COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] (18 December 2023)
SCA CR MA 06/2023 and
SCA CR MA 08/2023
(Arising in SCA MA 06/2023)

Mukesh Valabhji Applicant
(rep. by Mr. France Bonte)

And

Anti-Corruption Commission Respondent
(represented by Mr. Michael Skelly)

Neutral Citation: *Valabhji v Anti-Corruption Commission* (SCA CR MA 06/2023) and SCA CR MA 08/2023) [2023] (Arising in SCA CR MA 06/2023) (18 December 2023)
Before: Tibatemwa-Ekirikubinza, **Gunesh-Balaghee**, De Silva, JJA
Heard: 6 December 2023
Summary: Leave –academic judgment– hypothetical question- academic question- failure to disclose material facts
Delivered: 18 December 2023

ORDER

Leave to amend motion for special leave dated 3 July 2023 as well as the affidavit and exhibits marked MV1 to MV 8 in support thereof and to substitute the motion by a "Motion for leave to appeal out of time is refused. Special leave to appeal an interlocutory ruling delivered by the Supreme Court on 9 June 2023 is refused.

JUDGMENT

GUNESH-BALAGHEE JA (Dr. L. Tibatemwa-Ekirikubinza, De Silva JJA concurring)

1. In the first case (SCA CR MA 06 of 2023), the applicant has filed a Notice of motion dated 3 July 2023 seeking special leave to appeal against an interlocutory ruling delivered by the Supreme Court on 9 June 2023 and in the second case (SCA CR MA 08 of 2023 Arising in SCA CR MA 06 of 2023) he has filed a Notice of motion whereby he is seeking to amend the motion for special leave dated 3 July 2023 as well as the affidavit and exhibits marked MV1 to MV 8 in support thereof and to substitute the motion by a "Motion for leave to appeal out of time" .

2. Since the issues are intricately linked, I propose to deliver a single judgment.

3. The background facts leading to this case, so far as material, are as follows:
    (a) The applicant, Mukesh Valabhji, is being prosecuted in case CR 04 of 2022;
    (b) on or around 13 December 2021, the Anti-Corruption Commission ("the ACC") issued a restriction order in respect of the personal bank accounts of the applicant and those of his wife as well as the accounts of various companies of which the applicant or his wife is the shareholder, director, beneficial owner or signatory;
    (c) on 21 October 2022, the applicant sought a postponement of the trial, which was due to start in December 2022, on the ground that he could not pay his Counsel's fees;
    (d) on 10 November 2022, the Supreme Court ruled that the applicant could pay his fees from "*companies in which he held a beneficial interest*" subject to meeting a number of conditions;
    (e) despite the fact that two companies, Zil Pasyon Resort Limited and Intelvision Limited, in which the applicant held beneficial interests, passed resolutions allowing the payment of the legal fees by the companies, the ACC refused to approve the payment;
    (f) on 30 November 2022, the Supreme Court delivered a ruling ordering, *inter alios*, the applicant to file an application, before the Supreme Court itself, within 14 days for resolving the deadlock that had arisen between him and the ACC regarding the payment of legal fees by him;

(g) on 2 December 2022, the applicant sought a variation of the restriction Order pursuant to section 60(6) of the Anti-Corruption Act to allow for payment of his legal fees as per resolutions of Zil Pasyon Resort Limited and Intelvision Limited;

(h) on 10 February 2023, the Supreme Court delivered -

(i) a ruling (MC 82/2022) dismissing the application for variation order and ruled that the companies' resolutions were "*illegal by virtue of being contrary to section 172 of the Companies Ordinance*" (the February ruling);

(ii) a ruling (CO 144/2021) ordering that the applicant's trial proceeds on the dates fixed in April and May 2023;

(i) on 15 February 2023, the applicant sought leave to appeal against the February ruling;

(j) on 9 June 2023, the Supreme Court refused to grant leave on the ground that leave was not required for the appeal to proceed;

(k) according to the applicant, due to confusion which arose for numerous reasons, he filed the motion for Special leave to appeal an interlocutory ruling (SCA CR MA 06 of 2023) instead of filing a motion for leave to appeal outside time against the February ruling.

4. It is relevant to note that, in the first application, at paragraph 16 of the applicant's affidavit, it is averred that the applicant is seeking special leave to appeal against the Supreme Court ruling of 10 February 2023 while the motion is for "*special leave to appeal against an interlocutory ruling delivered by the Supreme Court on 9 June 2023*". In the second application (SCA CR MA 08 of 2023), it is stated the applicant is making a motion that he be allowed to amend the application in the first case with a view to amend certain errors which have crept in his application in the first case. In the second motion paper it is also averred that the motion in the first case should have been a motion for special leave to appeal out of time against the ruling of the Chief Justice delivered on the 10th February 2023 in MA 82 of 22 (the February ruling) consequent upon the ruling of the Chief Justice delivered on the 9th June 2023 dismissing the motion for leave to appeal to the Court of Appeal.

5. The ACC is objecting to both applications for a number of reasons.

6. I have duly considered the affidavits filed on record and the documents attached thereto as well as the submissions made on behalf of the parties.

7. At the outset, I must point out that the February ruling is not an interlocutory judgment but a final one. In this respect, it is apposite to note that although Lord Denning stated in **Salter Rex v. Gosh (1971) 1 All ER 8**65:

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

as far back as in 1888 in **Alexandrine v. Chaillet [1888 MR 29]**, the Supreme Court of Mauritius held that a final judgment was one which had "a character of finality" and placed the party in "the impossibility of moving further in the matter". In **C. Rassool v D. Gungadass [1922 MR 26]** which, interestingly, was an appeal from a decision of the Supreme Court of Seychelles to the Supreme Court of Mauritius, the Court stated –

> "*Turning in the first place to cases in which this court, in the exercise of its appellate jurisdiction, had to decide, what is, or what is not, a "final" judgment we see that it has held that a "final" judgment is one which "disposes finally" of the suit before a District Court, and not one which is only final as concerns the District Magistrate on any incidental points which may have arisen for his decision Nageon vs. Petit (k) - (2) that a judgment is "final" if it puts the Plaintiff in the impossibility of moving further, or proceeding with the hearing of his action on the merits.*"

In **Beenessreesing v Sawmy [1976 MR 205]**, the Supreme Court of Mauritius stated that there seems to be agreement about the main characteristic of a final order which is that it finally disposes of the matter in litigation or the rights of the parties.

8. It cannot be disputed that the impugned February ruling of the Supreme Court is a final decision in so far as the prayer which was being sought in that case, namely a

variation of the restriction order issued by the ACC in respect of all the applicant's bank accounts and those of companies in which he had a beneficial interest. The applicant however sought leave to appeal the February ruling when, pursuant to section 12(2) of the Courts Act, he should have appealed directly to this Court.

9. Even if I were to agree with the applicant that he made a genuine mistake when he filed the first application and that he was in fact seeking special leave to appeal against the February ruling, the applicant is clearly outside delay as the February ruling was delivered on 10 February 2023 and the first application was only lodged on 3 July 2023. The explanations given by the applicant do not constitute exceptional reasons warranting this Court to exercise its discretion to grant him leave to appeal out of time. In addition, the evidence on record shows that the delay was due to the applicants own laches and those of his legal advisers.

10. Although the above is sufficient for setting aside the present applications, I find it important to address some of the other issues raised by the applications.

11. It is apparent from the respondent's affidavit dated 20 October 2023 that the restriction order which was made against the applicant under section 60(1) of the Anti-Corruption Act, was, pursuant to section 60(4) of the Anti-Corruption Act, extended by the Commissioner of the ACC for 6 months. However, it expired on 13 March 2023 and is therefore no longer into force.

12. The respondent therefore rightly argued that the proposed appeal is moot.

13. More importantly, it is apparent from the averments in the respondent's affidavit that the applicant has only disclosed part of the material facts relevant to the payment of the legal fees: following the expiration of the restriction order on 13 March 2023, the respondent applied for and obtained a restraint order against the applicant on 31 March 2023 which was granted, *ex parte*, by Carolus J. On 16 June 2023, the applicant applied for a variation of the restraint order to allow for the payment of his legal fees. A copy of Carolus Judge's ruling

dated 23 June 2023 concerning the variation of the restraint order which was annexed to the respondent's affidavit shows that, by this order, the applicant was allowed to pay, inter alia, a sum not exceeding GBP 3,253, 250 in respect of the legal fees to his solicitors and Counsel from the United Kingdom **to represent him in the proceedings in cases CR 04/2022** and CR 114/2021 and also **to pay Mr France Bonte**, the applicant's Counsel in the present two applications, **the sum of SCR 123,000**.

14. It cannot be gainsaid that the ultimate purpose of the present applications is to challenge the February ruling where the Chief Justice maintained the restriction order and dismissed the application for a variation order and that the said application had been lodged by the applicant for the purpose of allowing him to have access to funds for the purposes of paying the legal fees of his Counsel in his criminal trial (CR 04/2022).

15. Since the restriction order has itself expired, the question of challenging the judgment of the Chief Justice maintaining the restriction order does not arise. Further, it is amply clear from the variation order made by Carolus Judge on 23 June 2023 that the applicant was allowed to pay solicitors and Counsel to represent him in the proceedings in case CR 04/2022. In the circumstances it makes no doubt that the applications before this Court are purely academic.

16. With regard to academic questions I can do no better than echo the dictum of Lord Justice Clerk Thomson in **McNaughton v McNaughton's Trs (1953) SC 387, 392***:*

> *"Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The Courts are neither a debating club nor an advisory bureau."*

17. It is also apposite to refer to what was stated by the Supreme Court of Mauritius in the judicial review application in **Ariranga Govindasamy Pillay, G.O.S.K. v Honourable**

Prime Minister & Ors [2017] SCJ 190 to illustrate the point. In that case the applicant had applied for leave for the judicial review of the decision of the first respondent and/or the second respondent and/or the third respondent to replace him as a candidate for election to the United Nations Committee on Economic, Social and Cultural Rights in favour of the co-respondent. In upholding the respondents' objection to leave being granted on the ground that there was no live issue for determination as *ex facie* the applicant's supporting affidavit the elections had already taken place and the co-respondent had not been elected, the Court, inter alia, stated-

> *"...there must be a live issue to be tried and that the result of any decision on the merits eventually should not have the effect of being of only academic value, with no possible concrete result..."*

The Court went on to say that-

> *"...the election had already been held..., and the co-respondent has not been elected... The question here also is now* ***purely academic*** *as to whether the respondents or any one or more of them acted illegally, and/or procedurally improperly, and/or unreasonably, and/or unfairly, and/or in violation of applicant's legitimate expectations in submitting the candidature of the co-respondent instead of the applicant's. Consequently, all the allegations of illegality, unfairness and impropriety etc., become irrelevant and only of academic interest since ex facie the averments in the applicant's affidavit there is no longer any live issue: the co-respondent has not been elected, and a revision of the outcome of the election in the applicant's favour cannot now be contemplated."* [emphasis added]

18. In their book entitled "**Judicial Review" (5th Ed.)**, Sir Michael Supperstone, James Goudie QC and Sir Paul Walker state at paragraph 18.18.1-

> *"The court does not beat the air in vain. It may have become otiose or pointless to grant a remedy because the relevant detriment to the claimant has been removed or because nothing in practice will change if the remedy is granted. However, the court will not readily assume that a declaration will be ineffective."*

19. I also find it relevant to refer to **De Smith's Judicial Review (7th Ed.) at paragraph 18-**

054 :

> *"The court may exercise discretion not to provide a remedy if to make an order would serve no practical purpose. For example, events can overtake proceedings. So a licence, the validity of which is challenged in the proceedings, may have expired by the time the claim is determined by the Administrative Court. Similarly* ***an activity under challenge may have ceased before a remedy has been granted****. It may, for instance, be pointless to quash a decision to enable the public to be consulted on data that has become out of date; or to quash a decision to disclose a report which had, by the date of judgment, already been disclosed. Even a declaration may serve little practical purpose in such circumstances."* [emphasis added]

19. However, it can be seen in the following extract from **De Smith's Judicial Review (7th Ed.) at paragraph 18-042**, where reference is made to the distinction drawn between hypothetical and academic questions, albeit with regard to judicial review applications, by Sir John Laws, as he then was, in the **Modern Law Review at (1994) 57 M.L.R 213 at page 214-19** that the situation has evolved slightly –

> *"In claims for judicial review, however, there have now been a number of cases in which the courts have given advisory opinions, in the form of a declaration, where it was clearly desirable that they should do so. The declaratory opinions are given in circumstances where no other remedy would be appropriate. Sir John Laws categorises these situations where it is appropriate for the courts to grant declarations as being "hypothetical". They can equally appropriately be described as raising theoretical issues. A hypothetical question is a question which needs to be answered for a real practical purpose, although there may not be an immediate situation on which the decision will have practical effect. A "hypothetical" question has to be distinguished from an "academic" question. An academic question is one which need not be answered for any visible practical purpose, although an answer would satisfy academic curiosity, for example, by clarifying a difficult area of the law. Sir John considers that it would be wrong for the court to grant relief in order to answer academic questions."*

20. Therefore, a hypothetical question, by definition, would be one that needs to be answered for a real practical purpose and an academic one need not be answered for any visible practical purpose, although an answer would satisfy academic curiosity. In the present case, the question as to whether the applicant should be granted special leave to appeal outside delay is **purely academic**. The question as to whether the February ruling is wrong becomes irrelevant and only of academic interest since as per the averments in the respondent's affidavit there is no longer any live issue. As explained above, not only has the restriction order expired but the funds which the applicant was seeking to have access to for paying the legal fees of his Counsel to represent him in his criminal trial (CR 04 of 2022) have already been released from the purview of any order made by the ACC.

21. The next case which it is relevant to consider is the case of **R v Secretary of State for the Home Department, ex parte Salem** [1999] 1 AC 450 where Lord Slynn stated as follows:

> *"My Lords, I accept, as both counsel agree, that in a case where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.*
>
> *The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless* ***there is a good reason in the public interest for doing so****, as for example (by only way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where* ***a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future****."*[emphasis added]

22. The above words have been quoted with approval in a number of subsequent cases, including **Rolls Royce plc v Unite the Union [2009] EWCA Civ 387, [2010] 1 WLR 318**, in which it was observed by the Court of Appeal that "*the thrust of modern authority*

favours engagement (on the part of the Court) rather than abstention" (at paragraph 58). As highlighted in **R (on the applicationof Zoolife International Ltd) v Secretary of State for Environment, Food and Rural Affairs [2007] EWHC 2995** (Admin) at paragraph 36, however, "academic issues cannot and should not be determined by courts unless there are exceptional circumstances (such as the examples referred to in Salem)".

23. The editors of **Civil Procedure (The White Book Service 2021,Volume 2)** have also noted at paragraph 9A-77, in relation to appeal cases, that "(in) modern times the appellate courts have indicated a greater willingness to entertain proceedings which raise points of law which, although "academic" or "hypothetical" are points of general public interest(...) but no general principle to that effect has emerged (...). The law is not settled".

24. Being given that the law in Seychelles is substantially based on English law, one may draw useful guidance from this evolution of the case-law before the English Courts. I agree that the Court may, in exceptional cases "*and* ***where there is a good reason in the public interest for doing so***", exercise its discretion to hear a matter which has become academic. The discretion should be exercised on a case-to-case basis and it would not be appropriate to be unduly prescriptive as to how it should be exercised.

25. Having carefully considered the facts and circumstances set out in the affidavits filed and the Exhibits attached thereto, I find no reason to exercise our discretion to grant the applicant's motion to amend the motion for special leave nor to grant special leave to the applicant to appeal out of time against the interlocutory ruling for the following reasons –

    (a) the respondents strongly dispute that the present circumstances warrant the granting of leave, whereas the consent of all parties is essential for a case which has become academic to be allowed to proceed (see **Hutcheson v Popdog Limited [2011] EWCA Civ 1580**). In **Bowman v Fels [2005] EWCA Civ 226**, for example, the Court proceeded to hear an appeal on a matter which had become academic, in order "to comply with the entreaties of all the parties" who had appeared before it; In addition, I do not consider the present case is one where there is a good reason in the public interest for granting leave;

    (b) it is most objectionable for the applicant, who is asking this court to exercise its

discretion to grant him leave to amend his motion for special leave to appeal against an interlocutory ruling to one for special leave to appeal out of time, to have failed to disclose material facts in his affidavit;

(c) the proper procedure was to appeal against the February ruling directly to the Court of Appeal and the delay for doing is solely attributable to the applicant's own laches or those of his legal advisers.

26. For all the above reasons, I dismiss both applications with costs.

K. Gunesh-Balaghee JA

I concur:-

Dr. L. Tibatemwa-Ekirikubinza JA

I concur:-

J. De Silva JA

Signed, dated and delivered at Ile du Port on 18 December 2023.