

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 322/2015
(arising in CC 29/2014)

[2016] SCSC 295

FREGATE ISLAND PRIVATE LIMITED
Petitioner

versus

DF PROJECTS PROPERTIES PROPRIETARY LIMITED
Respondent

Heard: 3 February 2016
Counsel: Mr. Divino Sabino for petitioner
Mr. Basil Hoareau for respondent
Delivered: 7 April 2016

ORDER ON MOTION

Robinson J

[1] Introduction

[2] The question is whether or not this Court may, in the exercise of its discretion, grant leave to the applicant to appeal from Civil Side: MA165/2015 arising in CC29/2014

under section 12 (2) (a) and (b) of the Courts Act [CAP52]. *The Courts Act [CAP52] is hereinafter referred to as the Courts Act.*

[3] Background to MA322/2015 arising in the Head Suit:

MA165/2015 arising in the Head Suit

[4] The applicant in MA165/2015 arising in CC29/2014 is the defendant in CC29/2014 filed in the Supreme Court of Seychelles on 26 September, 2014. CC29/2014 is hereinafter referred to as the Head Suit. The respondent in MA165/2015 arising in the Head Suit is the plaintiff in the Head Suit.

[5] In MA165/2015 arising in the Head Suit, the applicant sought, as against the respondent, security for costs in the amount of Seychelles rupees 608, 000. 00/-, or such other amount as the court may consider reasonable in the circumstances under section 16 of the Civil Code of Seychelles Act [CAP 33], and that in the meantime all proceedings be stayed. *The Civil Code of Seychelles Act is hereinafter referred to as the "Civil Code".* On 6 November, 2015, this court, basing itself on section 16 of the Civil Code and the jurisprudence of the Supreme Court, refused to grant the orders prayed for by the applicant as against the respondent.

[6] MA322/2015 arising in the Head Suit

[7] The applicant in MA165/2015 arising in the Head Suit, being dissatisfied with the orders of this court, has applied for leave to appeal to the Seychelles Court of Appeal under section 12 (2) (a) and (b) of the Courts Act.

[8] The application was commenced by way of Notice of Motion supported by an affidavit sworn by Wayne Ronald Kafcsak, the Managing Director of the applicant.

[9] The respondent filed affidavit in reply. The affidavit was sworn by one Tiffany Jane Andraos, who averred in the affidavit that she is a Director of the respondent.

[10] Case for applicant

[11] Wayne Ronald Kafcsak averred the following in the affidavit in support of the application for leave to appeal to the Seychelles Court of Appeal —

- "5. That the Applicant had applied to the court in MA No. 165 of 2015 for security for costs against the Respondent.
6. That on the 6th November 2015, the learned Judge Robinson dismissed the Applicant's application for security for costs.
7. Being dissatisfied with the Court's ruling, the Applicant wishes to appeal. The case proper has been set on the 27th November 2015 for a ruling on another application of the Applicant.
8. I am advised and I verily believe that the learned Judge erred in both the law and on the facts in her ruling. An indicative draft of the grounds of appeal is herewith attached as Exhibit WK1.
9. I am therefore advised and verily believe that the intended Appeal discloses important issues relating to our law concerning the security for costs upon which further argument and a decision of the Court of Appeal would be in the public advantage and interest.
10. I accordingly pray this Honourable Court to grant the reliefs sought in the Applicant's motion."

[12] Case for respondent

[13] Tiffany Jane Andraos, informed by learned counsel Mr. Hoareau, verily believes that (i) the application of the applicant is baseless and without merits whatsoever, and (ii) the indicative, "*Draft Grounds Of Appeal*" does not disclose important issues relating to the written laws of Seychelles concerning security for costs upon which further argument and a decision of the Seychelles Court of Appeal would be in the public advantage and interests.

[14] Submissions of counsel

[15] Mr. Sabino and Mr. Hoareau were in agreement that two conditions must be satisfied before this court may exercise its discretionary powers to grant leave to appeal to the Seychelles Court of Appeal under section 12 (2) (a) and (b) of the Courts Act. Learned counsel submitted that this court must be satisfied, "*(a) that the interlocutory judgment disposes so substantially of all the matters in issue as to leave only subordinate or ancillary matters for decision; and (b) that there are grounds for treating the case as an exceptional one and granting leave to bring it under review*": see **Pillay v. Pillay (No. 2) (1970) SLR 79** at page 80, **Beitsma v. Dingjan (No. 2) (1974) SLR 302**, **Islands Development Company Limited v. EME Management Services Limited SCA 31/09** delivered on 11 December, 2009, [EME Management Services Limited v. Islands Development Company Limited CS. No. 90/09] and **Cable & Wireless Seychelles Ltd and Innocente Alpha Ventigadoo Gangadoo SCA MA: 2 of 2013** delivered on 30 August, 2013, [Innocente Alpha Ventigadoo Gangadoo v. Cable & Wireless Seychelles Ltd CS No. 175 of 2011]. This court concurs with the position.

[16] Mr. Sabino, while admitting that this court should be mindful of unnecessary delay, submitted that the interlocutory judgment or order of this court should be reviewed principally because the non-granting of leave by this court will breach the applicant's right to a fair hearing enunciated under the Constitution of the Republic of Seychelles. Elaborating further on the submission, learned counsel contended that there is no guarantee that the defendant/applicant will be able to recoup its costs at the conclusion of the Head Suit and, therefore, affect the conduct of its defence. I note that the submissions of learned counsel are not supported by the evidence of Wayne Ronald Kafcsak. Rule 17 (2) (a) of the Legal Practitioner's (Professional Conduct) Rules provides —

"17 (2) A legal practitioner shall not devise facts which will assist in advancing a client's case".

The law generally is that counsel must not enter the litigation arena as a witness for his client.

[17] Further, Mr. Sabino is of the opinion that the decision of this court on the interpretation of section 16 of the Civil Code is manifestly wrong. He referred this court to the Supreme

Court decision, **JFA Holdings v Latitudes Consulting(2011) SLR 342**). I will return to this point and offer an explanation later.

- [18] Mr. Hoareau did not accept the submissions for the applicant. Mr. Hoareau, relying on the evidence of Tiffany Jane Andraos, submitted that an appeal from such a judgment or order is not looked upon favourably under the Courts Act since it is an obstacle to the ordinary course of the Head Suit and will delay its progress, amounting to a breach of the plaintiff's right to a fair hearing. This is why an appeal from such judgment or order is at the discretion of this court only when the criteria set out above are fulfilled. He referred this court to the case of **Pillay**, *supra*, wherein Judge Sauzier, as he then was, refused to exercise his discretion to grant leave to appeal to the Court of Civil Appeal for Mauritius against a ruling by the Supreme Court rejecting a plea in *limine litis* stating that —

"[a]n appeal at this stage would entail unnecessary delay and expense and would be most prejudicial to the interests of the plaintiff. Granting leave to appeal to the defendant at this stage would in practice amount to a denial of justice to the plaintiff. As this case does not come within paragraphs (a) and (b) above I will not exercise my discretion to grant the application which is dismissed with costs".

- [19] Further, Mr. Hoareau submitted that the applicant has not shown that the judgment or order of this court is manifestly wrong and irreparable loss would be caused to the defendant/applicant. Relying on the Seychelles Court of Appeal ruling in the matter of **Islands Development Company Limited**, *supra*, he submitted that for a case to be treated as an, *exceptional one*", in order to grant leave to appeal —

"[...] *one must be able to show that the interlocutory judgment or order is manifestly wrong and irreparable loss would be caused to him or her if the case proper were to proceed without the interlocutory judgment or order being corrected. It would not be in the 'public advantage and interest' to unnecessarily delay trials before the Supreme Court, otherwise.*" (See also the **Cable & Wireless Seychelles Ltd** case, *supra*).

Mr. Hoareau referred this court to paragraphs (14) and (16) of the **Islands Development Company Limited** case, *supra*, which examine this criterion. Justice A. F.T. Fernando delivering the judgment of the Seychelles Court of Appeal stated —

"(14) A challenge which goes to the merits of the Ruling of the 20th of July namely, that the learned Trial Judge failed to properly consider and weigh all evidence and facts placed before him and to correctly apply the law, is not ground for treating this case as an exceptional one and granting leave to bring it under review. Certainly there are likely to be interlocutory orders made in the course of a trial which are erroneous. If leave is to be granted to appeal against each such order, the procedural bar in section 12 of the Courts Act, which is in accordance with article 120 (2) of the Constitution would be rendered meaningless. The appeal from the final decision would enable this court to correct any interlocutory order which it may deem erroneous.

(16) The Applicant-Defendant has not clarified in his affidavit as to how the issue involved in this case is of 'national interest' or as to why Special Leave should be granted 'in the interest of justice'. Making broad statements in an Affidavit without substantiating them, in a case which has to be decided purely on the basis of the averments contained in affidavits, does not espouse the cause of the party relying on such affidavit. All litigants filing cases before the courts do so "in the interest of justice", unless there has been a clear abuse of the "process of the courts."

[20] Further, learned counsel submitted that the Supreme Court and the Seychelles Court of Appeal will take into account the same factors in their consideration of whether or not to grant leave to appeal. On the question of, "*special leave*" learned counsel referring to the case of **Islands Development Company Limited**, *supra*, submitted that the words, "*special leave*" have been used with a purpose —

"[...] namely in this situation the Court of Appeal is being called upon to exercise its jurisdiction in a matter where no appeal lies as of right but also to interfere with the exercise of discretion by the Supreme Court in refusing to grant leave to appeal. In the opinion of this court "*Special Leave*" should therefore be granted only where there are exceptional reasons for doing so, or in view of reasons which may not have been in the knowledge of the Applicant at the time leave to appeal was sought from the Supreme Court or for reasons that supervened after the refusal to grant leave by the Supreme Court. The reasons before the court should be such that the non-granting of "*Special Leave*" by this court is likely to offend the principle of fair hearing enunciated in the Constitution. It is to be noted however that an appeal against an interlocutory judgment or order has a tendency to delay the main action and

- (i) from any interlocutory judgment or order of the Supreme Court; or
 - (ii) from any final judgment or order of the Supreme Court where the only subject matter of the appeal has a monetary value and that value does not exceed ten thousand rupees.
- (b) In any such cases as aforesaid 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.
- (c) Should the Supreme Court refuse to grant leave to appeal under the preceding paragraph, the Court of Appeal may grant special leave to appeal.
- (3) For all the purposes of and 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 of the Court of Appeal in England.
- (4) In this section the expression “civil matters” includes all non-criminal matters.”.

[29] Discussion

[30] I have considered the application of the applicant, the affidavit in reply of the respondent, and the submissions of both counsel. The submissions of Mr. Hoareau on point, which I accept, have been of assistance to this court.

[31] This court has, out of interest, considered the case of **JFA Holdings**, *supra*, on the interpretation of section 16 of the Civil Code. With regards to security for costs it states that, *this is usually an estimate of costs (party to party costs) that would be incurred by a party by the close of the proceedings*". This court agrees with this proposition. However, this court is of the opinion that an application for security for costs should substantiate the estimates of costs. In the exercise of its discretion, this court should not speculate about estimates of costs. Secondly, it stands to reason that the effectiveness of enforcement where a claimant is resident outside the jurisdiction of the Supreme Court

of Seychelles is a material factor in weighing whether or not to grant an order of security for costs. However, the fact that a claimant has no assets in Seychelles should not be the only factor to be weighed by this court under section 16 of the Civil Code. The application states without more that, "*it will be difficult if not impossible to enforce any order for costs against the Respondent*". The applicant was required to substantiate the statement. This court should not speculate about the risk of recovery of costs to the defendant/applicant should it be successful in the Head Suit. Be that as it may, this court states that Wayne Ronald Kafcsak has not clarified in the affidavit the important issues relating to the written laws of Seychelles concerning security for costs upon which further argument and a decision of the Seychelles Court of Appeal would be in the public advantage and interest.


[32] Further, this court is of the opinion that this matter does not dispose so substantially of the matters in issue as to leave only subordinate or ancillary matters for decision: see paragraphs (18) and (19) of **Islands Development Company Limited**, case, *supra*. It is noted that the affidavit of the applicant does not contain any such averment. The applicant will be entitled as of right to question the decision in the interlocutory judgment if and when it exercises its right to appeal the final judgment or order. It is also the considered view of this court that an appeal at this point in time would result in considerable delay and expense and would be most prejudicial to the interests of the plaintiff.

[33] Further, this court must be satisfied that there are grounds for treating this matter as an exceptional one and granting leave to bring it under review. This court having considered the evidence of the applicant is not satisfied that there are grounds for treating this matter as an exceptional one and granting leave to bring it under review. This court states that making broad statements in an affidavit without substantiating them, in a case which has to be decided purely on the basis of the averments contained in affidavits, does not support the cause of the party relying on such affidavit: see **Islands Development Company Limited** case, *supra*.

[34] **DECISION**

[35] In light of the above, this court will not exercise its discretion under section 12 (2) (a) and (b) of the Courts Act to grant leave to the applicant to appeal to the Seychelles Court of Appeal against the Ruling of this court delivered on the 6 November, 2015, with costs as against the applicant/defendant.

Signed, dated and delivered at Ile du Port on 7 April 2016

The seal of the Supreme Court of Seychelles is circular. It features a central emblem with a bird, possibly a frigatebird, perched on a branch. The emblem is surrounded by a wreath. The text "SUPREME COURT" is written in a circle around the emblem, and "SEYCHELLES" is written below it. The name "FIONA ROBINSON" is written in a larger circle at the top. There are two stars on either side of the emblem.
F Robinson
Judge of the Supreme Court