

**In Re: Ailee Development Corporation Ltd and the Companies Act 1972**  
**Liquidator of Ailee Development Corporation Ltd**  
**(2008) SLR 87**

Kieran SHAH for the applicant (Bank of Baroda and the Consortium Banks)  
Ronny GOVINDEN for the Government of Seychelles  
Francis CHANG SAM for the liquidator  
Bernard GEORGES for "the beneficial holders of charges registered" - absent

**Order delivered on 19 September 2008 by:**

**PERERA CJ:** This is an application, purportedly, for leave to file an appeal to the Court of Appeal, from an interlocutory order made by this Court on 28 August 2008. Consequent to that order, certain companies and banks represented by Mr B Georges, Attorney-at-Law, identifying themselves as "beneficial holders of charges registered" filed a notice of appeal directly before the Court of Appeal. By ruling dated 10 September 2008, this Court, on an application made by the same parties for a stay of winding up proceedings, held that, the appeal filed before the Court of Appeal was incompetent as the order of 28 August 2008 was "interlocutory" and hence needed to obtain prior leave to appeal, and that in those circumstances, the application for stay could not be entertained. No application was made by that party for leave to appeal.

The present applicant supported the winding up petition, but is aggrieved by the order of 28 August 2008 "in so far as that order affects the interests of Bank of Baroda and the Consortium Banks". Unlike the other "beneficial holders of charges registered", the applicant, who is also a secured creditor, did not file an appeal before the Court of Appeal. Mr KB Shah, counsel representing them, in seeking leave to appeal, has filed an affidavit averring that the decision of the Supreme Court dated 28 August 2008, was wrong in the following instances -

1. Interpretation of sections 17 and 18 of the Central Bank of Seychelles Act.
2. Interpretation of section 278(5)(d) of the Companies Act 1972.
3. Interpretation of section 222(d) of the Companies Act, and the alleged failure of the Court to consider section 20(c) of the Land Registration Act and articles of the Civil Code of Seychelles relating to mortgages, especially articles 2179 and 2182.
4. The propriety of the order to erase and remove registered charges, in view of article 2182.
5. The Court acting ultra petita in ordering the removal of charges, when the liquidator had only asked for an order for removal of restrictions and/or inhibitions against Title T 147.

Mr Shah concedes that this Court cannot make any pronouncement on the merits or demerits of any of those points of law. However he urges the Court to use its discretion under section 12(2)(b) of the Courts Act which provides that -

In any such cases as aforesaid (that is, where no appeal shall lie as of right from an interlocutory order), the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.

Mr R Govinden, Deputy Attorney-General, representing the Government of Seychelles and Mr F Chang Sam, representing the liquidator, object to the granting of leave. Both counsel submitted that for this Court to exercise its discretion, the Court should be provided with the intended notice of appeal, with the grounds of appeal duly rehearsed therein. Mr Shah contended that although no such notice of appeal has been filed yet, he has set out the grounds he proposes to rely on in the appeal if leave is granted. Mr Govinden made submissions on the merits of those grounds and stated that they were frivolous and vexatious and should not be considered as being fit to be the subject matter of an appeal. Mr Chang Sam supported that view.

Before I consider the merits of the application, I wish to consider the provisions made in the Seychelles Court of Appeal Rules 2005 as regards obtaining leave from an interlocutory order of this Court. Section 12 of the Courts Act by an amendment in 1978, sets out two stages, to provide for such applications that were filed when there were no resident Justices of Appeal. Under subsection 2(b), the Supreme Court can grant leave to appeal. Subsection 2(c) provides that where the Supreme Court refuses such leave, special leave to appeal could be granted by the Court of Appeal. Rule 24 of the Seychelles Court of Appeal Rules 1978 (now repealed) provided for those two stages, unambiguously, under rule 24 thereof. However, the Rules of 2005 obliterated those two stages and provided only for special leave to appeal. Inferentially, "special leave" would imply that there should be an "ordinary" or "normal" stage of leave to appeal. There is however no specific rule, as under the 1978 Rules. Therefore the 2005 Rules of the Court of Appeal do not provide for filing an application for leave to appeal in the Supreme Court, as required by section 12(2)(b) of the Courts Act.

However, rule 16 provides that —

*Whenever an application may be made to the Court or to the Supreme Court it should normally be made in the first instance to the Supreme Court.*

Hence whether an application for leave to appeal from an interlocutory order should be made to the Court of Appeal or to the Supreme Court, it should normally be made to the Supreme Court. Exceptionally, this procedure could be bypassed, and an application may be made direct to the Court of Appeal. Due to the ambiguity in the Rules, the present applicant cannot be penalized, and therefore, the present application should be entertained by this Court. In this respect, the requirement in rule 17(2) to file such

application within 14 days of the date of the interlocutory order would apply. The present application has been made within time.

There is no requirement in the Rules that an applicant for leave should file parallelly, a notice of appeal. However, in certain cases, it would be prudent to do so, as the appeal period may lapse by the time leave is obtained. The Court would therefore consider the points of law raised in the affidavit of Mr Shah, as the grounds that he will rely on in the appeal. It was held in the case *Smith v Gosworth Casting Processes Ltd* [1997] 1 WLR 1538 that –

There can be many reasons for granting leave even if the Court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises an issue where the law requires clarifying.

This pronouncement is consistent with section 12(2)(b) of our Courts Act. Rule 52.3.7 of the Supreme Court Practice (UK) (2008 Edition) commenting on that passage states –

The theoretical difficulty with the passage just quoted is that if the case raises an issue where the law requires clarifying, then, by definition the appeal does have a real prospect of success. Such clarification might operate in favour of the appellant. If the "clarification" cannot affect the outcome of the appeal, then in many cases it may be inappropriate to grant permission.

In the present case, the interpretation of section 278(5)(d), which is the basis of the grievance of the applicant has not been tested before this jurisdiction. Mr Shah submitted that an authoritative interpretation should be obtained from the highest appellate court. If such interpretation is in favour of the applicant, it will affect the outcome of the proposed appeal of the present applicant to the limited issue of removal of registered charges, consequent to a winding up under the Companies Act. Hence this is a fit case where leave to appeal should be granted to the applicant.

Accordingly leave to appeal is granted to the applicant to file a notice of appeal before the Court of Appeal.

**Record: Civil Side No 27 of 2008**