

IN THE SEYCHELLES COURT OF APPEAL

[Coram: A.Fernando (President) , M. Twomey (J.A) , F. Robinson (J.A)]

Civil Appeal SCA MA 14/2020

(arising in SCA CS 23/2019)

In re:

Vijay Construction (Pty) Ltd Applicant

Versus

Eastern European Engineering Limited Respondent

And

Vijay Construction (Pty) Ltd Appellant

Versus

Eastern European Engineering Limited Respondent

Heard: 07 August 2020

Counsel: Bernard Georges for the Applicant
Alexandra Madeleine for the Respondent

Delivered: 21 August 2020

REASONS FOR RULING DELIVERED ON 7 AUGUST 2020

F. Robinson (J.A)

The background to this application

1. The Applicant applied for a stay of execution of the judgment delivered by a learned

Judge of the Supreme Court, on the 30 June 2020, in the case of *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd (CS23/2019) [2020] SCSC 350* (delivered on the 30 June 2020), (hereinafter referred to as the "*Judgment*"), declaring two orders of the High Court of England and Wales, to enforce an arbitral award, executory and enforceable, in Seychelles.

2. The learned Judge delivered a Ruling on the 24 July 2020, granting a stay of execution of the Judgment *inter alia* on condition that —

"1. Execution of the judgment dated 30 June 2020 in CS23/2019 is stayed on condition that within 14 days of the date of this Ruling, Vijay Construction (Pty) Ltd pays into Court security in the form of a bank guarantee in the sum of EURO Twenty Million (EUR20,000,000) pending determination of the appeal against the judgment dated 30 June 2020 in CC33/2019. Failure to comply with this Order in the time stipulated will result in the Order for the stay of execution lapsing",

hereinafter referred to as the "*the Order*".

3. The Applicant filed an application by way of notice of motion supported by an affidavit asking that the Court of Appeal of Seychelles hears, as a matter of urgency, the appeal filed, before the Court of Appeal, against the imposition of the Order. Mr Kaushalkumar Patel averred in the affidavit in support of the application *inter alia* that: "*I verily believe that the condition imposed by the Honourable Court is entirely disproportionate and unjust. The impact of failing to meet the condition imposed will be devastating not only on Vijay and its employees but, as set out in paragraph 10 above, to the national interest. In considering proportionality, I verily believe that the national interest is a key factor to be considered*".

The question in issue

4. At the hearing of the application on the 7 August 2020, the Court of Appeal informed both Counsel that it wanted to hear argument with respect to whether or not it has jurisdiction to hear and determine the appeal lodged against the Order. Both Counsel were ready to argue this threshold question. Thus, I am embarking on its analysis with the benefit of submissions from both Counsel.

Contentions of Counsel

5. Counsel for the Applicant urged the Court of Appeal to treat the appeal as an appeal as of right.
6. In support of his contention, Counsel essentially argued that the Order had not been made in the action, which had disposed of the rights of the Applicant and the Respondent. Since the Order made, after the Judgment, had decided the question raised by the application, Counsel for the Applicant asked the Court of Appeal to treat it as a final Order. Thus, in the opinion of Counsel for the Applicant, Rule 25 (1) of the Rules did not find application in the present case.
7. For her part, Counsel for the Respondent opined that the appeal should be treated as interlocutory, and that, in this respect, the Applicant should have first sought leave under section 12 of the Courts Act. Thus, the Court of Appeal did not have the jurisdiction to hear the appeal.

Ruling delivered on 7 August 2020

8. Concerning the question in issue, I held the view that I had jurisdiction to hear and determine the appeal lodged against the Order based on Article 120 (2) of the Constitution of the Republic of Seychelles read with the relevant provisions of the written law of Seychelles. This holding held the Order to be a final order for purposes of appeal.

Reasons for Ruling: The appeal's final nature

9. The Court of Appeal is established and given its jurisdiction, authority and power under Article 120 of the Constitution of the Republic of Seychelles. Article 120 (2) of the Constitution of the Republic of Seychelles provides that there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court, except as this Constitution or an Act otherwise provides. Section 12¹ of the Courts Act provides that, for a judgment or order of the Supreme Court

¹ "12(1) Subject as otherwise provided in this Act or in any other law, the Court of Appeal shall, in civil matters, have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in its original or appellate jurisdiction.

to be appealable as of right, it must not emanate from an interlocutory judgment or order of the Supreme Court or that the final judgment or order of the Supreme Court must have a value of over ten thousand rupees.

10. I have also referred to Rules 18 and 25 of the Seychelles Court of Appeal Rules. The said Rule 18 speaks about the procedure to be followed with respect to an appeal before the Court of Appeal. Rule 25 (1) provides: "*In this Rule, an interlocutory matter means any matter relevant to a pending appeal the decision of which will not involve the decision of the appeal*".
11. The Courts Act does not define "*interlocutory judgment or order*" or "*final judgment or order*".
12. I start my analysis by considering English cases in which the character of a judgment or an order, as being final or interlocutory, is discussed. I note that the English cases are discussed under the relevant English Rules of the Supreme Court, which limit the time for appealing. I appreciate that the determination of what is and is not an interlocutory or a final judgment or order does not always admit to ready answer.

(2)(a) *In civil matters no appeal shall lie as of right-*

(i) *from any interlocutory judgment or order of the Supreme Court; or*

(ii) *from any final judgment or order of the Supreme Court where the only subject matter of the appeal has a monetary value and that value does not exceed ten thousand rupees.*

(b) *In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.*

(c) *Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.*

(3) *For all the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the powers, authority and jurisdiction of the Supreme Court of Seychelles and of the Court of Appeal in England.*

(4) *In this section the expression "civil matters" includes all non-criminal matters.*

13. Lord Denning MR in the case of *Salter Rex & Co v Ghosh* [1971] 2 All ER 865 (Court of Appeal, Civil Division) at page 866, stated—

"This question of "final" or "interlocutory" is so uncertain, that the only thing for Practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way".

14. In *Salaman v. Warner* [1891] 1. Q. B. 734, the Court of Appeal unanimously adopted the definition given by Lord Esher in *Standard Discount Co. v. La Grange* 3 C. P. D. 67-91, as the correct test for determining whether or not an order, for the purpose of giving notice to appeal under the English Rules of the Supreme Court, is final. The Court of Appeal in **Salaman** held that a decision, although it finally disposed of the matter in dispute, was not considered to be a final order for the purpose of the Rules unless it would have finally disposed of the matter if it had been given the other way.

15. I refer to Fry L.J., in **Salaman**, who commented with respect to the third and fifteenth Rules of Order LVIII as follows —

*"[h]ave raised considerable difficulties because they use the term "interlocutory order" of which no definition is to be found in the rules themselves, or as, so far as I know, by reference to the earlier practice either in the common law or chancery courts. These difficulties have been well illustrated by various cases that have been decided. **We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to time for appealing. The intention appears to give a longer time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further.** I think the true definition is this: I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the*

action. Conversely, I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined". Emphasis supplied

16. The decisions in **Salaman** and **Standard Discount Co.** were confirmed in **Salter Rex**. In **Salter Rex** Lord Denning MR stated —

"[i]n Standard Discount Co. v La Grange (1877)3 CPD 67 and Salaman v Warner, Lord Esher MR said that the test was the nature of the application to the court and not the nature of the order which the court eventually made. But in Bozson v Altrincham Urban District Council [1903] 1KB at 548^[2], the Court said that the test was the nature of the order as made. Lord Alverstone CJ said that the test is: 'Does the judgment or order, as made finally dispose of the rights of the parties?' Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord 14 (even apart from a new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory. See Hunt v Allied Bakeries Ltd [1956]3 All ER 513, [1956] 1 WLR 1326. So I would apply Lord Esher's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an unreported case, Anglo-Auto Finance (Commercial) Ltd v Robert Dick, and we should follow it today".

17. As noted, the decision in **Bozson** takes an entirely inconsistent view. **Bozson** which followed *Shubrook v Tufnell (1882) 9 Q. B. D. 621*, decided that the order made is alone to be looked at. If the order finally disposes of the rights of the parties, then it is final and

² "An order was made in an action, brought to recover damages for breach of contract, that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an official referee. At the trial the judge held that there was no binding contract between the parties, and made an order dismissing the action, from which order the plaintiff appealed:— Held, that the appeal was from a final order.

not interlocutory, and that it is quite immaterial that the refusal of the order would have been interlocutory because, if the order sought had been refused, the action would have had to proceed further.

18. The decision in **Salaman** was also approved in *White v Brunton (1984) 2 ALL ER 606*. In the case of **White**, the Court of Appeal, Civil Division, went over some relevant cases³ to solve the "*obscurity of what is and is not an interlocutory order or judgment*". The cases reviewed represent an opposing line of cases which determined that the question of interlocutory or final rested, on the one hand, upon the nature and effect of the order as made and, on the other hand, upon the nature of the application or proceeding giving rise to the order. **White** approved the latter approach. It supported the premise put forward in **Salaman** that the question of final or interlocutory rested upon the nature of the application or proceeding giving rise to the order.

19. I now consider Seychellois authority. In *Financial Intelligence Unit v Mares Corp 2011* (SCA 48 of 2011) [2011] SCCA 33 (09 December 2011), regarding the Proceeds of Crime (Civil Confiscation) Act, 2008, (POCCCA), the Court of Appeal considered whether an appeal by the appellant was interlocutory as the Courts Act required leave to lodge the appeal if it were. It is worthy of note that, in **Financial Intelligence Unit**, the appellant had sought special leave to appeal to the Court of Appeal and also filed an appeal under Rule 18 of the Seychelles Court of Appeal Rules, 2005. Section 22 of POCCCA provides that: "[...] *an appeal from an order made under this Act [...] shall lie to the Court of Appeal.*"

20. I quote a few extracts from both decisions (Twomey and Domah JJA., gave judgment to the same effect) in the case of **Financial Intelligence Unit**, which held the appeal not to be interlocutory and classified it as an appeal as of right —

³ *Bozson v Alterincham Urban District Council* [1903] I. K. B. 547, CA.
Page, Re, Hill v Fladgate [1910] 1 Ch 489, CA.
Salaman v Warner [1891] 1 QB 734, CA.
Salter Rex & Co v Gosh [1971] 2 All ER 865, [1971] 2 QB 597, [1971]3 WLR 31, CA.
Shubrook v Tufnell (1882)9 QBD 621, [1881-8]All ER Rep 180, CA.
Steinway & Sons v Broadhurst-Clegg (1983) Times, 25 February, CA.

*"[Twomey JA.]: The fact that POCCCA is a relatively novel statutory creation containing draconian measures novel to this jurisdiction and also sits uncomfortably between civil and criminal law and procedure and also within our mixed jurisdiction, clearly contributed to the general confusion. **The term interlocutory order has been used in this jurisdiction mainly in relation to injunctions. In those cases the Seychelles Code of Civil Procedure provides for their process. In any case, such matters are clearly interim in nature as they take place in the course of a suit. The term interlocutory in the POCCCA is however to be read in its own context because it appears from section 4 that it may in many cases in fact be the final proceedings between the applicant and the respondent.***

[Fernando JA., (as he then was)]: This was an application by the applicant for special leave to appeal against a ruling made by the Chief Justice on the 3 October 2011, refusing an application by the applicant seeking a stay of execution and leave to appeal against the judgment of the Chief Justice of 19 September 2011, wherein the Chief Justice had refused to grant an order under section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008 hereinafter referred to as [POCCCA].

The applicant in the skeletal argument in relation to the special leave to appeal had submitted:

An application for an Interlocutory Order under section 4 of [POCCCA] is not truly "interlocutory". If the order is granted, and then the final order will be the disposal order under section 5 of the Act transferring the property to the Republic. On the other hand if the Order is refused then, subject to an appeal to the court of appeal, that is the end of the case.

*In this case the Supreme Court had refused, as stated earlier, to grant an order under section 4 of [POCCCA]. **We are of the view that this was for all purposes a final order and not an interlocutory order as contemplated in section 12(2) (a) (i) of the Courts Act.** Section 22 of [POCCCA] states: "For the avoidance of doubt an appeal from an order made under this Act, other than an interim order shall lie to the Court of Appeal." Interim order referred to herein is one made under section 3 of [POCCCA]. **Even if one were to be guided by section 12(2)(a) (i) of the Courts Act this was not an "interlocutory judgment or order of the Supreme Court" as set out therein, but a final order which disposed of the whole action leaving no subordinate or ancillary matters for decision by the Supreme Court. These provisions make it clear that the proper procedure to have been followed by the applicant was to have appealed against the judgment of the Chief Justice refusing to grant the interlocutory and receivership orders sought by the applicant, by filing a notice of appeal. There was no necessity to seek leave to appeal from the Supreme Court or seek special leave from this Court [...]**". Emphasis supplied*

21. Does the outcome in the **Financial Intelligence Unit**, referred to in paragraph 20 hereof, support the premise of Counsel for the Applicant?
22. Before I grapple with the distinction, I consider out of interest *Delcy v Camille (2005) SLR 87*, a Supreme Court case, which considered the question of whether or not an order of 7 February 2005, was to be treated as an interlocutory or a final order for purposes of an appeal to the Court of Appeal. The order of 7 February 2005, was issued after the final judgment, which had disposed of the rights of the plaintiff and the defendant. Perera J., considered the cases of **Bozson, Salaman, Salter Rex and White** and "*Ord 59/1A/4 of the R.S.C Rules (U.K.)*", which "*lists "enforcement of judgment" under Ord 59/1A/21, as an "Interlocutory Order" under Ord 59/1A(6) (cc)*", section 12 of the Seychellois Courts Act and Rules 18 and 25 of the Seychelles Court of Appeal Rules in that matter.
23. In **Delcy** no appeal was filed against the "*final judgment*". Perera J., on the 7 February

2005, in terms of an application for summons to show cause, filed by the plaintiff, ordered that the judgment debtor be civilly imprisoned for a period of six months, unless the judgment was satisfied within three months. Perera J., also made an order granting the judgment debtor a last opportunity to avoid imprisonment by paying 200000rupees of the judgment debt within three months, and the balance in instalments of 5000rupees. The judgment debt was not paid as per the order of 7 February 2005. The judgment debtor applied to stay execution of the order of the 7 February 2005, pending an appeal before the Court of Appeal. The judgment creditor objected to a stay until the hearing of the appeal, on the ground that the judgment debtor had not filed an appeal against the "*final judgment*".

24. Perera J., called upon Counsel for the judgment debtor to satisfy him as to whether or not there was a proper appeal before the Court of Appeal, as it appeared that the order of 7 February 2005, was interlocutory and, hence, needed leave to appeal.
25. Perera J., opined that: "[c]learly, therefore, for Rule 25 to apply there should already be filed an appeal from a final judgment of the Supreme Court. "Interlocutory matters" would then be matters relevant to that Appeal, such as matters concerning the furnishing of security for costs, delays in filing heads of arguments, and such other incidental matters. Rule 20 (1) provides that the Supreme Court or the Court of Appeal may on application stay execution on any judgment or order pending appeal. This Court has therefore the jurisdiction to consider an application for stay of execution of its own judgment pending the determination of an Appeal to the Court of Appeal. But where leave to appeal is required before an Appeal is filed in the Court of Appeal, the consideration of an application to stay execution would arise only upon such leave being granted. Subject to the provision in Rule 20 (1) that "an Appeal shall not operate as a stay of execution or of proceedings under the decision appealed from". It is in this context that it becomes necessary to consider whether the Order of this Court dated 7 February 2005 was "interlocutory" or "final" ... In the present matter, the judgment dated 27 October 2003 finally disposed of the rights of the parties. But to the successful party, finality is reached only when he obtains the fruits of the judgment. To that end he would pursue the avenues provided in the Code of Civil Procedure for execution of

judgment. Any application made in the process of execution of judgment, would, on the basis of Salaman v Warner (supra, and approved by Salter Rex & Co v Ghosh (supra), be interlocutory..."

26. In the final analysis Perera J., opined that the order of 7 February 2005, was for the purpose of an appeal, interlocutory in nature, and that, thus, leave to appeal was required. As I understand it Perera J., had approved the premise put forward in **Salaman** and **Salter Rex** that the question of final or interlocutory rested upon the nature of the application or proceedings giving rise to the order.
27. It is against this background that I grapple with the distinction as the jurisdiction of the Court of Appeal turns on the distinction: a final order is appealable as of right; an interlocutory order is not. I mention that the majority of this panel had stated to both sides that the Order is interlocutory. I found that the majority has done so for reasons that, I accept are cogent. But I hold a different opinion.
28. In the present case, it was undisputed that the Judgment was final, and that it had disposed of the entire action. An appeal as of right has been lodged against the Judgment. It is worthy of note that, since the learned Judge had granted the application for a stay of execution, the Applicant could not file a new application for a stay of execution of the Judgment, in terms of section 230 of the Seychelles Code of Civil Procedure and Rule 28 (1) of the Seychelles Court of Appeal Rules 2005, read with Rule 20 of the said Rules.
29. As I understand it, **Financial Intelligence Unit** laid down the test that an interlocutory order or judgment, for the purpose of section 12 of the Courts Act, is an order or a judgment which does not dispose of the whole action between the parties - the question in controversy between the parties - but disposes of any matter subordinate or ancillary to the action. That case did not consider the English cases mentioned above. Nonetheless, I think that **Financial Intelligence Unit** approves the approach that the effect of the order or judgment decides whether or not the order or judgment is to be treated as interlocutory or final for the purpose of an appeal.

30. Applying the test in **Financial Intelligence unit** and **Bozson** to the present application, the effect of the Order was that it brought the proceedings to an end, i.e., the Order, the subject matter of the appeal, is final because it decided the question raised by the application for a stay of execution. Had the learned Judge refused to stay the execution, the effect would have been the same. It would have brought the proceedings before the learned Judge to an end. Therefore, I find that **Financial Intelligence Unit** supports the approach of Counsel that the Order is final. Thus, the right to appeal as of right follows from this finding that the Order is final.
31. The Applicant brought its appeal under Rule 18 of the Seychelles Court of Appeal Rules. The Applicant's approach is correct. Neither the Constitution of the Republic of Seychelles nor an Act had removed the Applicant's right of appeal against the Order. Rule 25 (1) of the Rules will find application if an interlocutory matter were brought in terms of the said Rule.
32. As I understand it, a consideration of the effect of an order or a judgment under appeal is fundamental to any decision as to its probable interlocutory nature. The decisions upon the English Rules of the Supreme Court are as likely to misinform as to help in the interpretation of this definition unless careful attention is paid to the difference between the law in the one case and the other. I also appreciate that in the English cases the terms "*final*" and "*interlocutory*" are not treated as terms of precision to be strictly applied. In that regard, my consideration of the question in issue has given effect to the intention of our written law.
33. For the reasons stated above, I allow the application and make no order as to costs.

F. Robinson (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 21 August 2020.

