'appel de Paris **(1re ch. B, 13 déc. 1984, Société Sofracima C. Isabelle Adjani)** which appeared in the **Revue Trimestrielle de Droit 1986 page 97** further illustrates the principle as regards agreements to negotiate:

> *Le second intérêt de l'arrêt rendu par la cour de Paris est, une fois la conclusion du contrat écartée, d'avoir statué sur l'éventuelle responsabilité délictuelle engagée pour rupture fautive de pourparlers. En ce domaine, une jurisprudence à présent bien assise considère que le principe de la liberté de contracter (ou de ne pas le faire) ne doit pas assurer une systématique impunité à toute rupture de négociation contractuelle. Celle-ci peut, en effet, être abusive (cf. Civ. 3e, 16 oct. 1973, D. 1974. I. R. 35) pour reposer sur la mauvaise foi ou la volonté de nuire.*

An example of the bad faith of a defaulting party is demonstrated in the decision of the Cour de Cassation handed down on 26 November 2003 **(Arrêt Manoukian Cass. com. 26 novembre 2003, RTD civ. 2004, p. 80, obs J. Mestre et B. Fages).** In this case, the defaulting party was negotiating with a third party and indeed sold its shares to the third party whilst maintaining negotiations with the co-contractor and leading the latter to believe that the deal could not effected because of the absence of the accountant. The defaulting party was found liable.

The question which therefore arises from the provisions of article 1134 is whether AML is guilty of "*rupture abusive*" and/or bad faith. Now, given that Mr. Soobarah did request for the design concept of the hotel to be constructed, it has not been proved, in my view, that Mr. Soobarah out of bad faith led the Consortium to incur expenses whilst not intending to award the Concession to the Consortium. The parties were still negotiating. Indeed the MOU had not been signed. There were still pending issues not resolved, as observed by the Consortium itself in its correspondence of 15 May 2002 (see above). In my view, the Consortium could have legitimately refused to incur such expenses; indeed caution and prudence would have required it to exact more commitment from AML before it set out to incur great expenses.

On the other hand, Mr. Thancanamootoo explained the circumstances in which the proposed hotel was moved from the terminal for the further expansion and development of the terminal. This aspect of the testimony of Mr. Thancanamootoo has not been contradicted and I have no reason to disbelieve or reject it. Therefore it cannot be said that AML had no valid and good reason to abandon the Project and has rendered itself liable for "*rupture abusive*".

On the evidence adduced and for the reasons stated above, I am unable to find that AML has acted in bad faith and is liable for "*faute delictuelle*". It may be argued that it should have acted with more professionalism but there is no evidence of bad faith.

An interesting and recent article by Lady Justice Arden entitled **"Coming to terms with Good Faith"** appeared in the **[2013] 30 Journal of Contract Law** at page 199. Lady Justice Arden sets out therein the development from a hostility of English law to good faith as an overarching principle to "*some recent decisions in which the English courts have implied a duty to act in good faith as a matter of interpretation in cases where a party has an apparently unfettered right to act in his own interests*". The article also draws attention to how the requirement of good faith is prevalent in the majority of civil law systems of the European Union and that under consumer protection legislation in the European Union, "*the requirement of good faith is satisfied where the consumer is equitably and fairly dealt with. Fairness is to be determined by reference to the subject matter, circumstances of the case and other terms of the contract*". On the evidence adduced and taking into account the circumstances in which AML withdrew from the negotiations, it cannot be said that the Consortium was treated unfairly.

For the reasons stated above, the present plaint is dismissed. With costs.

A. F. Chui Yew Cheong
Judge

9 April 2014

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