

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 56 (21 October 2022)
SCA MA 35/2022
(Arising in SCA MA 24/2020)
Out of SCA 28/2020 / CC 23/2019

In the matter between

Eastern European Engineering Limited
(rep. by Mr. Serge Rouillon)

Applicant

and

Vijay Construction (Proprietary) Limited
*(rep. by Mr. Bernard Georges, with
Mr. Leon Siegfried Kuschke)*

Respondent

Neutral Citation: *Eastern European Engineering Limited v Vijay Construction (Proprietary) Limited* SCA MA 35/2022 [2022] SCCA 56 (Arising in SCA MA 24/2020)
Out of SCA 28/2020 / CC23/2019 (21 October 2022)

Before: Anderson JA (Presiding), Young JA, Singh JA
Summary: Application for stay of proceedings dismissed.
Heard: 12 October 2022
Delivered: 21 October 2022

ORDER

The Application for a Stay of Proceedings is dismissed

RULING

ANDERSON JA

Introduction

[1] On 12 October 2022, this Court heard a motion to stay proceedings in the *de novo* hearing of the appeal in *Vijay Construction (Pty) Ltd v Eastern European Engineering*

Ltd. (SCA 28 of 2020). After the hearing, and following deliberations, we dismissed the motion and promised that we would give our reasons later. We do so now.

Background

- [2] The Applicant (hereinafter referred to as ‘EEEL’) and Respondent (hereinafter referred to as ‘Vijay’) were heard in 2020 by Carolus J, resulting in the judgment of *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (CS23/2019) [2020] SCSC 350 (30 June 2020). Dissatisfied with this judgment Vijay appealed to the Court of Appeal and that appeal resulted in the judgment of *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited* (SCA 28 of 2020) [2020] SCCA 23 (02 October 2020), hereinafter referred to as ‘*Vijay 2020*’. A majority in *Vijay 2020*, dismissed the appeal; a dissenting judgment would have upheld the appeal. Another appeal was lodged before the Court of Appeal to set aside *Vijay 2020*, thus raising questions as to whether the Court of Appeal had inherent power to set aside its own decisions. The Court agreed it had such powers and thus set aside *Vijay 2020*, in *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited And Vijay Construction (Pty) Ltd v Eastern European Engineering* (MA 24 of 2020) [2022] SCCA 5 (21 March 2022) hereinafter referred to as ‘*Vijay 2022*’.
- [3] In *Vijay 2022*, the Court also ordered a *de novo* hearing following its decision to set aside *Vijay 2020*. My learned brothers and I have the honour to preside over this *de novo* hearing.
- [4] In exercise of its right, EEEL approached the Constitutional Court to determine whether or not *Vijay 2022* intruded upon their constitutionally protected rights. These rights included the right to a fair hearing within a reasonable time as envisaged under article 19 (7) of the Constitution, and the right to equal protection of the law as provided by article 27 (1) of the Constitution. It was also the contention of EEEL that *Vijay 2022* also violated article 120 of the Constitution.

[5] Against this background, and the appeal *de novo* set to be heard in October 2022, EEEL filed the aforesaid application for a Stay of Proceedings before this Court on 29 September 2022. It was their contention that the proceedings before this Court ought to be stayed because there was a constitutional petition filed in the Constitutional Court and was yet to be determined.

Pleadings

[6] According to the supporting affidavit for a Stay of Proceedings filed by Mr. Vadim Zaslov, Director of EEEL, dated 29 September 2022, EEEL became aware of the majority decision in *Bristol v Rosenbauer* (SCA MA 28 of 2021) [2022] SCCA 23 (29 April 2022) where it was determined that the decision of the Court of Appeal in *Vijay 2022* was wrong to annul *Vijay 2020*. It was averred by EEEL that the Court in *Rosenbauer* (supra) raised five pertinent points in support of its assertion that *Vijay 2022* was wrongly decided. These are taken verbatim from the affidavit in support by Mr. Vadim Zaslov, as follows :

“ ...

- a.** *it was inappropriate for the court of appeal to clothe itself with inherent powers to amend its own orders when it had already found that it had no inherent jurisdiction to hear the matter.*
- b.** *it had misguided itself in relying on decisions involving Courts of Appeal in the UK and New Zealand allowing the reopening of cases where fresh evidence was not available at the hearing of the appeals emerged;*
- c.** *the court of appeal as a statutory court, did not have inherent power or inherent jurisdiction to set aside its earlier judgment;*
- d.** *the powers of the Court of Appeal are incidental and attendant to the exercise of its jurisdiction to enable the Court to consider matters on appeal from the trial court;*

- e. *the proper forum for determination of the right to a fair hearing is the Constitutional Court even if the issue arose in the Court of Appeal.*

...”

- [7] With regard to the above reference to *Rosenbauer*, it was averred that EEEL “...feels aggrieved that its constitutional rights to equal protection of the law without discrimination under Article 27 (1) and a fair hearing within a reasonable period under Article 19 (7)” have been breached. It was further averred that article 120 of the Constitution had been contravened when the Court in *Vijay 2022* found that it had three powers, namely, to reopen its own judgment, annul the said judgment and order for an *ad hoc* panel to rehear the appeal. With this, EEEL opined that it had been severely prejudiced by the judgment of *Vijay 2022*.
- [8] To further support the motion for a Stay of Proceedings, it was the contention of EEEL that if this Court did not stay proceedings on the appeal *de novo*, it would be caused severe prejudice, substantial loss, and damage. Moreover, EEEL pleaded that it was just, urgent, and necessary to grant the requested Stay of Proceedings to prevent the premature hearing of the appeal *de novo* until, and at such time, as when the Constitutional Court determined the Petition before it. Finally, EEEL opined that there was “...clear merit and a very good chance of succeeding due to the extremely important breaches and contraventions of the Constitution...”
- [9] On the other hand, Vijay opposed the motion. In an affidavit by Kaushalkumar Patel, Director of Vijay, filed 7 October 2022, the following was averred. Firstly that *Rosenbauer* was of unsound authority because it was obiter and unsupported by any legal argument or authority. It was also averred that *Rosenbauer* was directly contradictory to a previous unanimous judgment of the Court of Appeal. As such, it was the contention of Vijay that the authority on which the application was grounded was unsafe.
- [10] Secondly, Vijay disputed that the Petition before the Constitutional Court had any merits. This was because the Petition had been filed out of time and at this juncture it was unknown whether or not the Constitutional Court would grant leave to extend the time for

the Petition to be filed. It was also averred by Vijay that it had filed preliminary objections to the Petition, including that the Constitutional Court, being inferior to the Court of Appeal, cannot sit in judgment over a decision of the Court of Appeal.

[11] Thirdly, and finally, Vijay averred that there were no merits to the motion for stay of proceedings.

Written Submissions by the Parties

[12] Considering the importance of the issues raised, this Court, at the Case Management Conference (CMC) held on 10 October 2022, sought the further assistance of the parties by written submissions. The parties duly complied with the request and provided written submissions which supported and supplemented their pleadings. The Office of the Attorney-General was subsequently served with pleadings and the assistance of that office as *amicus curiae* was sought.

Submissions by EEEL

[13] Counsel for EEEL, Mr Serge Rouillon submitted that the pendency of the matter before the Constitutional Court was the primary matter for the consideration of this Court. Counsel advanced this submission on the premise of article 120 (5) of the Constitution. With this, Counsel Rouillon further submitted that the “written heart of the Seychelles people should not simply be cast aside to suit the whims of a few litigants to a court case where it is admitted that a serious Constitutional issue in itself has arisen.” The said article 120 (5) reads as follows:

“Proceedings in respect of a matter relating to the application, contravention, enforcement or interpretation of this Constitution shall take precedence over other matters before the Court of Appeal.”

[14] The Court found no difficulty with this submission as a general proposition of law. It was clear to this Court, that where a matter arises in proceedings before the Court of Appeal

regarding the contravention of the Constitution such a matter will take precedence over other matters. It was for this very reason that the Court, with the agreement of counsel on both sides, ordered that the application for a Stay of Proceedings, grounded as it were in allegations of contraventions of the Constitution, should be heard as the first order of business in the *de novo* proceedings. I am of the considered view that the Motion before this Court for a Stay of Proceedings on its face, does, indeed, raise constitutional issues. This must therefore be given, as it has been, precedence over other matters before this Court. To put this into context, a “Motion to Seek Leave to File Additional Grounds” by Vijay was filed 27 September 2022 and thus before the motion for a Stay of Proceedings, which was filed on 29 September 2022. Yet, this Court was judicious in hearing the latter first; thus giving precedence to the latter owing to the constitutional issues it raised.

[15] Counsel Roullion further submitted that there are many Court of Appeal cases in which he appeared as Counsel over the years, and which resulted in gross constitutional injustice where certain rights had been ignored. Yet such cases were never reopened or questioned. Counsel Roullion therefore considered it “curious” why the Court of Appeal reopened its own case on the call of the minority dissenting judge.

[16] We pause *en passant*, to state and emphasize that we have no knowledge of these matters to which Counsel averred. Nor do we associate with any allegation that the Court of Appeal of Seychelles has presided over or allowed constitutional injustice, gross or otherwise, to have been perpetuated; or to have ignored the rights of litigants in any case coming before it.

[17] According to Counsel Roullion, the present appeal *de novo* has opened a “Pandora’s Box” as mentioned by the *Rosenbauer* case.

[18] In rejecting that this Court had the power to hear constitutional issues, Counsel Roullion stated three things. Firstly, it was his contention that the Constitutional Court was now seized with the matter and should therefore determine it. Counsel emphasized that the Constitution of Seychelles through article 120 conferred *only* appellate jurisdiction upon the Court of Appeal. As such, it was his contention that this Court cannot assume powers by itself to hear a constitutional matter. Secondly, he rejected that article 46 (7) gave this

Court the jurisdiction to be a court of first instance in constitutional matters. Thirdly, he disputed that there was an identical jurisdiction between the Constitutional Court and Court of Appeal given that the former's decisions were reviewable by appeal by the latter court. To support this, he referred to the *Rosenbauer* case in which this reasoning was given by that court when it stated that a constitutional issue arising in an appeal before the Court of Appeal must be referred to the Constitutional Court. Fourthly, and finally, Counsel submitted that if this Court heard the constitutional matter presented before the Constitutional Court, it would be a judge in its own cause because the constitutional issues arose in the Court of Appeal.

[19] It was the submission of Counsel Roullion that the opposing affidavit by Vijay did not provide any substantial reasons for not granting the stay of proceedings.

Submissions by Vijay

[20] Counsel for Vijay, Mr. Bernard Georges, opposed the motion to stay proceedings on the basis that the reasons advanced by EEEL had no merits.

[21] To begin, it was Counsel Georges' submission that the judgement on which EEEL relied to approach the Constitutional Court should not be followed for four reasons, which, taken verbatim from the submissions of Counsel Georges, are as follows:

- “ i. As an authority which purports to overturn an established line of precedents, it did not proceed from original and in-depth submissions on why the previous line of authorities should have been departed from, but is rather the opinion of one Justice of Appeal (supported by another) apparently sitting in judgment of Vijay 2022;*
- ii. It is selective in its treatment of the law regarding authority – inherent or otherwise- of the Court of Appeal;*
- iii. The part of the judgment that purports to overrule Vijay 2022 and cases preceding it is obiter. The outcome of the appeal, as clear from the final two paragraphs of the majority judgment, did not depend on the consideration of the*

authority of the Court of Appeal, but on the fact that the matters in lite had not been raised earlier;

- iv. *Insofar as it holds that the proper forum for addressing constitutional contraventions, including those arising in the Court of Appeal, is the Constitutional Court, this ignores the hierarchy of courts in Seychelles and introduces an undesirable situation where this Court may have to sit on appeal against a finding that its own proceedings were unconstitutional.”*

[22] Counsel Georges further submitted that the Petition by EEEL had no merits. This was because the thrust of its challenge before the Constitutional Court was that the Court of Appeal had no authority to revisit its own judgment once delivered. However, following the agreement to ask this Court to determine the constitutional challenges, it was the contention of Counsel Georges that EEEL was, in effect, asking this Court to allow the stay on its merits and *ipso facto* set aside its previous decision of *Vijay 2022*.

[23] In addition to the above, Counsel Georges submitted that the allegations of constitutional contraventions have no merits because they were collateral attacks on the *Vijay 2022* judgment cloaked in the garment of constitutional contraventions. He argued that such attacks on judgments were not possible.

[24] As to the question of whether or not this Court was empowered by article 46 (7) to hear constitutional issues arising out of proceedings, Counsel Georges answered in the affirmative. With the above, Counsel Georges proceeded to submit on the alleged contraventions to constitutional rights and contraventions to article 120 of the Constitution.

[25] In respect of alleged article 19 (7) and article 27 (1), Counsel Georges submitted that the allegations of contraventions are simply collateral attacks on the *Vijay 2022* judgment. Further these allegations fell afoul of the principle in the case of *Simeon v R Cr App 26/2002*. It was Counsel’s submission that the principle was developed following Simeon’s failure to successfully appeal against his conviction and proceeded to petition the Constitutional Court on an allegation of contravention of his right to a fair trial before the Court of Appeal. The petition was dismissed by the Constitutional Court, and Simeon

appealed to the Court of Appeal which then made three important statements. Firstly, collateral attacks on a judgment of the Court of Appeal cannot be made in the Constitutional Court, so as to have a second bite at the cherry and review the merits of a decision. Secondly, to allow such collateral attacks would in essence allow the subordinate court to review the merits of a decision of the Court of Appeal. Thirdly, the proper procedure to follow where a party alleges that the Court of Appeal has denied a fair hearing, is to file a notice of motion to invoke the inherent jurisdiction to hear the alleged contraventions rather than petition the Constitutional Court.

[26] In support of his emphasis on collateral attacks, Counsel Georges also relied on the authorities of *D'Offay v Louise* [2008-2009] SCAR 123 and *Mellie v Government of Seychelles & Anor* SCA CP 03/2019.

[27] In respect of alleged breach of article 120 of the Constitution, Counsel Georges submitted that this line of attack was not necessary to contradict the decision of the Court of Appeal in *Vijay 2022* but was rather a veiled attack on the merits of *Vijay 2022* in the guise of a constitutional application.

Office of the Attorney-General

[28] The Office of the Attorney-General was invited by this Court, to take up the role of *amicus curiae* in the hearing of the Motion to Stay Proceedings. This was done because of the constitutional grounds which the Motion presented as the reasons that this Court should be moved to grant the Stay. Further, we are aware of the Constitutional Court Rules which require the citing of the Attorney-General as a party in constitutional matters, save for those where the office is exercising its prosecutorial powers or appearing as the principal advisor for the government.

[29] Mr. Muhamed Saley appeared for the Attorney General. His submissions were oral and are available in the record of proceedings.

[30] To begin, State Counsel Saley admitted that EEEL have a right under the Constitution to bring a constitutional claim in the Constitutional Court. However, such a right had been exercised out of time and what was before the Constitutional Court was an application for leave to file out of time. It was the submission of State Counsel that before the Constitutional Court, he had queried whether or not the matter should be dealt with by the Constitutional Court or as a preliminary issue before the Court of Appeal. According to State Counsel, this was put forward as an option for EEEL to consider and, in the circumstances and in face of the Motion to Stay Proceedings in this Court, it appeared they had opted to have the matter remain in the Constitutional Court.

[31] It was the submission of State Counsel Saley that the matter before the Constitutional Court may have no merits in substance and that this was so even if leave was granted for filing out of time. State Counsel supported the latter part of his argument by referring to the case of *Mellie v Government of Seychelles* (supra) where the Constitutional Court, in denying the Petitioner leave to file out of time, stated that one cannot put their head in the sand and seek to argue that they only became aware of constitutional challenges at a later point in time. State Counsel submitted that arguing that EEEL became aware of a constitutional challenge when *Rosenbauer* was handed down was akin to doing what the Court in *Mellie v Government of Seychelles* have pronounced as being undesirable. With this, State Counsel Saley raised concerns on the substance of the application for leave to file the petition out of time in the Constitutional Court.

[32] In respect of whether or not article 46 (7) empowers the Court of Appeal to hear and determine constitutional issues that arise in the course of proceedings, State Counsel Saley submitted in a similar vein as Counsel Georges. In particular, he submitted that this Court was empowered to hear constitutional matters that arise in the course of proceedings. He did admit that in certain circumstances, this Court may remit the constitutional question to the Constitutional Court. However, nothing in the law required such remission and the Court of Appeal may itself determine the constitutional issues arising before it.

[33] Finally, State Counsel submitted that the constitutional issues that are live for EEEL may possibly be dealt with as preliminary issues before this Court.

Analysis by the Court

[34] I am deeply indebted to my learned brother, Singh JA, with whom I discussed this judgment extensively and who provided views and authorities which were exceedingly useful in the reasoning and conclusions which I have reached herein.

[35] Further, both Counsel of EEEL and Vijay are to be commended for taking time to carve their arguments and submissions in helpful ways in support of their respective positions on the Motion to Stay Proceedings. The Court is particularly indebted to the Office of the Attorney-General for its very useful interventions bearing in mind the very late stage at which that Office was invited to assist the Court.

[36] I wish to reiterate that this Court is here to determine whether to grant the Motion to Stay Proceedings. The Motion stands *ex facie* on constitutional issues which allege contravention of two fundamental rights, namely article 19 (7); article 27 (1); and also of article 120 of the Constitution. As such, I am of the considered view that although the Petition itself cannot be exhausted in this ancillary proceeding to the appeal *de novo*, the constitutional grounds raised in these proceedings must be given cognisance and precedence. To do otherwise would be to underplay the gravity of the issues and therefore fail to make a fair determination on the Motion to Stay Proceedings. It would also be to ignore a fundamental issue of the relation between this Court and the Constitutional Court, which cannot properly be left unanswered.

[37] Let us begin at the beginning. Every court has inherent power to properly regulate its jurisdiction. In regulating that jurisdiction, the court may stay its proceedings in favour of other proceedings taking place in another court or tribunal. There is nothing remarkable about this and the principle goes at least as far back as almost 150 years ago to the case of *Wilson v Church (No. 2)* [1878] W. 81. In that early case no authority was cited for the proposition that a court could grant a stay of judgment. Since then, stays of proceedings have been granted in a multitude of areas such as: pending execution (*Elmasry and Anor*

v Hua Sun (SCA 28/2019) [2020] SCCA 2 (23 June 2020), *Government of Seychelles & Ors v Seychelles National Party* (SCA 4 of 2014) [2014] SCCA 31 (29 September 2014)); pending the hearing of an interlocutory matter, where the court adjourns to decide on that interlocutory matter (*King Crown Online Services Ltd v Finance Intelligence Unit* (MC 81 of 2014) [2015] SCSC 60 (06 March 2015)); on a plea of *forum non conveniens* (*Beitsma v Dingjam No. 1* (1974) SLR 292, *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10 (19 November 1986)); in favour of arbitration proceedings (*Autoridad del Canal de Panama v Sacyr SA et al* [2017] 2 Lloyd's Rep 351, *Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd* [2022] MLJU 108); and as between civil and criminal proceedings *Akcine Bendrove Bankas Snoras (in Bankruptcy) v Vladimir Antonov* [2013] EWHC 131 (Comm). There are probably several other circumstances in which stays of proceedings arise.

[38] What these situations all have in common is that a stay will normally prolong litigation and thus inconvenience the respondent, add expense, and delay finality to litigation. For these (and other) reasons, a stay is not normally granted unless the applicant convinces the court that it is in the interest of justice for the stay to be granted. In my view this is normally done by adducing evidence that the continuation of the proceedings would cause disproportionately greater hardship to the applicant than the advantage to the respondent by continuation of the proceedings. In specific situations, the applicant may be required to show good chances of success in the alternative trial in favour of which the proceedings are stayed as was held in *Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000*. It is sometimes said that there is a “balance of convenience” test¹ but in my view the court starts with the scales tilted in favour of continuation of proceedings; it is for the applicant for the stay to attempt to balance the scales.

[39] In the present case, the Motion for Stay of Proceedings was predicated upon a related trial in another court within this jurisdiction. In this regard, some of the observations similar cases are relevant. In *AB (Sudan) v Secretary of State for the Home Department* [2013]

¹ I acknowledge that the balance of convenience test is also used in stay of execution cases.

EWCA Civ 921 sets out important considerations in respect of stay of proceedings. The Court of Appeal there agreed with the statement of the trial judge that:

"27. A stay of proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown."

[40] There are three main points to take away from the decision by the Court of Appeal of England in *AB (Sudan)*.

First, the expeditious hearing of cases is an imperative especially when the right to a fair hearing within a reasonable time is a live issue. The Seychelles Court of Appeal in *Hedgeintro International Ltd v Hedge Funds Investment Management* (SCA 5 of 2017) [2017] SCCA 32 (27 August 2017) paragraphs 17 and 29, has affirmed this right to trial within a reasonable time. In the present case, litigation between parties started 31 January 2019 when EEEL filed a Plaint in the Supreme Court seeking to register and render executory, two orders from the High Court of England and Wales given in 2015 and 2018. I am of the view that staying the appeal *de novo* prolongs the litigation between the parties and would not be consistent with the right to be heard within a reasonable time. EEEL alleges the breach of article 19 (7) yet, in asking this Court to stay these proceedings, it actively participates in prolonging the final determination of this matter.

[41] The second point worth noting from *AB (Sudan)* is that the Court should take cognisance of whether there is “some event in the foreseeable future that may have an impact on the way a claim is decided”. First, this Court simply has no idea whether leave will be given by the Constitutional Court to file the petition out of time. Second, I do not see how the pronouncements of the Constitutional Court could properly have an impact on how this Court will conclude in the appeal *de novo*, given the hierarchical relationship between the two courts. To be more forthcoming, the legal issues set to be determined in this Court relate to enforcement of British judgments, while the constitutional matter (if it proceeds in the Constitutional Court) will be to determine whether this Court should have proceeded on the *de novo* hearing. The Constitutional Court, as a division of the Supreme Court of Seychelles, cannot overrule the Court of Appeal, as the apex Court of the Republic of Seychelles, as to whether the Court of Appeal can or ought to hear an appeal *de novo*.

[42] The third take away from *AB (Sudan)* is that the Court may grant a stay of proceedings in instances where the parties have an agreement to stay proceedings. In this instance, there is no agreement between the parties to this effect.

[43] In *Kenya Wildlife Service v James Mutembei* (2019) eKLR, Gikonyo J at paragraph 5 held that:

“... Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

[44] Gikonyo J also relied on the Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, which he quoted at paragraph 5. It reads as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

‘This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.’

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.’ ”.

[45] In *Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000*, Ringera J, stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

[46] In *Ticketmaster UK Ltd v The Information Commissioner* (Case management decision to stay) [2021] UKFTT 83 (GRC) (12 March 2021), O’Connor J relied on *AB (Sudan)*, among established cases, and stated in part that:

“23. The determination of the instant stay application requires an exercise of balancing the ingredients enshrined in the overriding objective: managing the interface and overlap between two judicial organisations, the avoidance of excessive cost, the right of every litigant to expeditious justice, the minimising of litigation delays, the allocation of limited judicial resources and, broadly, the

convenience of all concerned. The striking of the balance is delicate and intensely fact sensitive...

24. *...The granting of a stay is the exception not the norm. That is not to put in place a legal threshold of exceptionally, but rather it is the expression of an expectation that a proper and robust application of the relevant principles is likely to lead to the granting of a stay in only a small minority of cases, identifiable on a case by case basis.”*

[47] The above are some of the considerations that can properly be taken into account in deciding whether or not a stay should be granted in this case. However, for the reasons earlier traversed, the Motion for Stay in this case must be contextualized within the specialized regime of the constitutional role of the Court of Appeal and the constitutional relationship between the Court of appeal and the Constitutional Court.

[48] Where a Motion to Stay Proceedings is laid over in the Court of Appeal of Seychelles, that Motion must be considered in the totality of the arguments and allegations that it raises. Where no constitutional issue arises, it may well be sufficient to dispose of the Motion on the considerations which have been developed and refined in case-law such as *AB (Sudan)* and *Ticketmaster*. However, where the Motion raises constitutional issues, the Court of Appeal must, in addition to these considerations, pay attention to its constitutional role. In this context, it bears setting out the constitutional provisions in Article 46 (7) and Article 130 (6), which provide as follows:

Article 46 (7)

*“Where in the course of any proceedings in any court, **other than** the Constitutional Court or **the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter**, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.” (Emphasis added)*

Article 130 (6)

*“Where in the course of any proceedings in any court, **other than the Court of Appeal** or the Supreme Court sitting as the Constitutional Court, or tribunal, **a question arises with regard to whether there has been or is likely to be a contravention of this Constitution**, other than Chapter III, the court or tribunal shall, if it is satisfied that the question is not frivolous or vexatious or has not already been the subject of a decision of the Constitutional Court or **the Court of Appeal**, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.” (Emphasis added)*

[49] It follows ineluctably, by clear and inescapable implication from the words emphasized in Article 46 (7) and 130 (6) of the Constitution, that where a question arises in proceedings before this Court of Appeal with regard to whether there has been or is likely to be a contravention of the Charter (in this case, Article 19 (7), and 27 (1)), or of the Constitution (in this case, Article 120)), then this Court is, by virtue of Article 46 (7) and 130 (6) of the Constitution, respectively, not obliged or required to refer the question for determination to the Constitutional Court but may consider and make the determination itself. Furthermore, by necessary implication, where the Court of Appeal decides to take up and determine a constitutional question that arises in proceedings before it, such a question cannot properly be simultaneously or thereafter be prosecuted in the Constitutional Court. The Constitutional Court has *no* jurisdiction to consider a constitutional question that has arisen in the Court of Appeal and which the Court of Appeal has decided to consider and determine. To the extent that the majority in *Rosenbauer* held to the contrary of this proposition, we would respectfully disagree and hold that that view ought not to be followed.

[50] The provisions in Article 46 (7) and 130 (6) of the Constitution do not *require* the Court of Appeal to remit to the Constitutional Court, a constitutional question that arises in proceedings before it. However, the Court of Appeal may well, in the special circumstances of a particular case, decide that it is proper and convenient to refer the question to the Constitutional Court for its determination. The Court of Appeal may remit questions of constitutional rights as where, for example, the view of the Constitutional Court on the question is considered desirable and to give a litigant the additional benefit of an original hearing in the Constitutional Court with the possibility of an appeal to the

Court of Appeal. There are several Privy Council cases where their Lordships remitted constitutional matters to the Court of Appeal to benefit from the views of the local judges: *Bowe v R* [2006] UKPC 10. Similarly, the Caribbean Court of Justice (“CCJ”)² stayed consideration of the constitutionality of legislation in *Boyce v Attorney General et al* [2004] UKPC 32, [2005] 1 AC 400, [2004] 3 WLR 786, until the matter had been considered by the Court of Appeal of Belize, to which the CCJ remitted the case. See, to similar effect, *August & Gabb v The Queen* [2018] CCJ 7 (AJ).

[51] The original jurisdiction of the Constitutional Court is further protected from another source. It is only *if* the constitutional question has arisen in proceedings before the Court of Appeal that it may be retained and determined by the Court of Appeal.

[52] The parties in this present case did not engage the Court in any extensive way as to when it could properly be said that a constitutional issue has arisen before the Court of Appeal. This Court shared with counsel the case of *Marin v The Queen* [2021] CCJ 6 (AJ BZ in which this question was extensively canvassed before the CCJ. As the judgment was a long one, attention was drawn especially to paras 62 and 162. The written views of Counsel were sought. The CCJ in *Marin Jr* stated:

“In law, ‘proceedings’ generally refer to, collectively or individually, the form in which legal actions are commenced and conducted, encompassing all steps taken in a legal action, and includes all steps from filing, through hearing, judgment, appeal, to final disposition, including steps towards enforcement and recovery. In short, a reference to ‘proceedings’ encompass the totality as well as all parts, processes and procedures, from first filing to the final disposition of a lawsuit or criminal prosecution.”

[53] The precise question of whether and when a constitutional question “arises” was discussed in *Marin Jr* at paras. 148-162 by Anderson JCCJ, who stated:

“[162] ... It is if, and only if, the issue raised in the appellate proceedings affected, or could have affected, the question of whether the conduct of the trial (including

² The apex appellate court in the Caribbean presently for four sovereign Caribbean States (Barbados, Belize, Guyana, and Dominica).

appellate proceedings) accorded with the constitutional protection of law guarantees that the matter could properly be said to ‘arise’ in the appellate proceedings.”

- [54] This Court entertains no doubt that the averments on which the Motion for Stay of Proceedings in this Court was sought, if established, could have affected, as argued by EEEL, their constitutional rights to a fair hearing within a reasonable time (Article 19 (7)) and to equal protection of the law (Article 27 (1)). Similarly, a breach of Article 120, if established, could affect the constitutional protection of the law guarantees afforded to EEEL. Having decided that the constitutional questions at the base of the Motion for Stay of Proceedings in this Court arose in the course of proceedings in this Court, we gave anxious consideration to whether these constitutional questions ought, in our discretion, to be remitted to the Constitutional Court for determination.
- [55] We are acutely aware that a corresponding motion was earlier filed in the Constitutional Court, albeit the fate of its progress depends on the grant of leave to extend the time for filing, which leave is opposed. We also took into consideration the matters suggested as relevant by the case-law considered above, including importantly, the issue of the prolongation of litigation. Finality of litigation is a critical consideration, although it must necessarily be balanced with considerations of justice.
- [56] However, a key consideration for us was that the constitutional issue sought to be ventilated in the Constitutional Court essentially passed on the constitutionality of the actions of this Court in ordering a *de novo* hearing of *Vijay 2020*. To allow such an action to proceed in the Constitutional Court could well constitute a collateral attack on the decision of this Court in *Vijay 2022*. Indeed, the Court of Appeal has held repeatedly that it is not open to a litigant in the Constitutional Court to seek to have set aside as unconstitutional a decision of the Court of Appeal: *Simeon v R Cr App 26/2002*, *D’Offray v Louise SCA 34/2007*, *Mellie v Government of Seychelles & Anor* (SCA 3 of 2019) [2019] SCCA 40 (16 December 2019). This reflects decisions of the Privy Council in *Chokolingo v Attorney-General* [1981] 1 WLR 106 and *Hinds v Attorney General & Ors (Barbados)* [2002] 1 AC 854. Similarly, we also do not consider it appropriate or proper to have the Constitutional Court determine the constitutionality of the action of the apex

Court of Appeal especially in circumstances where the decision of the Constitutional Court could then be appealed to the Court of Appeal.

[57] For all of these reasons we decided not to refer the alleged constitutional breaches to the Constitutional Court but rather to retain consideration and determination of them ourselves.

[58] We do not consider it necessary, useful or appropriate, to delve into the minute details of all the alleged breaches by this Court in *Vijay 2022* of the constitutional rights of EEEL. We are convinced, after extensive and mature consideration, that there were no breaches of EEEL's constitutional rights in that case. The following discussion sheds light on how and why we have come to this conclusion.

[59] First, we are of the considered view that an apex court such as the Seychelles Court of Appeal does have inherent power (we say nothing of inherent jurisdiction) to re-open and reverse its own previous decision as we did in *Attorney-General v Marzorocchi* Civ App 8/1996 (delivered on the 9 April 1998)), and as we held that we could do in *Belmont & Anor v Belmont* (SCA 19 of 2020) [2020] SCCA 44 (18 December 2020). This corresponds with the decision of other apex courts such the House of Lords in the famous *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 2)* [2000] 1 A.C. 147. Even courts established by statute have been said to have a "residual jurisdiction" to reopen an appeal: *Taylor v Lawrence* [2002] 2 All ER 353 and *R v Smith* [2003] 3 NZLR 617.

[60] Two factors, however, warrant emphasis. First, the power to re-open an appeal is an extraordinary one which can only be properly exercised in the most extreme, rare, and exceptional circumstances where the interest of justice clearly demands that this be done. Secondly, the mere fact of the possession of the power is obviously not sufficient to justify a re-opening, otherwise there would be a realistic concern of the "flood-gates" argument, or to use the metaphor in the pleadings and submissions in this case, of "Pandora's Box" being opened. There must be finality to litigation and in the interest of this, there must be principles which discipline the circumstances in which an appeal can properly be reopened.

- [61] As presently advised, we are of the view that the exercise of the extreme, rare, and exceptional power to re-open an appeal is limited to the following two circumstances. The first is relatively uncontroversial. Where there is fresh evidence, that satisfies the regime for the admission of fresh evidence, such that an earlier/original decision of the Court of Appeal is likely to be unjust, that decision may be set aside: see *Pinochet (supra)*. There are necessarily strict and stringent conditions governing the admission of fresh evidence and these must be scrupulously observed as conditions precedent to the invocation of the exception to review/reverse the previous decision. For a detailed consideration of the regime applying to admission of fresh evidence: see *R (on the application of Elizabeth Wingfield) v Canterbury City Council & Anor* [2020] EWCA Civ 1588.
- [62] The second circumstance is more controversial but nonetheless rests on sound legal principles. The right to a fair hearing is a fundamental constitutional principle which permeates, guards, and protects, virtually every other fundamental right in the Constitution. A fair hearing is denied where there is a refusal to listen to what a party has to say regarding his case before the court. Where there is, serious and credible evidence of a substantial contravention of the constitutional right to a fair hearing, such that a party was not heard, the Court may, if it considers the breach to be consequential, review and nullify its previous decision tainted by the lack of fair hearing.
- [63] The contravention of the right to a fair hearing may be because a party was not heard at all in the sense that the party was not allowed to put his case to the Court. This happened in *Attorney-General v Marzorcchi* Civ App 8/1996 (delivered on the 9 April 1998). But the same thing may also happen where a party is ostensibly able to make submissions before the Court but the Court, or at least one of its members, has made clear beforehand that he or they will not consider the submissions in arriving at his or their decision in the case. In these latter circumstances, the party cannot properly be said to have had a fair hearing.
- [64] In *Vijay 2020* the majority made it clear that because of what they perceived as the serious procedural irregularity of the President of the Court of Appeal (PCA) (i) in

recalling the parties for a reconvened hearing and (ii) in unilaterally requesting specific clarifications on points of law and fact, when such a request was not supported by a majority of the Court, they could not hear the parties. This even though the majority was physically present in court during the reconvened court when the parties made submissions; subsequently they also made written submission on the clarifications sought by the PCA. These written submissions were not considered by the majority.

[65] The grounds offered by the majority for their position are, if I may be permitted to say so respectfully, very powerful grounds. There must be significant concern that the PCA may unilaterally reconvene court or produce interrogatories for the parties over the objection of other two Justices of Appeal who constituted the majority of the Court. Further, the grounds upon which the PCA purported to act, namely Rules 3 (1), 6 (2), 11 (1) (b) and 18 (9) of the Court of Appeal Rules 2005 face the problem of the tension created with the definition of “court” in the same Rules. A “court” consists of at least *three* Justices of Appeal as provided by Rule 4 refers. The power of a single Justice of Appeal is also provided for and the limits thereafter under Rule 5 refers. It must be remembered that the definition of “court” has royal lineage to the Constitution which defines Court as ‘a court of competent jurisdiction established by or under the authority of this Constitution’ and the Rules in the definition section say, ‘Court means Seychelles Court of Appeal’. The PCA should therefore be exceedingly slow to act upon whatever amended Court of Appeal Rules may say concerning his or her unilateral power of action. It should be remembered that the PCA is and always remains *primus inter pares*.

[66] However, I make no definitive ruling on this issue, mainly because I believe a greater legal principle is at stake, namely, that of the legitimate expectation of the parties to the litigation. In the case before us the litigants had been advised by the PCA there would be a reconvened hearing at which they were expected to make submissions to clarify their case made earlier. The litigants came, albeit with varying degrees of enthusiasm, to the reconvened hearing, made presentations and later made further written submissions as requested. It appears to me that they were entitled to the legitimate expectation that their submissions and clarifications would be heard by the *Court*, whatever the internecine

disagreements among member of the Court may have been on the propriety of the recall or the submission of the request for clarification.

[67] Litigants are entitled to treat with the Court as a whole and cannot be expected to draw the curtain on the judicial bench to discover any fractious differences between members of the court on the propriety of making submissions they have been asked to make. The parties were therefore legitimately entitled to expect that their submissions and arguments would be given a fair hearing by the Court as contemplated under Rule 4 of the Court of Appeal Rules.

[68] In *Vijay 2020* the majority of the Court made clear that they would not hear the arguments and submissions of the parties at the reconvened hearing or subsequently. In my view, this contravened the legitimate expectation of the parties that they would have received a fair, honest, and open-minded hearing in accordance with the judicial duty binding on all judicial officers. This was a legitimate expectation of a procedural nature. Had the parties been heard but the majority had remained of the view that the UK Orders were nonetheless enforceable in Seychelles than *cadit questio*, that would have been the end of the matter, and the appellants would have had no cause to cavil at the result. But the appellants were not heard which makes the case very much akin to the instance in *Marzocchi (supra)* where the party was not heard at all, and the decision of the Court of Appeal was quashed. For the parties to have been expressly denied the opportunity to be heard by the Court (as the majority indicated by their own admission in the judgments of *Vijay 2020*) appears to me to fall squarely within the ambits of the narrow circumstance in which an apex court may re-open its own case and afford both parties a fresh (or *de novo*) opportunity to be heard.

[69] In parenthesis, I express the hope that this situation is most unlikely to recur in the Court of Appeal of the Seychelles. The President of the Court of Appeal must be mindful of the views of his colleagues on the Bench and must make every effort to reach a consensus or at least a compromise, especially in situations where it could cause the integrity of the institution to be brought into question by right-thinking members of the Republic of Seychelles. Similarly, all members of the Bench must give the greatest of sympathetic

consideration to a request for clarification from any member of the Bench (including, perhaps especially, their leader, the President) in the spirit of judicial collegiality, always remembering that judges are the servants of the people over whose right and obligations they have been given the extraordinary privilege to preside and decide. A conscientious application of these principles should serve to ensure that this decision will not open either the “flood-gates” or “Pandora’s Box” to frequent efforts to overturn previous decisions of the Court of Appeal. Where the judiciary fails to regulate itself, there is always the risk that external regulation could be brought to bear, thereby opening a new Pandora’s Box.

[70] I conclude that the failure of the majority to hear the parties at the reconvened hearing and to consider their response to the request for submission for clarification by the PCA constituted an egregious breach of their legitimate expectation of the right to a fair hearing and thus warranted the decision in *Vijay 2022* to vitiate the *Vijay 2020* decision and order the hearing of the appeal *de novo*.

[71] In the premises, I conclude that *Vijay 2022* did not breach that applicant’s constitutional rights such as to warrant a stay of the *de novo* hearing to allow those alleged breaches to be considered by the Constitutional Court. Having retained and decided those alleged constitutional grounds it follows that the jurisdiction of the Constitutional Court in this regard is hereby correspondingly pre-empted.

Anderson JA

I concur

Singh JA

Signed, dated and delivered at Ile du Port on 21 October 2022.

YOUNG JA, concurring with different reasons

Background

- [1] In July this year, the Applicant Eastern European Engineering Limited (Eastern), out of time, filed a petition in the Constitutional Court seeking, amongst other things, the setting aside of the judgment in *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited And Vijay Construction (Pty) Ltd v Eastern European Engineering* (MA 24 of 2020) [2022] SCCA 5 (21 March 2022) (the March 2022 Court of Appeal judgment). In this petition, Eastern alleged, in various ways, that that judgment infringed its constitutional rights. In doing so, it also challenged our ability to hear the appeal from the judgment of Carolus J.
- [2] The petition is based primarily on the contention that the Court of Appeal did not have power to re-open the October 2020 Court of Appeal judgment. This argument is premised on article 120 of the Constitution. I will discuss the basis of this challenge in more detail shortly.
- [3] More recently Eastern applied to this Court for a stay of the appeal proceedings pending determination of the proceedings in the Constitutional Court.
- [4] This Court convened a case management conference on 10 October 2022 to discuss, amongst other things, the stay application and how the constitutional issue raised by Eastern might be resolved.
- [5] Being of the provisional view that this Court had jurisdiction to resolve the constitutional issue, we invited Eastern to advance to us, in the context of the present appeal, the

arguments that are set out in its petition. We directed that these arguments be dealt with on 12 October 2022 at 9.30am.

[6] Although I understood that Mr Rouillon, counsel for Eastern, had accepted this invitation, at the hearing of 12 October his primary argument was that this Court is not empowered to address the constitutional issue as it lay solely within the jurisdiction of the Constitutional Court and that, accordingly, we should stay the hearing of the appeal until the Constitutional Court had resolved the constitutional issue and any appeal in relation to that resolution had been dealt with by this Court.

[7] To the very limited extent that Mr Rouillon advanced argument addressed to the substantive constitutional issue, it was largely confined to the contention that the Court of Appeal did not have power to re-open an earlier decision.

[8] Against that background, I will address first the stay application and then the substantive constitutional issue.

The stay application

[9] I can see no utility in the petition to the Constitutional Court. This is for two reasons.

[10] The first is that the March 2022 Court of Appeal judgment was premised on the conclusion of the Court that it had power to do what it did. It is this conclusion that is primarily challenged in the petition filed with the Constitutional Court. I have difficulty seeing how the Constitutional Court, which is a division of the Supreme Court and thus lower in the hierarchy than this Court, could be expected to conclude that this Court, in the March 2022 Court of Appeal judgment, reached the wrong conclusion as to the extent of its powers.

[11] As to this, there are judgments of this Court in *Simeon v R Cr App 26/2002*, *D'Offray v Louise SCA 34/2007*, and *Mellie v Government of Seychelles & Anor* (SCA 3 of 2019) [2019] SCCA 40 (16 December 2019) that warrant mention. In each of these cases, the Court of Appeal held that it is not open to a litigant in the Constitutional Court to seek to

have set aside as unconstitutional a decision of the Court of Appeal. As Twomey JA pointed out in *Mellie*, this is in accordance with the approach taken by the Privy Council in *Chokolingo v Attorney-General* [1981] 1 WLR 106 and *Hinds v Attorney General & Ors (Barbados)* [2002] 1 AC 854.

[12] Before us, Mr Rouillon relied on *Bristol v Rosenbauer*, (SCA MA 28 of 2021) [2022] SCCA 23 (29 April 2022). In it, Twomey–Wood JA was particularly critical of the March 2022 Court of Appeal decision. In the course of this criticism, she observed:

“The March 2022 Court of Appeal decision] raised the issue of a breach of a fair hearing –although it masked itself as a procedural irregularity. The proper forum for the determination of breaches for human rights is the Constitutional Court. This is so even if the issue of fair hearing arises in the Court of Appeal. The distinction is that in those circumstances, the application for redress constitutes a fresh case. It is not the same case that has already been heard and determined. That was the approach adopted in *Mellie v Government of Seychelles* and *d’Offray v Louise*. But even then, as was pointed out in *d’Offray*, the right to a fair hearing must be balanced with the need for finality of judgment.”

[13] Whether it is open to the Constitutional Court to review the process followed by the Court of Appeal in an earlier case – as suggested by Twomey–Wood JA in the passage just cited – raises difficult issues, particularly if the process that was followed was the result of a conclusion by the Court of Appeal that the process in question was in accord with the Constitution. In such a situation, a later challenge to the process in the Constitutional Court might be thought to be a collateral challenge to the decision of the Court of Appeal as to the procedure it should follow. For this reason I doubt very much whether it would have been open to Vijay to challenge the October 2020 Court of Appeal judgment in the Constitutional Court on the process grounds that were the basis of the March 2022 Court of Appeal judgment. In saying this, however, I recognize that there may sometimes be scope for challenges in the Constitutional Court in relation to process issues associated with the way an appeal has been dealt with by the Court of Appeal, an issue that was discussed in some detail in *Karunakaran v A-G* (SCA CL 1 of 2020)

[2021] SCCA 8 (30 April 2021) and also relevant in the earlier case, *Elizabeth v President of the Court of Appeal & Anor* (2 of 2009) [2010] SCCC 2 (29 July 2010).

[14] More to the present point, Eastern’s petition is a challenge not to process but rather to the substance of the March 2022 Court of Appeal judgment. That judgment is premised on the conclusion that the Court of Appeal had the right to re-open the October 2020 Court of Appeal judgment. A constitutional challenge to the correctness of that conclusion is a challenge to the crux of that judgment. If brought in the Constitutional Court, such a challenge is objectionably collateral within the principles adopted and applied in *Simeon, D’Offrey v Louise and Mellie* (supra).

[15] The second and overlapping reason why I see no utility in Eastern’s resort to the Constitutional Court is that, as I have just foreshadowed, I am of the view that this Court has power to address constitutional issues that arise in cases that come before it. I see this as at least implicit and practically explicit in article 46(7) (in the case of constitutional issues as to the Charter, arts 15 – 39) and 130(6) (in respect of other articles) of the Constitution). They provide:

“46. ...

7. Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal, a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”

“130. ...

6. Where in the course of any proceedings in any court, other than the Court of Appeal or the Supreme Court sittings as the Constitutional Court, or tribunal, a question arises with regard to whether there has been or is likely to be a contravention of this Constitution, other than Chapter III, the court or tribunal shall, if it is satisfied that the question is not frivolous or vexatious or has not

already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court.”

[16] Contrary to the argument advanced of Mr Rouillon for Eastern, I think it plain that arts 46(7) and 130(6)) mean that constitutional questions that arise in the context of proceeding before the Court of Appeal need not be referred to the Constitutional Court but rather may be determined by the Court of Appeal. There is Seychellois authority which supports this view, see for instance *Subaris Company Ltd and Others v Seychelles Court of Appeal and Another* (Constitutional Court Case 7 of 2010) [2011] SCCC 1 (01 February 2011). That the Court of Appeal may deal direct with constitutional issues is, as well, a fundamental premise of the judgments to which I have earlier referred to the effect that the Constitutional Court may not entertain collateral challenges, on constitutional grounds, to Court of Appeal judgments. Given that the challenge by Eastern extends to whether this Court is able to hear the appeal, arguments along the lines of those advanced in the petition can be addressed directly by us as arising generally in relation to the appeal against the judgment of Carolus J.

[17] In her reasons in *Rosenbauer*, Twomey–Wood JA made the point that if the Court of Appeal hears and determines such a challenge, there is no right of appeal, a consideration that she saw as supporting the view that such challenges should be dealt with first by the Constitutional Court (in which case, there would be scope for an appeal). It is, however, a reality of the practice of appellate courts that issues sometimes arise in the course of an appeal that were not considered by the first instance court but must, nonetheless have to be determined. And, more closely relevant to what is now in issue, when it comes to challenges to the judgments of a final appellate court, there is a very particular need to recognize the importance of the finality of judgments.

[18] For the reasons just given I am of the opinion that a challenge by Eastern to the conclusion of the Court of Appeal in the March 2022 judgment that it had the power to re-open the October 2020 judgment: (a) cannot be entertained by the Constitutional Court; but (b) can be determined by this Court.

[19] Against this background, I was of the view that the application for a stay of this appeal should be dismissed, as it was at the conclusion of the hearing on 12 October 2022.

The substantive constitutional issue

A preliminary comment

[20] As I have noted, Mr Rouillon’s primary position was that we could not address the constitutional challenge to the March 2022 Court of Appeal judgment and for this reason he did not advance detailed argument in support of that challenge. It is, however, fair to say that he did at least generally take the position that that judgment was in breach of the Constitution. That being so, I must address whether that position is correct.

[21] Given the absence of detailed argument, it is sensible to refer to the points advanced in the petition to the Constitutional Court. That petition alleges breaches of arts 19(7), 27(1) and 120 of the Constitution.

Breach of article 19(7)

[22] This article requires of any court that it be “independent and impartial” and that proceedings before it “shall be given a fair hearing within a reasonable time”.

[23] The complaints set out in the petition are that in respect of the March 2022 Court of Appeal judgment: (a) the Court of Appeal exercised a jurisdiction it does not have (contrary to art 120); (b) the Court of Appeal did not consider and ignored arguments advanced by Eastern; and (c) the setting aside of the earlier decision and appointment of this panel denied Easterns’s right to a fair hearing within a reasonable time.

Breach of art 27(1)

[24] This article provides that “Every person has a right to equal protection of the law ...” . The primary complaint in relation art 27(1) relates to the 2019 rejection by the Court of Appeal, on the ground that the Court was functus, of an application by Eastern seeking to re-open the 2017 judgment of the Court of Appeal given in favour of Vijay. It is alleged that the different ways in which the Court of Appeal dealt with challenges by Eastern to

the 2017 Court of Appeal judgment and by Vijay to the October 2020 Court of Appeal judgment meant that Eastern had been denied equal protection of the law. We were given no details as to the grounds on which the challenge to the 2017 Court of Appeal judgment had been based on and this aspect of the challenge was not developed in argument by Mr Rouillon.

- [25] Other grounds that are advanced under article 27(1) are repetitious complaints (a) that the Court of Appeal did not jurisdiction to set-aside its own judgment; and (b) of delays associated with the annulling of the 2020 CA judgment and appointing foreign judges.

Breach of art 120(1)

- [26] Article 120 (1) of the Constitution provides for jurisdiction of the Court of Appeal. I will refer to the relevant wording of this article shortly.

- [27] The primary complaint is that the March 2022 Court of Appeal judgment was premised on a power that article 120 did not confer on the Court of Appeal. Other complaints in relation to this article are repetitious, namely that (a) the Court of Appeal did not consider the arguments of Eastern and (b) Eastern's rights under the judgment of Carolus J as affirmed by this Court in October 2020, have been unfairly and unjustly frustrated.

The key issue

- [28] Against this background, the key issue is whether, in in the March 2022 Court of Appeal judgment, the Court purported to exercise a power not conferred on it by article 120. This was the only issue seriously advanced by Mr Rouillon. I emphasise at this point that resolution of this issue turns simply on whether the Court of Appeal had power to do what it did; not whether, if had that power, its decision to exercise it was correct.

- [29] The limited way Mr Rouillon argued the case is understandable.

- [30] The complaint that the Court of Appeal did not pay proper regard to Eastern's arguments seems to be based on the simple premise that the Court of Appeal, by rejecting those arguments reached the wrong conclusion, a point that at best goes to the correctness of

the decision on the merits, rather than whether the Court had the power to re-open its earlier decision.

[31] The complaint about the 2019 decision, also not developed, seems to lead nowhere. No attempt was made to show that this decision was wrong in relation to the application in issue at that time. And even if this Court took too narrow a view of its powers in 2019 (something that has not been demonstrated), it would not necessitate the Court continuing to take too narrow a view of its powers.

[32] Associated delays are simply the corollary of the exercise of jurisdiction.

[33] Against this background I will confine my focus to whether the Court of Appeal's claimed power to re-open an earlier decision is consistent with article 120.

Article 120 and section 12(3) of the Courts Act

[34] Article 120 relevantly provides:

“120. Establishment and jurisdiction of Court of Appeal

(1) *There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction to hear and determine appeals from a judgement, direction, decision, declaration, decree, writ or order of the Supreme Court and such other appellate jurisdiction as may be conferred upon the Court of Appeal by this Constitution and by or under an Act.*

(2) *Except as this Constitution or an Act otherwise provides, 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.*

(3) *The Court of Appeal shall, when exercising its appellate jurisdiction, have all the authority, jurisdiction and power of the court from which the appeal is*

brought and such other authority, jurisdiction and power as may be conferred upon it by or under an Act.”

[35] Section 12(3) of the Courts Act provides:

“For all the purposes of an 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 the Court of Appeal of England.”

[36] As I will explain shortly, the view of the English Court of Appeal is that a power to re-open earlier decisions is incidental to its jurisdiction to determine appeals; this on the basis that the jurisdiction to determine appeals is to be construed as envisaging just determination. Whether section 12(3) of the Courts Act carries this power across to this Court depends upon whether such re-opening is incidental to “the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon.” This is essentially the issue that was addressed in the March 2022 Court of Appeal judgment and is now put in issue again before us. For this reason, I do not see section 12(3) as controlling. It does, however, provide some assistance to Vijay.

The authorities

[37] There is a good deal of international authority that supports the view that appellate courts have the power to re-open their own decisions; albeit a power to be exercised in the most narrow of circumstances.

[38] That this is so is illustrated by the decision of the House of Lords the *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 2)* [2000] 1 A.C. 147. The same view has been taken by appellate courts established by statute and given powers broadly similar to those conferred by article 120 of the Constitution . The most relevant

of these are *Taylor v Lawrence* [2002] 2 All ER 353 and *R v Smith* [2003] 3 NZLR 617. At the heart of the *Taylor* reasoning is the point adverted to earlier, that the jurisdiction to determine appeals is to be exercised on the basis that what is required is a just determination.

39] In two earlier cases, *Attorney-General v Marzorcchi* Civ App 8/1996 (9 April 1998) and *Belmont & Anor v Belmont* (SCA 19 of 2020) [2020] SCCA 44 (18 December 2020) this Court has either exercised (in *Marzorcchi*) or held that it has (in *Belmont*), power to re-open its own decisions.

[40] In *Simeon v R* Cr App 26/2002, one the cases to which we have referred in which the Court of Appeal has made it clear that the Constitutional Court may not entertain collateral challenges to Court of Appeal decisions, the Court observed:

We wish to point out for future guidance that if the Seychelles Court of Appeal is alleged by any litigant to have denied him his right to a fair hearing ... , the proper procedure to follow is to make an application by way of notice of motion to this Court and to invoke the latter's inherent jurisdiction in the matter, instead of going to the Constitutional Court, as was done in ... Marzoochi

41] To the same effect is *Karunakaran v AG* (SCA CL 1 of 2020) [2021] SCCA 8 (30 April 2021) in which this Court accepted that, in exceptional circumstances, it may review an earlier decision, citing in this respect, *Mellie, d'Offray* and *Chokolingo* (supra).

[42] As I have noted, in *Rosenbauer*, Twomey–Woods JA expressed the view that the March 2022 Court of Appeal judgment was wrongly decided; this primarily on the basis that the Court of Appeal does not have power to re-open an earlier decision, although she was also of the view that, assuming the Court had the power to do so, its decision was wrong on the merits. As I have emphasised, I am concerned only with whether the Court of Appeal had the power to do what it did.

[43] On the approach of Twomey–Woods JA, *Marzorcchi* was also wrongly decided and the views expressed in *Belmont* were wrong.

[44] At the heart of the reasoning of Twomey–Woods JA was what she saw as the limited jurisdiction conferred on the Court of Appeal by article 120 of the Constitution. She distinguished *Taylor v Lawrence* and *Smith v R* (supra) on the basis that the United Kingdom and New Zealand do not have written constitutions that govern the jurisdiction of their Courts of Appeal. In her view, any challenge by Vijay to the October 2020 Court of Appeal judgment could only be by way of petition to the Constitutional Court. One of her colleagues (Tibatemwa-Ekirikubinza JA) agreed with her approach. The third (the President) disagreed in the reasoning but concurred in the result (which was not to re-open the earlier judgment).

[45] In his argument before us, Mr Rouillon in effect adopted the approach of Twomey JA.

Analysis

[46] Virtually all cases in which the existence of an implied power to re-open decisions has been specifically addressed support the existence of an implied power to set-aside judgments for serious procedural irregularity. This line of authority mainly comes from England and Wales and New Zealand but there are a number of Seychellois judgments, including *Marzorcci*, *Belmont* and *Simeon* that are to the same effect. Indeed, as Mr Georges for Vijay contended, *Rosebauer* is, on this issue, very much an “outlier”.

[47] I propose to follow the preponderance of Seychellois authority on this issue. There are, however, also other factors that support a conclusion that the Court of Appeal has such a power.

[48] Providing such a power is exercised in a sufficiently sparing way, so that resort to it is confined to truly exceptional circumstances, its existence does not destabilise the finality of judgments. This is evidenced by the significance accorded to finality in the courts of England and Wales and New Zealand.

[49] As will be apparent, section 12(3) of the Courts Act is supportive of the view that a similar power is vested in this Court. The English Court of Appeal’s power to re-open

earlier decisions can only be incidental to its jurisdiction to hear and determine appeals. The extension by section 12(3) to this Court of the powers of the English Court of Appeal is most easily construed as encompassing this power.

[50] While it is true that the United Kingdom and New Zealand are not subject to written constitutions, legislatively conferred jurisdiction to determine appeals is as binding on English and New Zealand courts as the grant by article 120 of the Constitution of similar jurisdiction on this Court. The judges in the English and New Zealand, cases in which an implied power was recognized were not claiming to be entitled to go beyond their statutorily conferred jurisdiction. Rather, they took the view that the jurisdiction to determine appeals encompasses, by implication, a power to re-open and re-determine appeals in the very rare circumstances in which this is required in the interests of justice. Whether this is correct involves a question of interpretation and I do not consider that the fact that the jurisdiction-conferring provision is constitutional rather than legislative supports the adoption of a more narrow view of the powers of the Court, as I will now explain.

[51] The courts are subject to the Constitution. Leaving aside for the moment, the possibility of resort to the Constitutional Court, the absence of a power to revisit decisions arrived at unjustly in a court of final appeal, such as this Court, creates the potential for serious injustice. A conclusion that a breach of constitutional rights by the Court of Appeal cannot be addressed would leave a lacuna that would not be consistent with the promotion of the rights guaranteed by the constitution.

[52] Resort to the Constitutional Court in relation to Court of Appeal judgments, as postulated by Twomey-Woods JA, would be inconsistent with the line of authority to which I have referred precluding the Constitutional Court entertaining collateral challenge to the substance of Court of Appeal judgments.

[53] Such resort would, in any event, not be a satisfactory response to the risk of injustice and the lacuna just identified; this because: (a) the availability of such resort would be as destabilizing to the finality of judgments as a power for the Court of Appeal to re-open its own judgments; and (b) a requirement to go first to the Constitutional Court and then to

the Court of Appeal would be a round-about way of addressing issues that can be more simply resolved by application direct to the Court of Appeal. In this respect, I consider that the desirability of a second appeal is outweighed by the importance of promoting finality.

[54] A further factor of concern to me is that Eastern, by advancing its constitutional challenge before us, is now asking us to set-aside the March 2022 Court of Appeal judgment, a position that sits awkwardly with its primary contention in respect the same judgment that the Court of Appeal was not entitled to set aside the October 2020 Court of Appeal judgment.

Conclusion

[55] Given that the preponderance of international and Seychellois authority supports the existence of a power to re-open decisions and my view that such a power, properly exercised in an extremely sparing way, promotes, rather than diminishes, constitutional rights, I hold the Court of Appeal has jurisdiction to re-open its judgments.

Young JA

Signed, dated, and delivered at Ile du Port on 21 October 2022.