

**IN THE COURT OF APPEAL OF SEYCHELLES**

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**Reportable**  
[2020] SCCA .....  
SCA 28/2020

In the matter between

**Vijay Construction (Pty) Ltd**  
(rep. by Mr Bernard Georges)

**Appellant**

and

**Eastern European Engineering Limited**  
(rep. by Miss Alexandra Madeleine)

**Respondent**

And in the matter between

**Vijay Construction (Pty) Ltd**  
(rep. by Mr Philippe Boullé)

**Appellant**

and

**Eastern European Engineering Limited**  
(rep. by Miss Alexandra Madeleine)

**Respondent**

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**Neutral Citation:** *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited* (SCA 28/2020) [2020] SCSC November 2020

**Before:** Fernando President of the Court of Appeal, Robinson JA, Dingake JA

**Summary:** Notice of motion supported by affidavit to declare judgments of the Court of Appeal delivered in the appeal *Vijay Construction (Pty) Ltd* versus *Eastern European Engineering Limited*, Civil Appeal SCA 28/2020, on the 2 October 2020, unconstitutional, null and void made to the Court of Appeal - Whether the three-judge panel who sat to hear the appeal violated the Constitution and the Seychelles Court of Appeal Rules 2005 stemming from the fact that the prior appointment of Her Ladyship Twomey, as a Justice of Appeal, terminated *ipso facto* upon her being appointed Chief Justice - Alleged breach of the constitutional right of appeal as of right under Article 120 (2) of the Constitution - Appellant abandoned its pleaded case - Judges are *ex-officio* members of the Court of Appeal under Article 121 (b) of the Constitution - (*orbiter*) The Constitution and the Rules authorise the President of the Court of Appeal to select any Judge of the Supreme Court to

constitute a panel not being less than three Judges to sit to hear an appeal.  
Notice of Motion dismissed with costs.

**Heard:** 5 November 2020  
**Delivered:** 13 November 2020

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## **ORDER**

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The Notice of Motion is dismissed with costs.

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## **RULING OF THE COURT OF APPEAL**

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### **ROBINSON JA (FERNANDO PRESIDENT, DINGAKE JA CONCURRING)**

[1] This matter is before the Court of Appeal of Seychelles by way of notice of motion supported by affidavit. The Appellant in this matter was the Appellant in the appeal heard by the Court of Appeal in Vijay Construction (Pty) Ltd versus Eastern European Engineering Limited, Civil Appeal SCA 28/2020 and the Respondent was the Respondent in the said appeal. For the purpose of this Ruling, I continue to refer to the parties as the Appellant and the Respondent, respectively.

#### **The background**

[2] A learned Judge of the Supreme Court delivered a judgment on the 30 June 2020, in the suit of Eastern European Engineering Ltd versus Vijay Construction (Pty) Ltd (CS23/2019) [2020] SCSC 350 (hereinafter referred to as the "*Judgment*").

[3] In the Judgment, the learned Judge found it just and convenient that the Order of Mr Justice Cooke, dated 18 August 2015, and the Order of Mrs Justice Cockerill, dated 11 October 2018, be registered in terms of section 3 (1) of the Reciprocal Enforcement of British Judgments Act.

[4] As a result of her finding, the learned Judge made orders in favour of the Plaintiff under Rule 4 of the Practice and Procedure Rules GN 27 of 1923, in terms of the Order of Mr Justice Cooke, dated 18 August 2015, and the Order of Mrs Justice Cockerill, dated 11 October 2018, as follows —

"[155] [...].

1. In accordance with the Order of Mr Justice Cook dated 18<sup>th</sup> August 2015 -

a) In relation to the arbitration proceedings:

- i. the sum of Euros 15,963,858.90 (arbitral award in favour of plaintiff)
- ii. the sum of Euros 640,811.53 (plaintiff's legal and other costs of the arbitration)
- iii. the sum of US Dollars 126,000 (plaintiff's costs to the ICC; and

b) In relation to the application for leave to enforce the arbitral award and to enter judgment in terms of the award, the costs of such application, including the costs of entering judgment, such costs to be summarily assessed if not agreed.

c) In relation to posts award interest:

- i. Euros 14,498.25 in respect of the damages under Contracts 1-5 and accruing hereafter at the daily rate of Euros 131.61;
- ii. Euros 3,385,261.64 in respect of the damages under Contract 6 and accruing hereafter at the daily rate of Euros 2,818.01;
- iii. Euros 39,200.25 in respect of the breach of confidentiality provision under Contract 6 and accruing hereafter at the daily rate of Euros 32.88.

2. In accordance with the Order of Mrs Justice Cockerill dated 11<sup>th</sup> October 2018 —

a) The Claimant (plaintiff) costs of (1) the defendant's application to set aside the Order of Mr Justice Cooke dated 18<sup>th</sup> August 2015 and (2) the defendant's application to cross-examine witnesses of the plaintiff, on the indemnity basis, to be assessed if not agreed.

- b) An interim payment on account of the costs referred to in paragraph (a) above in the sum of £245,315.90.

[156] In accordance with —

- (a) Section 3(3)(a) of the REBJA, as from the date of this judgment the Order of Mr Justice Cooke dated 18<sup>th</sup> August 2015 and the Order of Mrs Justice Cockerill dated 11 October 2018, shall be of the same force and effect, as if they had been Orders originally obtained or entered up on the date of this judgment;
- (b) Section 3(3)(b) of the REBJA this Court shall have the same control over the said Orders as it has over similar judgments given by itself, but insofar only as it relates to execution of the Orders under section 3 of the REBJA;
- (c) Section 3(3) (c) of the REBJA, the reasonable costs of and incidental to the registration of the Orders (including the costs of obtaining a certified copy thereof from the original court) and of the application for registration before this Court shall be borne by the defendant”.

[5] The Judgment was appealed (see paragraph [1] hereof). On the 2 October 2020, Dingake JA delivered a judgment dismissing the appeal of the Appellant (the Defendant before the Supreme Court) with costs. Twomey JA concurred with Dingake's "*judgment, reasoning and order*" and, also wrote a separate concurring opinion in which she considered the purport of various provisions of the Seychelles Court of Appeal Rules 2005, enabled under the Constitution of the Republic of Seychelles [CAP 42]. The Constitution of the Republic of Seychelles [CAP 42] is hereinafter referred to as the "*Constitution*". The Seychelles Court of Appeal Rules 2005, are hereinafter referred to as the "*Rules*".

[6] Fernando President<sup>1</sup> wrote a dissenting opinion allowing the appeal, reversing the orders made by the learned Judge of the Supreme Court and dismissing the plaint of the Respondent, the Plaintiff before the Supreme Court.

### **The Notice of Motion**

[7] The notice of motion filed by the Appellant on the 15 October 2020, is seeking the

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<sup>1</sup> Under section 2 (1) of the Rules: ""President" means the President of the Seychelles Court of Appeal appointed as such in terms of Article 123 of the Constitution;".

following orders —

- "i) declaring the judgments delivered in the above appeal on the 2 October 2020 unconstitutional null and void.
- ii) that this motion be heard as a matter of urgency.
- iii) that the execution of the judgment of the Supreme Court and the judgments of the Court of Appeal abovementioned be stayed pending the hearing of this motion, under rule 5 of the Seychelles Court of Appeal Rules."

[8] The grounds advanced by the Appellant for declaring the judgments of the Court of Appeal unconstitutional, null and void are contained in an affidavit in support of the notice of motion sworn by Mr V. J. Patel of Royal Palm Residence, La Misere, Mahe, Seychelles, a director of the Appellant. I find it appropriate to repeat the relevant paragraphs of the affidavit of Mr V. J. Patel —

"1. I am a director of the Company Vijay Construction (Pty) Limited duly authorised to act on behalf of the company which is the Appellant.

[...]

- 4. The Bench that sat to hear the appeal abovementioned comprised of His Lordship A. Fernando Justice of Appeal and President of the Court of Appeal, His Lordship O. Dingake Justice of Appeal and Her Ladyship M. Twomey Chief Justice of the Supreme Court.
- 5. The Seychelles Court of Appeal Rules provide that in respect of any appeal, the Court of Appeal shall consist of not less than three Justices of Appeal acting as such.
- 6. A (*sic*) Ladyship M. Twomey being the Chief Justice of the Supreme Court appointed as such to hold that Constitutional office under article 125 (3) of the Constitution is therefore not a Justice of Appeal.
- 7. To the best of my information, knowledge and belief, upon being appointed Chief Justice, the previous appointment of Her Ladyship M. Twomey as a Justice of Appeal terminated *ipso facto* and Her Ladyship could no longer sit as a Justice of Appeal on the Court of Appeal.

8. To the best of my information, knowledge and belief, the Court of Appeal that heard the abovementioned appeal violated the Rules of the Court of Appeal abovementioned made under the Constitution, as there were only two Justices of Appeal on the Bench.
9. To the best of my information, knowledge and belief, the violation mentioned in paragraph 8 above, breached my constitutional right of appeal under Article 120 (2) of the Constitution as no valid Court of Appeal heard my abovementioned appeal.
10. To the best of my information, knowledge and belief, as a result of the breach of my Constitutional right mentioned in paragraph 9 above, the judgments mentioned in paragraph 3 above are unconstitutional, null and void.

[...]

14. To the best of my information, knowledge and belief, the Appellant has a good chance of success with respect to the order listed in the Notice of Motion and also in its appeal before the Court of Appeal which will be heard as a consequence of the Court of Appeal Judgments mentioned in paragraph 3 above being declared unconstitutional.
15. To the best of my information, knowledge and belief, it is fair, just and reasonable for the reasons set out above, that the Motion be heard as a matter of urgency and that the Judgment of the Supreme Court and the Judgments of the Court of Appeal be stayed pending the hearing of the Motion to declare the Judgments of the Court of Appeal to be unconstitutional."

[9] Mr Vadim Zaslantov of Beau-Belle, Beau Vallon, Mahe, Seychelles, a director of the Respondent, swore an affidavit in reply resisting the claims of the Appellant. I repeat the relevant paragraphs of the affidavit of Mr Vadim Zaslantov —

- "7. I admit paragraph 4 of V. J. Patel's Affidavit.
8. Under paragraph 5 of V. J. Patel's Affidavit, based on legal advice from the EEEL's Attorney which I verily believe to be true, I admit that in respect of any appeal the Court shall consist of not less than three Judges. I am also advised by EEEL's Attorney and verily believe the same to be true that the three Judges are selected by the President of the Court of Appeal to sit for the purposes of hearing the appeal. In respect of the appeal SCA28/2020, the three Judges selected by the President of the Court of Appeal for the purposes of hearing the appeal were indeed his

Lordship A. Fernando, the President of the Court of Appeal, His Lordship O. Dingake and Her Ladyship M. Twomey.

9. I deny paragraph 6 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe that same to be true that her Ladyship M. Twomey sat on the panel selected to hear the appeal in accordance with the Constitution and the panel was therefore valid.
10. I deny paragraph 7 of V. J. Patel's Affidavit. I repeat paragraph 9 of this Affidavit. I am further advised and verily believe that the Court of Appeal has no jurisdiction to determine the question arising from the said paragraph 7 of V. J. Patel's Affidavit and the said question does not arise for determination in SCA28/2020.
11. I deny paragraph 8 of V. J. Patel's affidavit. I state that the appeal in SCA28/2020 was validly heard by the Court of Appeal consisting of a panel of three Judges selected by the President of the Court of Appeal in accordance with the Rules of the Court of Appeal.
12. Further, I am advised by EEEL's Attorney and verily believe the same to be true that the allegations made in paragraph 8 of V. J. Patel's Affidavit is without any constitutional and/or other legal basis whatsoever, is frivolous, vexatious and spurious and an abuse of process of the Court. The composition of the court of appeal for the purposes of hearing of the appeal was well known to the Appellant prior to the hearing of the appeal and the only reason for the Appellant's challenge of the composition of the Court that heard the appeal is the fact that the majority decision was entered against the Appellant.
12. (*sic*) I deny paragraph 9 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe the same to be true that the hearing of the appeal on 3 September 2020 by the Judges selected for that purpose by the President of the Court of Appeal and including Her Ladyship M. Twomey did not violate article 120 (2) of the Constitution. The composition of the Court that heard the appeal was valid and constitutional.
13. (*sic*) I deny paragraph 10 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe the same to be true that there has been no violation of article 120 (2) of the Constitution as alleged in view that the appeal was heard by the Court that had been validly constituted in accordance with the Constitution. The Judgments are constitutional, valid and enforceable.

[...]

17. (sic) I deny paragraph 14 of V. J. Patel's Affidavit. I am advised by EEEL's Attorney and verily believe the same to be true that the Appellant does not have a good chance of success with respect to the order annulling the Judgments and the appeal in that the Court of Appeal is now functus officio and cannot reconsider the appeal, there have not been a violation of article 120 (2) of the Constitution as alleged such that there is no question of denial of right to fair hearing by the Court which heard the appeal on the 3 September 2020 and delivered judgments on 2 October 2020. I am further advised by EEEL's Attorney that the application is purely frivolous, vexatious, spurious and an abuse of the process of the Court which should be dismissed with costs.

18. (sic) I deny paragraph 15 of V. J. Patel's Affidavit. I state that based on the matters aforementioned, there is no urgency in hearing the application and granting a stay of execution of the Judgments and the entire application should be dismissed with costs."

[10] The affidavit of Mr V. J. Patel revealed that the crux of the Appellant's case is that the three-judge panel selected by the President to sit to hear the appeal violated the Constitution and the Rules stemming from the fact that the prior appointment of Her Ladyship Twomey, as a Justice of Appeal, terminated *ipso facto* upon her being appointed Chief Justice under the Constitution. Consequently, no valid Court of Appeal heard the appeal as only two Justices of Appeal were selected to sit to hear the appeal, instead of three, which constituted a violation of the Rules that contravened the Appellant's constitutionally protected right of appeal as of right under Article 120 (2) of the Constitution.

[11] In bare outline, the Respondent in resisting the notice of motion supported by affidavit, contended that —

- the three-judge panel on which Her Ladyship Twomey sat for the purpose of hearing the appeal was validly selected to hear the appeal under the Constitution
- the Court of Appeal has no jurisdiction to determine the question arising from paragraph [7] of the affidavit of Mr V. J. Patel
- the appeal was "*validly heard*" by a three-judge panel selected by the President under the Rules



- because the judgments have been delivered, the Court of Appeal is *functus officio* and, thus, there is no jurisdiction to declare the judgments of 2 October 2020, unconstitutional, null and void
- the Court of Appeal selected by the President to sit to hear the appeal has not violated Article 120 (2) of the Constitution such that there is no question of denial of the Appellant's fundamental right to a fair hearing by the Court of Appeal
- this case is frivolous, vexatious and spurious and an abuse of the process of the Court.

[12] I find it appropriate, at this juncture, to narrate the exchanges between Fernando President and Counsel for the Appellant, from which Counsel for the Appellant came away with the understanding that the three-judge panel selected by the President to sit to hear the appeal consisted of Fernando President, Dingake, a Justice of Appeal, and Twomey, the Chief Justice, an *ex-officio* member of the Court of Appeal. There is no dispute between Fernando President and Counsel for the Appellant about what was said in that context.

***The exchanges:***

*The sitting of 22 October 2020*

[13] Because of Mr V. J. Patel's averments contained in paragraph [7] of the affidavit, on the 22 October 2020, at the first sitting of the Court of Appeal, Fernando President at the outset, drew the attention of Counsel for the Appellant to Article 121 (b) of the Constitution and the meaning assigned to the word "*Judge*" under Schedule 2 of the Constitution.

[14] Counsel for the Appellant acknowledged more than once in the exchanges with Fernando President that he has extensively considered the purport of the said provisions of the Constitution brought to his attention by Fernando President.

*The sitting of 29 October 2020*

[15] On the 29 October 2020, at the second sitting of the Court of Appeal, Fernando President again drew the attention of Counsel for the Appellant to the implications of Article 121 (b) of the Constitution. Shortly after, Fernando President stated —

*"Court (President): And of course, I have mentioned 136 (1), that is under which the Rules were made and as I did point out, I might as well say it, because there are issues that you might as well come ready to address, it will help us all, we have been concentrating on paragraph 7, which says: "To the best of my information, knowledge and belief, upon being appointed Chief Justice, the previous appointment of Her Ladyship M. Twomey as a Justice of Appeal terminated ipso facto and Her ladyship could no longer sit as a Justice of Appeal on the Court of Appeal".*" Emphasis supplied

Fernando President continued —

*"Court (President): I believe it is a very important paragraph, which would have a bearing in the future. But, for the purpose of this case, we would like to hear you on how relevant that would be, because at the time this case was heard, that is, on 3 September, she continued to be the Chief Justice and then, of course, as I did mention, according to Article 121 (b) of the Constitution, it says: "The Court of Appeal shall consist of the Judges who shall be ex-officio members of the Court". And a Judge has been defined in the Constitution as also including the Chief Justice".*" Emphasis supplied

[16] Given the exchanges between Fernando President and Counsel for the Appellant, the latter responded by stating that the Appellant would not be: "[...] address[ing] the issue of her standing as a Justice of Appeal<sup>4</sup>". In that regard, Fernando President responded by saying, "yes<sup>5</sup>".

[17] Shortly after, Fernando President, added —

*"Court (President): Of course, there is another issue. Hearing was on 3 September. This is another matter as I might as well bring to your attention, which again you can argue and then enlighten us, the fact remains the case was heard on the 3<sup>rd</sup> September, then Judgment was delivered on the 2<sup>nd</sup> of October. So, when she heard the case, she was an ex-officio Judge of the Court of Appeal. But when Judgment was delivered, her term of office as Chief Justice, as a result*

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<sup>2</sup> Record of proceedings of 29 October 2020 at 10 a: m at pp. 5, 6

<sup>3</sup> Opcit., at p. 6

<sup>4</sup> Opcit., at p. 8

<sup>5</sup> Opcit.,

*of her retirement, or rather resignation, had come to an end. Now, there is the other Article in the Constitution, which says: "A Justice of Appeal or Judge or a person acting as such pursuant to article 124 or article 128, whose appointment has terminated otherwise than by reason of being removed from office under article 134, may continue to sit as a Justice of Appeal or Judge, or to act as such, for the purpose of giving judgment or otherwise<sup>6</sup>."*

- [18] After that, Counsel for the Appellant, without any impediment to the presentation of the Appellant's case, stated to the Court of Appeal that the Appellant would be restricting its claim to the issue of whether or not Twomey, the Chief Justice, a Judge of the Supreme Court, had *"the authority to sit on the Court of Appeal as an ex-officio<sup>7</sup>"* member of the Court of Appeal to hear the appeal.

*The sitting of 5 November 2020*

- [19] On the 5 November 2020, at the hearing of the notice of motion, Fernando President and Dingake JA intervened to explain that the Court of Appeal has not made any determination concerning the Appellant's allegations contained in the affidavit of Mr V. J. Patel, during the exchanges between Fernando President and Counsel for the Appellant, at the previous sittings of the Court of Appeal.
- [20] The record of proceedings of 5 November 2020, revealed that Counsel for the Appellant clearly stated that he had understood Fernando President to be saying that Twomey, the Chief Justice, had sat on the three-judge panel to hear the appeal in her capacity as an *ex-officio* member of the Court of Appeal under the Constitution and the Rules<sup>8</sup>.

***The Appellant's case given the exchanges***

- [21] On the 5 November 2020, at the hearing of the notice of motion, despite the question at issue arising from the affidavit of Mr V. J. Patel, stated in paragraph [10] hereof, Counsel for the Appellant took the stand he considered fit to take on behalf of the Appellant. The

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<sup>6</sup> Opcit., at pp. 8, 9

<sup>7</sup> Opcit., at p. 10

<sup>8</sup> As per the recording of proceedings of 5 November 2020 at 10 a:m at p. 56: *"Mr. Boullé: This is what, how I understood it. I understood that she had been chosen as a Judge and therefore, I say I am not going to challenge the issue, whether she resigned as a Justice of Appeal, or not, because she was chosen as a Judge and following that, your Lordship mentions that she sat on the 3<sup>rd</sup>, but when she delivered Judgment, she was no longer Chief Justice"*.

record of proceedings revealed that Counsel for the Appellant presented his arguments concisely and was given full latitude with regard to the conduct of the Appellant's case.

[22] The main argument of the Appellant by Counsel was that, because of the specific and different definition attached to the word "*Judge*" under the Rules, in respect of any appeal, the Court of Appeal shall consist of only Justices of Appeal, not being less than three, whom the President shall select to sit to hear that appeal. (Emphasis supplied). In the view of Counsel for the Appellant, "*Judge*" as defined in the Rules, unambiguously for purposes of the Rules, means "*Justice of Appeal*". Whereas under the Constitution, the enabling legislation, "*Judge*" as defined means "*the Chief Justice or a Puisne Judge*".<sup>9</sup> Emphasis supplied

[23] Because of the different meanings attached to the word "*Judge*", under the Constitution and the Rules, Counsel went on to argue that no valid Court of Appeal heard the appeal as only two Justices of Appeal were selected to sit to hear the appeal, instead of three, which constituted a violation of the Rules that contravened the Appellant's constitutionally protected right of appeal under Article 120 (2) of the Constitution.

[24] With respect to the submissions of Counsel for the Appellant, concerning Article 121 (b) of the Constitution, all that needs to be noted about their contents are that, because of the different meanings assigned to the word "*Judge*" in the Constitution and the Rules, although the Judges of the Supreme Court are *ex-officio* members of the Court of Appeal under Article 121 (b) of the Constitution, the Judges of the Supreme Court are not Judges of the Court of Appeal for the time being.

### **Discussion**

[25] In light of the above, I find that the Appellant by Counsel has abandoned its claim contained in the affidavit of Mr V. J. Patel. The crux of the Appellant's pleaded case, as stated in paragraph [10] hereof, was that the three-judge panel selected by the President to sit to hear the appeal violated the Constitution and the Rules stemming from the fact that the prior appointment of Her Ladyship Twomey, as a Justice of Appeal, terminated

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<sup>9</sup> Article 6 of the Constitution, which enables Schedule 2 of the Constitution - Principles of Interpretation

*ipso facto* upon her being appointed Chief Justice under the Constitution.

[26] The affidavit of Mr V. J. Patel does not contain the alternative claim to the effect that the three-judge panel of the Court of Appeal that sat to hear the appeal contravened the Rules because only two Justices of Appeal sat to hear the appeal, instead of three.

**Decision**

[27] Since Counsel for the Appellant, at his own choice, proceeded on a claim different to that pleaded and abandoned the Appellant's pleaded case, I have no choice but to dismiss the notice of motion with costs in favour of the Respondent.

[28] Therefore, prayer (iii) of the notice of motion - "*iii) that the execution of the judgment of the Supreme Court and the judgments of the Court of Appeal abovementioned be stayed pending the hearing of this motion, under rule 5 of the Seychelles Court of Appeal Rules*" - does not arise for consideration.

Signed, dated and delivered at Ile du Port on 13 November 2020

Robinson Justice Appeal

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I concur

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Fernando President

I concur

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Dingake Justice of Appeal