

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 17 (26 April 2023)
SCA MA 23/2020,
(Arising out of SCA 28/2020, CS
23/2019 and SCA 15 & 18/2017))

SCA MA 44/2022
(Arising out of SCA MA 23/2020,
SCA 28/2020 and CS 23/2019,

And SCA MA 09/23
(Arising out of SCA 28/20 and
CS 23/2019)

In the matter Between:

Vijay Construction (Pty) Ltd

Applicant

*(rep by Mr. John Campbell, QC, together
with Mr. Bernard Georges)*

versus

Eastern European Engineering Ltd (EEEL)

Respondent

(rep by Mr. Basil Hoareau)

And

Vijay Construction (Pty) Ltd

Applicant

*(rep. by Mr. John Campbell, QC, together
with Mr. Bernard Georges)*

versus

Eastern European Engineering Ltd (EEEL)

Respondent

(rep. by Mr. Basil Hoareau)

Neutral Citation: *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd (EEEL)*
SCA MA 23/2020 (Arising out of SCA 28/2020, CS 23/2019 and SCA 15 &
18/2017) - SCA MA 44/2022 (Arising out of SCA MA 23/2020, SCA
28/2020 and CS 23/2019) and SCA MA 09/2023 (Arising out of SCA
28/2020 and CS 23/2019) [2023] SCCA 17 (26 April 2023)

Before: Fernando, President; Twomey-Woods; Tibatemwa-Ekirikubinza, JJA.

Summary: The motion to rehear the appeal in SCA 58/2022 is dismissed with costs to
the Respondent.

The motion to re-hear SCA 15 and 18 of 2017 is dismissed with costs to the Respondent.

Heard: 18 April 2023.

Delivered: 26 April 2023

ORDER

The judgment of the ad hoc Court in SCA 58/2022 delivered on 21 October 2022 is upheld.

The judgment of this Court in SCA 15&18 of 2017 is upheld.

The application for stay of execution of the judgment of the Supreme Court, CS 23/19 is dismissed.

Costs of the applications are granted to the Respondent.

RULING

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA. (Fernando, President, Twomey-Woods JA concurring)

Preliminaries

1. On 24 January 2023, Counsel for the Applicant – Mr. Georges – moved this Court by way of Notice of Motion to take up for hearing a motion he had filed on the Applicant’s behalf on 4th November 2020. That motion sought an order to declare the judgment of the Supreme Court (before *Carolus J*)¹ null and void because it was proliferated with several procedural irregularities. Counsel Georges also informed Court of another motion he intended to file to stay the execution of the judgment of the ad hoc Court of Appeal/*de novo* appeal² and have the case reheard.
2. Counsel for the Respondent – Mr. Basil Hoareau – objected to the course of action taken up by the Applicant’s counsel on filing numerous motions and proposed to have the motions consolidated.
3. On 7th February 2023 at 11:00a.m, the President of the Court (Fernando A) reconvened the Court for mention of the matters and informed both counsel that the substantive

¹ CS 23/2019

² SCA 58/2022

application filed by the Applicant was scheduled for hearing in the April court session. He therefore directed the parties to file all the motions and their respective submissions in preparation for the session. He further directed that for proper case management, the motions would be taken up by a full Coram instead of him sitting as a single judge.

4. Indeed, on 18 April 2023, the full Coram took up the matters for hearing. In accordance with **Section 106 of the Seychelles Code of Civil Procedure**, the motion for declaration of the Supreme Court judgment by *Carolus J* as null and void was consolidated with the motion for stay of execution and rehearing of the judgment of the ad hoc Court of Appeal/*de novo* appeal.
5. The motion is an application for orders that:
 - (i) **This Court suspends its judgment of 2 October 2020 in SCA 28/2020 and its judgment of 21 October 2022 in the de novo appeal³;**
 - (ii) **Stay of execution of the Supreme Court judgment of 30 June 2020 in CS 23/2019 and its judgment of 21 October 2022;**
 - (iii) **Rehear the appeal in SCA 28/2020 by taking up for hearing ground 4 of the additional grounds therein, which this Court did not consider in the de novo hearing.**

Background Facts.

6. The background facts to this application/motion are that the Applicant (Vijay Construction (Pty) Ltd., hereinafter referred to as Vijay) and the Respondent (Eastern European Engineering Ltd., hereinafter referred to as EEEL) entered into six contracts to construct a hotel.
7. It was a term of the executed contracts that in case of any disputes, recourse would be made to arbitration under the Rules of Arbitration of the International Chamber of

³SCA 58/2022

Commerce (ICC) in Paris. Subsequently, disputes arose which were referred to an arbitrator in accordance with the said Rules.

8. Following the arbitration proceedings, on 14 November 2014, the arbitrator held in favour of EEEL and awarded it €15,963,858.90 damages together with costs.
9. Vijay challenged the arbitral award before the French Court de Cassation and made a prayer to have the award set aside. The French Court dismissed Vijay's application and confirmed the award. Subsequently, Vijay appealed to the Court of Appeal in France against the decision dismissing its case but later abandoned pursuit of the appeal.
10. On 18 August 2015, EEEL made an ex parte application before Cooke J (High Court of England) for leave to enforce the award given in its favour. Cooke J allowed the application.
11. On 23 October 2015, Vijay applied to set-aside Cooke J's decision as well as the order and on 14 June 2016, Flaux J stayed Vijay's application pending determination of the French proceedings. On 6 November 2017, Andrew Baker J lifted the application to set aside the judgment and orders of Cooke J. The application was then heard by Cockerill J on 8 and 9 October 2018. In a reserved judgment delivered on 11 October 2018, Cockerill J dismissed the set-aside application.
12. At about the same time, EEEL directly applied to the Supreme Court in Seychelles *vide CC 33/2015* for recognition and enforcement of the arbitral award in Seychelles. This matter was handled by Fiona Robinson J (as she was then) who *inter alia* held – on 18 April 2017 - that although the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 was not applicable in Seychelles, the arbitral award was enforceable in Seychelles under Section 4 of the Courts Act.
13. On 13 December 2017, Vijay appealed against Robinson J's judgment to the Seychelles Court of Appeal *vide SCA 15 & 18 of 2017*. The Court of Appeal held in favour of Vijay

and overturned Robinson J's judgment. The Court of Appeal held that Section 4 of the Courts Act did not confer on the Supreme Court the substantive jurisdiction of the High Court of England and Wales in relation to the enforcement of foreign awards because Seychelles was not a party to the New York Convention under which enforcement of the award was sought.

14. Subsequently, on 31 January 2019, EEEL applied to the Seychelles Supreme Court to register a charging order made by a Deputy Master of the Queen's Bench Division of London. The said charging order was made in respect of securities held by Vijay as a portfolio out of which money would be realized to pay off the decretal sum given in the arbitral award. Furthermore, the Deputy Master ordered Vijay to pay EEEL the costs that it had incurred in bringing the application for a charging order.
15. The application to register the charging order was handled by Carolus J who *inter alia* held as follows:
 - (i) *It was just and convenient that the Costs Ordered by the Deputy Master Kay QC dated 10th April 2019 should be enforced in Seychelles, in terms of section 3(1) of the Reciprocal Enforcement of British Judgments Act (REBJA) ... as if it had been an Order originally obtained or entered up on the date of this judgment;*
 - (ii) *Pursuant to Section 3(3)(b) of the REBJA, this Court shall have the same control and jurisdiction over the said Order as it has over similar judgments given by itself, but only insofar as relates to execution of the Order, under section 3 of the REBJA;*
 - (iii) *Pursuant to Section 3(3)(c) of the REBJA, the reasonable costs of and incidental to the registration of the Order (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[Vijay].*

16. Dissatisfied with Carolus J's decision above, Vijay appealed to the Seychelles Court of Appeal. After the initial hearing of the appeal but before judgment was delivered, there was difference of opinion among the members of the Court as to whether the President of the Court of Appeal had the power to unilaterally reconvene the hearing of the matter and raise issues in relation to the appeal that had not been advanced by the parties at the initial hearing. Although the Court was reconvened, in writing their judgments, the two judges who opined that the President of the Court did not power to unilaterally reconvene the Court disregarded the additional submissions that were tendered by the parties addressing the questions raised by the President *suo moto*.
17. The final judgment by the majority justices dismissed Vijay's appeal. The President of the Court wrote a minority dissent judgment in which he allowed Vijay's appeal.⁴
18. On 10 October 2022, an ad hoc panel of 3 new Justices viz (Anderson JA, Young JA and Singh JA) was set up to rehear the appeal *de novo* as well as all the applications touching the appeal. The hearing by the new panel commenced on 14 October 2022.
19. Vijay raised 9 grounds in its Notice of Appeal but subsequently sought the leave of the court to have these grounds amended by adding 6 new grounds. The 9 grounds were as follows:
 1. *The application of the Respondent, then Plaintiff, was brought under the wrong legal provision (section 3 of the Reciprocal Enforcement of British Judgments Act) which had been replaced by section 9 of the Foreign Judgments (Reciprocal Enforcement) Act and, as a consequence, (i) was bad in law and (ii) should have been summarily dismissed by the Trial Court.*
 2. *The Learned Trial Judge erred [at paragraphs 80 and 154] in finding that a back-door entry to enforce an unenforceable award was just and convenient in a situation where the attempt was a clear flouting of a judgment of the Court of*

⁴ SCA 28 of 2020.

Appeal

3. *The Learned Trial Judge erred in her finding [at paragraphs 55-56] that the Cooke and Cockerill Orders were judgments within the definition of the word in the Recognition And Enforcement of British Judgments Act.*
4. *The Learned Trial Judge erred [in paragraphs 63-65] in emphasizing the fact that the Appellant had had a money award made against it and that that had been recognized numerous times without remarking that this had never been disputed and that her duty was not to achieve moral fairness but to apply the law as it stood.*
5. *The Learned Trial Judge erred [in paragraph 76] in dismissing the authority of Rosseel and failing to realize that the authority was applicable to the Seychelles Court, which was being asked to enforce rights which had been determined by another tribunal outside the jurisdiction, which was precisely the case in Rosseel.*
6. *The Learned Trial Judge erred in finding [at paragraph 90] that the roundabout route taken by the Respondent in seeking to enforce an unenforceable award through the process of a British judgment could not be faulted because of the 'change of the Seychelles position' through its accession to the New York Convention. In doing so, and in surmising [in paragraph 91] that the Respondent could now possibly seek to enforce the award directly, the Learned Trial Judge showed that her whole judgment was predicated, not on the law as it stood at the time of the hearing in 2019 but on the law as she interpreted it while preparing her judgment without having given the parties an opportunity of disabusing her of her view.*
7. *The Learned Judge erred in failing to provide the Defendant with an opportunity to address the issue of 'back-door- entry' due to Seychelles' ratification of the New York Convention and in concluding that 'it can no longer be argued that the*

enforcement of arbitral award would be unconstitutional, unconscionable and contrary to public policy as since 2020 Seychelles is a party to the New York Convention and foreign arbitration awards are capable of being enforced' [paragraph 89). This failure to provide a procedural opportunity is a breach of natural justice, as the Appellant would still argue that, in the unique circumstances of the case, the enforcement of the arbitral award would be unconscionable and contrary to public policy, and in breach of legitimate expectation.

*8. The Learned Trial Judge erred, having accepted that the British Orders were in the form of executory orders, in dismissing the submission *exequatur sur exequatur ne vaut* or similar arguments regarding double *exequatur*.*

9. The Learned Trial Judge erred in failing to apply the provisions of section 2A of the English Foreign Judgments (Reciprocal. Enforcement) Act to the matter.

20. Having been granted leave to amend the grounds of appeal, Vijay, in addition to the 9 grounds, raised 6 new grounds of appeal as follows:

1. The petition of the Respondent to the Supreme Court seeking leave to have the 2015 Cooke J Order registered in the Court of Seychelles was made out of time in that the period of twelve months within which it ought by law to have been made had expired and no application for extension of time had been brought by the Respondent, or an extension granted by the Court.

2. The Supreme Court erred in granting the relief sought by the Respondent in the 2015 Cooke J Order produced to be registered and was neither an original, nor a validated or certified or otherwise duly authenticated copy, as required by the law, but a copy certified by a Seychelles Notary who was not proved to have had access to the original order. In any event, the Orders sought to be registered had not been annexed to the Plaint, as required by law, and the action should have been summarily dismissed for that omission.

3. *The Respondent used the wrong procedure to bring the action seeking registration of the 2015 Cooke J Order and based its application on the wrong legal provision.*

4. *The pre-conditions for the court to exercise its powers to permit the issue for the initiating Plaintiff at the ex parte stage were not met because (a) neither the original England High Court Orders nor duly authenticated or certified copies were filed in the Supreme Court of Seychelles (b) twelve months' time limit had expired without any extension having been sought from or granted by the Court and (c) there was a fundamental and material procedural failure caused in and/or induced by the omission on the part of the Respondent's representative to disclose to the Court the applicable legal and procedural requirements and/or (d) the judgment of Carolus J is unsafe because of a proliferation of procedural irregularities of which the Honourable Judge was not made aware or which were not considered by the Judge.*

5. *One or more of the matters set out in paragraphs 1 to 4 above compromised the integrity of the judicial process in Seychelles and/or constituted abuse of the powers of the Seychelles Court, such as to enjoin or justify the refusal of the enforcement order sought as a matter of Seychelles public policy and/or discretion because it is not just to grant such order in the circumstances of the case.*

6. *Further, and in any event, the resort to the Supreme Court for permission to execute orders arising from Paris arbitration award via a British court mechanism after the substantive and definitive refusal by the Seychelles Court of Appeal to recognize that same award is (a) an abuse of process generally, (b) an impermissible subversion of that refusal by way of a collateral challenge, and/or (c) precluded by the principle established in Henderson v Henderson (1843) 3 hare 100 that a party is not to be harassed by staggered and fragmented suits in a court of justice.*

21. The ad hoc court agreed with the decision of Carolus J. It upheld her judgment and dismissed Vijay's appeal.⁵ The ad hoc court also awarded costs in favour of EEEL.
22. Vijay was dissatisfied with the ad hoc Court of Appeal decision on the basis that it did not address Ground 4 of the amended Notice of Appeal. It therefore brought an application before this Court praying that the judgment of the ad hoc court delivered on 21 October 2022 be reheard by taking up for hearing ground 4 which was not addressed by the ad hoc Court. Vijay also prayed that this Court suspends the judgment of Supreme Court in CS 23/2019 and grants an order of stay of execution of the judgment given by the ad hoc Court. This Ruling is the result of the Court's determination of these applications.

I. Motion to re-hear SCA 58 of 2022.

The Affidavit of Vijay

23. The application is supported by the affidavit of Vishram Jadva Patel – the Director of the Applicant Company – Vijay Construction (Pty) Ltd in which he averred as follows:

(i) On 30 June 2020, in CS 23/19, the Supreme Court ruled that two Orders of the High Court in London could be executed in Seychelles and proceeded to enter judgment in favour of EEEL 'in accordance with the Order of Mr. Justice Cooke dated 18th August 2015' and then proceeded to enter judgment in identical terms to that Order.

(ii) Against this judgment, Vijay appealed to the Seychelles Court of Appeal.

(iv) By a majority judgment on 2 October 2020, in SCA 28/2020, the Court dismissed Vijay's appeal.

(v) On 4 November 2020 Vijay filed two motions seeking to set aside the judgment of this Honourable Court in SCA 28/2020:

⁵ SCA 58/2022

a. One, marked MA 23/2020, seeking to hear the grounds on the merits which had been canvassed in a previous appeal in 2017 but which this Honourable Court had not considered because it had allowed Vijay's appeal on a legal ground;

b. One, marked MA 24/2020, seeking a rehearing of the 2020 appeal on the ground of a procedural irregularity where two members of the Court had failed to participate with and engage in arguments levelled by Vijay.

(iii) This Court took the motion in MA 24/2020 into consideration and, after ruling that it had the power to set aside its own judgment and rehear the appeal, appointed an adhoc court to hear the appeal de novo.

(iv) On 21 October 2022, after hearing the appeal, the ad hoc court found for EEEL and dismissed Vijay's appeal.

(v) At the hearing of the appeal de novo, Vijay applied for the amendment of its grounds of appeal by adding new grounds. The Court granted the application and a number of new grounds were taken up for hearing.

(vi) One of the new grounds of appeal was ground 4 which states:

'The pre-conditions for the court to exercise its powers to permit the issue of the initiating Plaintiff at the ex parte stage were not met because-

(a) *neither the original England High Court Orders nor duly authenticated or certified copies were filed in the Supreme Court of Seychelles*

(b) *the twelve months' time limit had expired without any extension having been sought from or granted by the Court and*

(c) *there was a fundamental and material procedural failure caused and/or induced by the omission on the part of the Respondent's representative to disclose to the Court the applicable legal and procedural requirements and/or (d) the judgment of Carolus J is unsafe because of a proliferation of procedural irregularities of which the Honourable Judge was not made aware or which were not considered by the Judge.*

(vii) I am informed by the legal advisers of Vijay and verily believe that, despite the Court having agreed to include ground 4, and despite the Court having taken it under consideration, the Court did not consider the merits of the ground in its judgment. I point to page 6 of DOC 1 where the Court clearly refers to the ground as a live ground, and to the rest of DOC 1, where the Court clearly does not return to a consideration of the ground.

(viii) I am informed by the legal advisers of Vijay and verily believe that that ground, other than for paragraph (b) thereof, was never abandoned by Vijay at the hearing of the appeal de novo.

(ix) I am informed by the legal advisers of Vijay and verily believe that the ground had excellent chances of succeeding and that, but for the fact that it was not considered by the Court, the outcome of the appeal would have been favourable to Vijay as that ground set up a duty fundamental on the Court to be satisfied as to the quality of the documents before it, and not on Vijay.

(x) I am informed by the legal advisers of Vijay and verily believe, as iterated by the Court itself, that a party coming before the Court has a legitimate expectation that all its arguments will be considered and disposed of and that, if that does not occur, a procedural irregularity occurs which can only be cured by a rehearing of the matter.

(xi) I verily believe that, in the circumstances of this lapse by the Court, the Court has no option but to take this matter up for rehearing and consider, and rule on ground 4.

(xii) For the foregoing reasons I verily believe that it is urgent and necessary that this Honourable Court take this motion, including the application for a stay of execution, for urgent hearing.

EEEL's Affidavit in Reply

24. EEEL opposed the application and filed an affidavit in reply sworn by Vadim Zaslouov, a director of EEEL, who deponed as follows:

1. By filing the present notice of motion, it is apparent that Vijay Construction (Pty) Ltd (hereinafter the Applicant) is -

(a) desperately attempting to avoid and evade the execution of the Supreme Court judgment of 30th June 2020 - in CS 23/2019 - and the judgment of this Honourable Court of 21 October 2022, in SCA 28/2020 (hereinafter collectively referred to as the judgments); and

(b) desperately attempting to protract the issues and disputes, which are the subject matters of the judgments, unnecessarily, and to prevent the said disputes and issues from being brought to a finality.

2. The Applicant was content with the judgment of this Honourable Court in SCA 15 and 18 of 2017 and did not apply to set aside the said judgment. It was only after the judgments had been delivered against the Applicant by the Supreme Court and this Honourable Court, respectively in SC 23/2019 and SCA 28/2020, that the Applicant belatedly and, as an afterthought, filed MA 23/2020. As a matter of fact, MA 23/2020 was filed 34 months after the delivering of the judgment in SCA 15 and 18 of 2017. The judgment in SCA 15 and 18 of 2017 was delivered on 13 December 2017, whilst motion MA 23/2020 was filed on 4 November 2020.

3. Moreover, after this Honourable Court set aside its initial judgement – delivered against the Applicant, in SCA 28/2020- the Applicant did not take any steps to request and cause this Honourable Court to hear and determine MA 23/2020. Indeed, the Applicant was content with the decision of this Honourable Court to set aside its judgment and to hear the appeal de novo.

4. Prior to the hearing of the appeal de novo in SCA 28/2020 in October 2020, the case was called and the following miscellaneous applications, were heard and determined by the Court of Appeal -

(a) an application by the Applicant for leave to amend its grounds of appeal, which application was granted; and

(b) an application by the Respondent to stay proceedings in respect of the de novo hearing of the appeal, which application the Applicant strenuously opposed and was dismissed.

5. The Applicant did not raise any issue, before the bench of the Court of Appeal hearing appeal in SCA 28/ 2020 de novo, in respect of MA 23/2020 but was willing and keen for the de novo appeal to be heard, as evidenced by the fact that the Applicant strenuously opposed the Respondent's application for a stay of proceedings in respect of the de novo hearing of the appeal.

6. It is evident that the Applicant is raising and making an, issue regarding MA23/2020, simply due to the fact that this Honourable Court dismissed the Applicant's appeal and upheld the Supreme Court judgment in CS 23/2019, in the de novo hearing of the appeal.

7. I have been informed by Attorney-at-Law Basil Hoareau and verily believe that the present notice of motion is -

(a) an abuse of process; and

(b) frivolous and vexatious.

8. Furthermore, I have been informed by Attorney-at-Law Basil Hoareau verily believe that, on the basis of the averments contained in the affidavit of Mr. Kaushalkumar Patel and my affidavit that -

(a) the Applicant is estopped from instituting the present Application; and/or

(b) the Applicant is deemed to have waived its rights, if any, in respect of MA 23/2020.

9. Moreover, I have been informed by Attorney-at-Law Basil Hoareau and verily believe that the affidavit of Mr. Kaushalkumar Patel is defective and not in accordance with the law.

10. The present application is part of the grand scheme of things by the Applicant, to avoid and obstruct the enforcement of the judgments in CS 23/2019 and SCA 28/2020, which includes the Applicant causing two individuals to purchase, for and on its behalf, the movables seized and sold in execution of the said judgments.

25. The Respondent prayed that the Notice of Motion be dismissed with costs in its favour.

Court's Consideration

26. I have read the documents filed in support of the Application for a re-hearing of the appeal in SCA 28/2020 and taking up the hearing of ground 4. I read the documents filed in opposition to the application. I also listened carefully to the oral arguments of Counsel from both sides.

27. I have methodically gone through the written submissions filed for the de novo hearing. I have meticulously studied the transcript recording of what transpired during the hearing of the appeal by the ad hoc panel of this Court.

28. What I note is that in resolving the appeal, the Court by and large answered the grounds in the order they were argued by the Appellant. The written submissions of the Appellant indicated what he referred to as the roadmap that would be followed in arguing the appeal – 1, 2,3, 5, 6 &7, 8. In the written submission, the Appellant also stated that Ground 4 (a) and 4 (b) would not be pursued. The Court in its judgment resolved the grounds in the following order – 1&3, 6&7, 5, 8, 7, 2.

29. A reading of the filed submissions reveals that Ground 4 was not argued. A reading of the transcribed proceedings of the oral presentations reveals the same pattern. During the

hearing of the motion to open the Court's Judgment for a hearing of the ground, the Appellant's Counsel conceded that Ground 4 was neither argued orally nor in the written submissions.

30. It was nevertheless the argument of Counsel for the Applicant that since the Appellant had not expressly withdrawn the ground, the ground remained alive. That the effect of the matter not having been taken up by the Court was to rob the litigant of the opportunity of having the matter resolved. That the ground was of utmost importance. It was core and at the heart of the case and there was a high likelihood that if the Court had considered the ground, the appeal would have been resolved differently.
31. Counsel for the Applicant conceded that the primary obligation of arguing a ground before court lies on the party who formulated it but argued that there is a parallel duty on the court to take up a ground which has not been abandoned, and either reject or accept it or invite the parties to a discussion about it. That a court cannot infer that a ground has been abandoned. Abandonment of a ground must be expressly done. That equity demands of this Court to bring back the matter for a re-hearing.
32. The Respondent opposed the motion/application. In response to the arguments of the Applicant, the Respondent averred *inter alia* that during the hearing of SCA 28/2020 the Applicant did not raise any arguments regarding the failure by the Respondents to file the original England High Court Orders or duly authenticated or certified or certified copies in the Supreme Court. That the Applicant did not, either in its heads of argument or during the hearing advance any arguments in respect of any material procedural failures or proliferation of procedural irregularities before the Supreme Court which could have affected the judgment of Carolus J. except that the application was wrongly instituted under the Reciprocal Enforcement of British Judgments Act, instead of under the Foreign Judgments (Reciprocal Enforcement) Act. The Respondent argued that the application was aimed at preventing the dispute from being brought to a finality. The Notice of Motion by the Applicant was filed almost four months after the judgment of the Court in the de novo hearing of the appeal was delivered.

33. That furthermore the Notice of Motion was filed more than three months after the Respondent had taken steps to execute the judgments. The Respondent attached to its affidavit a copy of a letter dated 25th October 2022 written by its Counsel requesting the Registrar of the Supreme Court to proceed with the execution of the judgments.
34. The Respondent averred that the application was an abuse of process, frivolous and vexatious and should be dismissed with costs.
35. I am not persuaded by the arguments of Counsel for the Applicant that there is a parallel duty on the court to take up a ground which has not been argued by an appellant. In an adversarial system, the judge is a referee in the adjudication process and their role is to ensure the fair play of due process. It must be presumed that the choice exercised by a party - to not argue a ground - is evidence that the party does not consider it important for the disposal of the appeal.
36. It is in the interest of Justice that there be finality to litigation. This is an overarching objective of the legal system. Review of a judgment should be available only in exceptional circumstances and not for considering matters a party chose to ignore.
37. But there is another reason why this application must fail. And this is because of the delay with which the Appellant came to court. The law does not specify the time period within which a party dissatisfied with a decision of the Court of Appeal must file their application for a re-opening of the matter. The Rules of the Court are silent. This is perhaps because a re-hearing or review of a judgment of a court of last resort is and should be a rare occurrence. It was the submission of Counsel for the Applicant that the determinant should be whether the application was filed within reasonable time from the delivery of the impugned judgment. That although a notice of appeal from a decision of the Supreme Court to the Court of Appeal must be filed within 30 days from the judgment of the lower court, 30 days should not be defined as the maximum limit of reasonable time for an application such as the one before court. That “reasonable time” is open and it is the court which should, after considering all the circumstances pertaining to the case before it, decide whether it can be said that there has been inexcusable delay.

38. It is my considered view that a motion filed beyond the 30 days' period set for an appeal is not filed within reasonable time. And in the circumstances of this case, the application was not only filed almost four months after the judgment of the Court was delivered, but more than three months after the Respondent had taken steps to execute the judgments.

39. The application to re-hear SCA 58 of 2022 is dismissed with costs to the Respondent.

II. MA 23 of 2020 to re-hear SCA 15 &18/2017.

40. I now proceed to deal with Application to re-hear SCA 15 &18 of 2017.

41. On 13 November 2020 the Applicant, Vijay Construction (Pty) Ltd, filed a motion seeking that this Court suspends its judgement of 2 October 2020 in SCA 28/2020 which dismissed Vijay's appeal; stay execution of the Supreme Court judgment in CS 23/2019 handed down by Carolus J and that this Court hears grounds number 2, 4,5 and 7 of Vijay's appeal in SCA 15 and 18 of 2017.

42. The motion was supported by an affidavit by Kaushalkumar Patel, a director in the Applicant Company.

43. The Respondent filed an affidavit by its Director Vadim Zaslonov on 14 April 2023, opposing the motion.

Vijay's case in support of its application

44. The affidavit in support tendered for the present Application by the Applicant provides a background of litigation between the parties, whose genesis is at the point when there was termination of contracts by EEEL and due to different positions taken on it, the parties subjected themselves to arbitration pursuant to an arbitration clause. The arbitration proceedings went ahead, conducted by a sole arbitrator appointed by the International Chamber of Commerce (ICC) in Paris. These proceedings resulted in an award in favour

of EEEL ordering the payment of € 13.6 million plus interest, by Vijay. This award was unsuccessfully appealed against by Vijay in the Tribunal de Grande Instance in Paris. A second appeal was instituted in the Paris Court d'Appel by Vijay but was withdrawn before it was heard.

45. It is averred that in June 2015 EEEL filed an application via CC 33/2015, for registration and enforcement of the award before the Supreme Court of Seychelles. That Vijay countered with a defence seeking that the award be set aside on a number of grounds.
46. It is averred that in August 2015, EEEL also filed an application before the High Court of England to render the arbitral award executory in Britain (the enforcement territory) and France (the *locus arbitri*), both States being parties to the New York Convention. That the premise on which this was done was that Vijay has assets in Britain against which the award was sought to be enforced. On 18 August 2015 the High Court in England granted leave to EEEL to enforce the arbitral award, and gave Vijay 14 days to apply to set aside the order granting leave. It is averred that Vijay applied to set aside the order and this was dismissed.
47. In respect of the earlier mentioned suit in the Supreme Court, namely CC 33/2015, Robinson J (as she was then) delivered her judgment in favour of EEEL, rendering the arbitral award enforceable in Seychelles and ordering the registration and enforcement of the award in Seychelles. The judge dismissed Vijay's set-aside grounds.
48. Vijay appealed against the judgment of Robinson J (in CC 33/2015). The appeal was on grounds of law and facts. The appeal which was registered as SCA 15 and 18 of 2018 and was heard by Renaud, Burhan and Govinden JJA is the subject of this present motion.
49. It is averred that in SCA 15 and 18 of 2018, the Court of Appeal allowed the appeal on a ground of law to wit that the legal substance underpinning the application by EEEL to register and enforce the award in Seychelles was lacking because Seychelles was not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The court did not consider the other, factual grounds of appeal canvassed

by Vijay. It stated: “In view of our conclusion here above, there is no necessity to consider the other grounds of appeal.”

50. Vijay’s application in the High Court of England to set aside the arbitral award was heard in October 2018 and on 11th October 2018, it was dismissed.
51. In early 2019, EEEL filed the civil suit CS 23/2019 in the Seychelles Supreme Court under the Reciprocal Enforcement of British Judgments Act seeking to render the 2015 and 2018 Orders of the High Court in England executory (enforceable) in Seychelles.
52. Vijay defended the suit citing numerous legal and factual reasons why the Supreme Court could not hold with EEEL. However, on 30 June 2020 a judgment was given in favour of EEEL and the Supreme Court ruling that the two Orders of the High Court of England could be executed in Seychelles. The court entered judgment in identical terms to the Order of Mr. Justice Cook dated 18th August 2015.
53. Dissatisfied with the 30 June 2020 judgment, Vijay appealed to the Seychelles Court of Appeal. This resulted in a majority judgment on 2 October 2020 in SCA 28/2020 dismissing the appeal.
54. Against this background, it is averred that dismissing Vijay’s appeal in SCA 28/2020 without having heard the appeal of Vijay in SCA 15 and 18 of 2017 on its merits, the Court of Appeal contravened the right to Vijay to a fair hearing as provided by Article 19 (7) of the Constitution.
55. It is further averred that by virtue of not hearing Vijay in SCA 15 and 18 of 2017, the Court of Appeal deprived Vijay the opportunity to have the arbitral award set aside as opposed to simply declaring that it was not enforceable. And therefore in hearing and also dismissing the appeal in SCA 28/2020 without having heard SCA 15 and 18 of 2017 on its merits, the Court of Appeal contravened Vijay’s right to a fair hearing provided in Article 19 (7) of the Constitution.
56. With the above, Vijay considers that the only way of redressing the matter is for the Court of Appeal to suspend its judgment of 2 October 2020 in SCA 28/2020, stay the execution

of the Supreme Court judgment in CS 23/2019 and rehear the remaining grounds of Vijay in SCA 15 and 18 of 2017.

EEEL's case opposing the application

57. An affidavit in reply dated 14 April 2023 opposing the application is tendered by the Respondent through its Director Vadim Zaslouov. It is averred that the present motion demonstrates that Vijay is desperately attempting to avoid and evade execution of the Supreme Court judgment on 30 June 2020 in CS 23/2019. Similarly, it is averred that Vijay is desperately attempting to protract the issues and disputes which are subject matters of the judgment, and to prevent the disputes to be brought to finality.
58. It is averred that it cannot be said that the Court of Appeal in its proceedings in SCA 15 and 18 of 2017 violated any principles of natural justice. That Vijay was content with the outcome in the said appeal until judgments were delivered against it in CS 23/2019 and SCA 28/2020 and thus belatedly and as an afterthought filed the present motion. That the present motion was filed on 4 November 2020, 34 months after delivery of the judgment in SCA 15 and 18 of 2017 delivered on 13 December 2017.
59. It is averred that even when this Court set aside its October 2020 judgment in SCA 28/2020 and ordered an appeal de novo, Vijay did not take any steps to request and cause this Court to determine MA 23/2020. That in the circumstances, Vijay was content with the setting aside of the October 2020 judgment and ordering an appeal de novo.
60. In addition to the above, it is averred that the present motion has now been overtaken by events because SCA 28/2020 was not only set aside but further subjected to the appeal de novo. And that prior to the appeal de novo, other applications – namely leave to amend grounds by Vijay and stay of proceedings by EEEL – were filed. That in all this, Vijay did not raise any issue before the de novo Court in respect of MA 23/2020 but was willing and keen to have the hearing of the de novo proceed. It is averred that such keenness on the part of Vijay is demonstrated by its strenuous opposition to EEEL's application for stay of the de novo proceedings, and the affidavit opposing the stay of proceedings is attached hereto.

61. That against this background, it is clear that Vijay is raising and making an issue regarding MA 23/2020 simply because the appeal de novo upheld the Supreme Court Judgment in CS 23/2019. As such, the present motion is an abuse of process and it is frivolous and vexatious.
62. Apart from being an abuse of process, frivolous and vexatious, EEEL avers that Vijay is estopped from instituting the present motion and is deemed to have waived its rights if any in respect of MA 23/2020. It is further averred that the present motion is ill-founded, out of time and seeking the wrong relief.
63. Finally, it is the position of EEEL that the present application is part of the grand scheme of things by which Vijay, to avoid and obstruct the enforcement of the judgments in CS 23/2019 and SCA 28/2020.
64. With the above, EEEL prays that the motion be dismissed with costs.

Court's Consideration.

65. In determining the application, I have been guided by several questions:

Do exceptional circumstances exist to warrant a re-hearing of a matter already determined by the Court?

Was the Application to re-hear an appeal brought within reasonable time?

Do exceptional circumstances exist?

66. Counsel for the Applicant argued that exceptional circumstances exist for the Court to re-hear the 2017 appeal. That it was a procedural irregularity on the part of the Court not to have canvassed all the other grounds which had been argued by the Appellant – now Applicant. That the consequence of the Court's decision not to deal with the other grounds was to deprive Vijay of an opportunity of setting aside the award.
67. It was the further submission of Counsel for the Applicant that the grounds which the Court of Appeal did not determine contained substantive criticism of the Arbitrator's

award and his treatment of the evidence. That had the appeal “gone ahead” it would be a substantive appeal on the merits of the case.

68. Counsel emphasised that if the Court had not limited itself to the point of law and gone ahead to determine the other grounds argued by Vijay on merit, and had found for Vijay and set aside the award, there would never have been an award for Justice Cook to endorse in London. It follows that there would not be a judgment for Justice Carolus to enforce in Seychelles. There would not have been any other judgment because there would be no award left to enforce.
69. That the circumstances of the matter presently before this Court were squarely in line with the judgment of this Court in SCMA 24/2020, delivered on 21st march 2022, which held that this Court has authority, in exceptional circumstances, to reopen a judgment and rehear a matter. That as had happened to SCA28/2020, SCA 15 and 18 of 2017 be set aside on account of a procedural irregularity during the hearing.
70. On the other hand, Counsel for the Respondent argued that the reason for bringing the application under exceptional circumstances for purposes of justifying a re-hearing would not apply in the matter before Court. That during the Court hearing of SCA 15 and 18 of 2017, Counsel Georges for the Appellant (same counsel for the Applicant in this matter) is quoted, on Pages page 2 and 3 of the proceedings to have submitted that if the Court determined the ground on the capacity of the Seychelles Court to recognise and enforce an arbitral award which is not in terms of the New York Convention, that would be the end of the matter. “If I am right that the court has no jurisdiction to enforce this award then that would be the end of the matter. ... if I succeed on this (ground) ... that is the end of the matter and this Court does not need to go further ...” Counsel Georges is quoted to have argued that if the court were to determine the appeal in favour of his client on the basis of jurisdiction, that the court did not have jurisdiction to enforce that arbitral award, there would be no need to continue with other grounds of appeal. So although Counsel went ahead to argue the other grounds, he was aware that the Court would not be obliged to pronounce itself on the remaining grounds if the ground on jurisdiction was determined in favour of the Appellant (Vijay).

71. The essence of the Respondent’s argument is that consequently, Counsel cannot turn round and blame the Court for the course it took.

72. I have read paragraphs 111, 112 and 113 of the judgment and indeed, after resolving the issue on jurisdiction, the Court did not consider other grounds. The Court held as follows:

“111. We therefore hold that the award, referred to herein, is not enforceable in the Seychelles

“112. We therefore proceed to hold as follows: The New York Convention is not applicable to the Seychelles and accordingly Articles 146 to 150 of the Commercial Code have no legal effect.

113. In view of our conclusion here above, there is no necessity to consider the other grounds of appeal.”

73. A court confronted with a dispute between parties focuses on resolving the dispute. If the dispute can be determined by resolving one particular ground, the decision not to interrogate other grounds cannot by any stretch of mind be referred to as a procedural irregularity.

74. The Court in SCA 15 and 18 of 2017 “identified” a ground which had to be resolved, which was essential in reaching a decision and answered that ground – the issue of whether the Supreme Court had jurisdiction to enforce the arbitral award which was the subject of contestation. My appreciation of this course of events can be linked to the legal relevance and value of a case, other than resolving a particular dispute - the value of a decision lies with its ratio *decidendi*, that which the judge openly or implicitly treats as having been essential in reaching the decision.

75. I am not persuaded by the submissions of the Applicant that such course of action was an irregularity in the hearing of the appeal. I am fortified in my view by the fact that the Appellant’s Counsel had in fact urged/invited the Court to take that very course - which they did take.

76. I hold that no injustice was caused to the Applicant. And the Applicant has failed to prove that exceptional circumstances exist for the Court to exercise its discretion and order a re-hearing of SCA 15 and 18 of 2017.

Acted in a timely manner?

77. MA 23/2020, the motion which seeks the Court to hear grounds raised in the 2017 appeal but which the Court had not considered because it allowed Vijay's appeal on a legal ground was filed on 4th November 2020. The impugned 2017 judgment had been delivered on 13th December 2017. It is noted that the motion was filed after delivery of the judgment of this Court in which Vijay first lost its appeal against the decision of the Supreme Court - the later decision in which Carolus ruled that the Order of Mr. Justice Cooke and the Order of Mrs. Justice Cockerill be registered in terms of Section 3 (1) of the Reciprocal Enforcement of British Judgments Act.

78. In answer to the question whether Vijay acted in a timely manner in coming before Court to ask for relief, Counsel for the Applicant argued that until the judgment of Carolus J., Vijay was ahead – had won. The Court (Renaud J.), had ruled that the award could not be enforced. So until then, Vijay had no reason to come to court and ask for a re-hearing of SCA 15 and 18 of 2017 on its merits. That when Vijay lost the case before Carolus J., it appealed against that judgment. Counsel then argued that had Vijay won the appeal against Carolus' judgment, there would be no need to canvas the 2017 grounds. But that it was only when the Ad Hoc hearing found against Vijay, and Vijay was confronted with a judgment on an award in regard to which they had lost an opportunity to have it set aside, that the issue of their lost opportunity in the 2017 appeal to have the Award set aside became alive. That it was after losing in the appeal heard by the ad hoc Court, when the door closed to Vijay completely that the (2017) issue became relevant. That in line with this argument, the time started running after delivery of the ad hoc Court and not way back on 13 December 2017 when judgment in SCA 15 and 18 of 2017 was delivered.

The Respondent

79. Counsel for the Respondent faulted the Applicant for filing the motion on 4 November 2020 - 34 months after delivery of the judgment in SCA 15 and 18 of 2017. The judgment was delivered on 13 December 2017.
80. In opposing the application, the Respondent submitted that at the latest, Vijay could have raised the issue of its “lost opportunity” to have all the grounds raised in SCA 15 and 18 with the de novo Court.
81. Counsel for the Respondent submitted that such an application ought to generally be filed within 30 days of the delivery of the impugned judgment. But even if it were to be taken as an application rooted in the right to a hearing under Article 19 (7) of the Constitution, the time period would be 3 months. But in the matter before Court, it took the Applicant 34 months to file the motion, asking the Court to suspend the 2017 judgment and another judgment which the Court (de Novo) had given in respect of another appeal.
82. Counsel argued that if the application before Court had any merit, the moment the Applicant became aware that the Respondent had obtained two Orders from the High Court of England, they ought to have filed the motion which is the subject of the matter before Court. That even if they had failed at the first opportunity already alluded to, they ought to have filed a motion the moment proceedings to enforce the two Orders commenced before Carolus J. But even when they lost the case before Carolus J, they did not file the relevant motion. Vijay filed the motion only after it lost the appeal in the judgment delivered 2nd October 2020.
83. That at the very least, such inordinate delay should have “compelled” the Applicant to seek leave from the Court, to file the motion out of time and explain to the Court, the reason for the delay. They did not.
84. I opine that by arguing that it was after losing the appeal heard by the ad hoc Court, when the door closed to Vijay completely, that the (2017) issue became relevant, the Appellant lends credence to the argument of the Respondent that Vijay was content with the outcome in the SCA 15 and 18 of 2017 until judgments were delivered against it.

85. I must again emphasize that finality to litigation serves the interest of Justice.

86. In the circumstances of the matter before us, it cannot be said that the Applicant acted within reasonable time.

87. **Conclusion and Orders:** The application to re-hear SCA 15 and 18 of 2017 is dismissed with costs to the Respondent.

88. Having dismissed the applications to re-hear the appeal in SCA 58/2022 and to re-hear SCA 15 and 18 of 2017, the motion to stay execution of the judgment of the Supreme Court in 23/2019 automatically fails.

DR. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA.

I concur

A. Fernando, President

I concur

Dr. M. Twomey-Woods, JA

Signed, dated and delivered at Ile du Port on 26 April 2023

