

**Cable & Wireless (Seychelles) Ltd v
Minister of Finance and Communications & Ors
(1998) SLR 132**

Pesi Pardiwalla for the applicant
Francis Chang Sam for the respondents

[Appeal by the applicant was dismissed on 3 August 1998 in CA 12/1998.]

Ruling on motion delivered on 28 January 1998 by:

PERERA J: The petitioner invoked the supervisory jurisdiction of this Court under article 125(1)(c) of the Constitution, seeking writs of certiorari and prohibition and an interlocutory injunction against the respondents. There was also filed a motion to amend the petition. This Court, by an order dated 22 December 1997, allowed a partial amendment of the petition by consent of the respondents. The application for interlocutory injunction was impliedly refused, in view of the findings in the case, and leave to proceed, as required by rule 6 of the Supreme Court (Supervisory Jurisdiction Over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 was refused of the whole application.

The petitioner has now filed a motion dated 12 January 1998, seeking leave to appeal against “that part of the order” dated 22nd December 1997 “refusing leave to the Petitioner to proceed” in the case. In the affidavit in support however, the attorney for the applicant avers thus –

4. This applicant intends to appeal against the whole of the order of His Lordship Justice Perera and has on 5 January 1998 filed a Notice of Appeal against such order including that part of the part of the order refusing leave to proceed.

In paragraph 6 of the affidavit, the motion is supported directly by averring that in the interests of justice, it is necessary that the leave to appeal be granted against “that part of the order refusing leave to proceed”. Counsel for the applicant, Mr Pardiwalla, in supporting the motion in court submitted that leave to appeal is sought only in respect of the part of the order relating to the writs of certiorari and prohibition which alone, he submitted, required leave to proceed, and not in respect of the other part relating to the motion to amend the petition and the interlocutory injunction. With respect, the said motion to amend, and the application for an interlocutory injunction arose in the main application, seeking the exercise of the supervisory jurisdiction as ancillary matters. This Court considered them separately in view of the agreement by counsel for both parties in making separate submissions. Leave to proceed was refused after allowing certain amendments to the petition, and on a consideration of the petition so amended. In such circumstances an order in respect of an interlocutory injunction became obsolete. It is for that reason that the Court held –

Hence in those circumstances the question of issuing a stay order on Bharti Global Ltd, nor an interlocutory injunction on the respondent does not arise for consideration.

Therefore, for the purpose of rule 6 aforesaid, the three matters referred to above cannot be considered in isolation. The greater therefore included the less and hence leave to appeal should have been sought against the whole of the order and not part of it, as is being done now.

Rule 8, under which the instant motion has been filed provides thus –

Where the Supreme Court refuses to grant leave to proceed, the petitioner may appeal to the Court of Appeal within 14 days of the order of refusal with leave of the Supreme Court first had and received.

The word “first” admits of no ambiguity. The applicant has on 5 January 1998 filed a “Notice of Appeal” against the “whole of the order dated 22 December 1997”, thereby implying that leave is required only to a part of that whole order. This view is untenable. Hence the “Notice of Appeal”, which according to the appellate procedures in Seychelles is tantamount to the “filing of an appeal”, was filed without leave of this Court “first had and received.” Accordingly there has been non-compliance with the said rule 8.

Rule 8 of the Supreme Court (Supervisory Jurisdiction) Rules SI 40 of 1995 aforesaid, contains the special provisions relating to an appeal being preferred from an order refusing leave to proceed. Those Rules do not provide the procedure for the filing of an appeal from a judgment of this Court on merits after leave to proceed has been granted. Hence in such circumstances the general Rules contained in the Seychelles Court of Appeal Rules 1978 read with the Practice Direction dated 5 August 1997 apply. However the said Practice Direction, which sought to make transitional provisions pending the making of fresh Rules under article 136(1) of the Constitution, has made some of the previous rules contained in SI 124 of 1978 applicable to “all appeals” to that Court. Hence rule 24 thereof, which is one of those specific rules, should apply to appeals from decisions of this Court in the exercise of the supervisory jurisdiction whether they arise from orders refusing to grant leave to proceed or upon adjudication on merits at a stage thereafter. Rule 24 which falls under the heading “Proceedings in the Supreme Court” provides that –

24(3): In all other cases, application to the Supreme Court for leave to appeal to the Court shall be by motion which shall state the grounds of the application and shall, if necessary, be supported by affidavit. Such application shall be made not more than fourteen days after the judgment or decision complained of and shall be entitled and filed in the proceedings from which it is intended to appeal, and all necessary parties shall be served.

There is no conflict between rule 8 of the Supervisory Jurisdiction Rules (Supra) and rule 24 of the Court of Appeal Rules insofar as the requirement to file an application for leave within 14 days of the order sought to be appealed against is concerned. Such application should necessarily precede the presentation or filing of a Notice of Appeal as such a Notice can be filed only if leave is granted. In the constitutional case of *Philip Simeon v Attorney-General* (unreported) Constitutional Case 5/1997 the petitioner failed to file the petition within 30 days of the alleged contravention of the Constitution as required by rule 4(1) of the Constitutional Court Rules 1994. Rule 4(3) however provides that “a petition.... may, with leave of the Constitutional Court, be filed out of time”. The application for leave was filed, as in the instant case, after the petition was filed. The Court did not use its discretion to grant leave. In my ruling I stated

Good faith and practicality in pleadings would require that where there has been a non-compliance with a time bar, an application seeking the discretion of the Court to accept the pleading notwithstanding the default should accompany or precede the presentation of the delayed pleading.

Mr Pardiwalla however urged the Court to consider exercising the discretion under rule 15 of the Supervisory Jurisdiction Rules which provides that –

15. Where the parties fail to comply with the requirements set out in the preceding Rules, the Court may, on the application of any of the parties, or ex mero motu make any suitable order.

In this respect, Mr Pardiwalla invited the Court to consider that the order sought to be appealed against contains matters of law and commercial practice which are of general or public importance and hence ought to be the subject of an appeal. Matters of general and public importance are no longer a consideration under section 12(2) (b) of the Courts Act (Cap 52) as amended by Act No 18 of 1978. Hence the only consideration is whether the question involved in the appeal is one which ought to be the subject matter of an appeal.

Leave to proceed in this case was refused by this Court as the petitioner failed to show “good faith” as required by rule 6(1). The court concluded that –

..... The petitioner has a wholly unarguable case upon the unambiguous terms and covenants in the licence and the connected agreement they rely on to claim exclusivity in the sense of a monopoly in respect of certain services

The supervisory jurisdiction of this Court is exercised to determine whether a subordinate court, tribunal or adjudicating authority has acted ultra vires its powers or failed to follow the rules of natural justice. In the instant matter, the petitioners failed to satisfy the Court that they had an arguable case to proceed to a hearing to consider those aspects.

The granting of leave to appeal is not a mechanical process. It is a procedural bar to

prevent frivolous and vexatious matters being canvassed in appeal, thus causing prejudice and delay to those benefiting by the decision sought to be canvassed in appeal. Hence under rule 8 of the Supervisory Jurisdiction Rules, or rule 24 of the Court of Appeal Rules, a person who wishes to file an appeal cannot file such appeal and seek covering approval or ratification. Leave is not granted as a matter of course. The applicant was found to have had a “wholly unarguable case”. If, as they claim now, they have an “arguable appeal”, they should have been more diligent in the following in the basic rules of court. The applicants had ample opportunity to advise themselves as to the practice and procedure to be followed when filing an appeal against the order of this Court. Rule 8, on which the instant motion is based, is clear and unambiguous. In this context the following dicta of Lord Guest in the case of *Ratnam v Cumarasamy* [1964] 2 All ER 933 would be relevant –

Rules of Court must prima facie be obeyed If the law were otherwise a party in breach would have an unqualified right to extension of time which would defeat the purpose of the Rules which is to provide a timetable for the conduct of litigation

In the circumstances, I find no grounds to make any order under rule 15, other than to refuse leave to appeal for non-compliance with rule 8 of the Supervisory Jurisdiction Rules as well as rule 24 of the Court of Appeal Rules which is now applicable as a general provision. Accordingly the Notice of Appeal dated 5 January 1998 has not been validly filed and hence there is no appeal before the Court of Appeal.

There will be no order for costs.

Record: Civil Side No 377 of 1997