

**SUPREME COURT OF SEYCHELLES**

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**Reportable/Not Reportable/Redact**

[2021] SCSC *.115*

MA66/2021

(Arising in MC112/2020)

In the matter between:

**DARIA TODOROVA**  
*(rep. by Mr. Frank Elizabeth)*

**Applicant**

and

**SAVOY DEVELOPMENT LIMITED**  
*(rep. by Ms. Manuella Parmentier)*

**Respondent**

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**Neutral Citation:** *Todorova v Island Savoy Development Limited* (MA66/2021) [2021] SCSC  
*.115*..... (07 April 2021).

**Before:** E. Carolus J

**Summary:** Application for Orders directing the Minister of Internal Affairs and the Chief Immigration Officer to allow Prohibited Immigrant to enter and remain in Seychelles pending determination of court cases against them.

**Heard:** 02 April 2021

**Delivered:** 07 April 2021

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**ORDER**

- (a) The Minister of Internal Affairs and the Chief Immigration Officer are hereby directed to allow Yuriy Nesterenko to re-enter Seychelles forthwith for the purpose of defending the three applications filed by Savoy Development Limited against them in MC112/2020, MA30/2021 and MA31/2021 as well as any appeal filed in the event that leave to appeal out of time is granted in MC112/2020, and to remain in Seychelles until final determination of those matters or further order of this Court.
- (b) The Minister of Internal Affairs and the Chief Immigration Officer are hereby directed to allow Daria Todorova and her daughter Sofia Olegovna Merkulova to remain in Seychelles for the said Daria Todorova to defend the matters referred to in paragraph (a) above, until final determination of those matters or further order of this Court.

- (c) The Orders stipulated at (a) and (b) above are subject to Yuriy Nesterenko and Daria Todorova proving to the satisfaction of this Court that they have sufficient funds to cover their and the child Sofia Olegovna Merkulova's expenses for the duration of their stay in Seychelles for the purposes stated in this Order, and to cover the cost of their airfares to leave Seychelles.
- (d) This Order is to be served on the Minister of Internal Affairs and the Chief Immigration Officer.

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## RULING ON MOTION

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**CAROLUS J**

### **Background**

[1] On 11<sup>th</sup> December 2020 Savoy Development Limited ("Savoy") filed an application for leave to appeal out of time in MC112/2020 ("the Principal Application") against an Order of the Employment Tribunal ("the Tribunal"). In terms of the Tribunal's Order Savoy was to pay Daria Todorova and Yuriy Nesterenko (respondents in the Principal Application) the sum of GBP700 each per month for shelter. On 25<sup>th</sup> February 2021 Savoy filed two motions: (1) MA30/2021 for a stay of execution of the Tribunal's Order pending the determination of the Principal Application for leave to appeal out of time and any subsequent appeal; and (2) MA31/2021 for the urgent hearing of the Principal Application on the ground that Daria Todorova (of Russian nationality) and Yuriy Nesterenko (of Ukrainian nationality), being non-Seychellois, could decide to leave Seychelles at any time and that it was therefore in the interest of justice that the matter be heard as a matter of extreme urgency. Daria Todorova and Yuriy Nesterenko, the respondents in all three applications opposed the applications and filed pleas in *limine litis* in respect thereof, reserving defence on the merits.

- [2] On 30<sup>th</sup> March 2021, Daria Todorova (“the applicant”) filed a Notice of Motion against Savoy (MA66/2021) which is the subject matter of this ruling, and which she sought to have heard as a matter of extreme urgency.
- [3] In her affidavit in support of the motion, Daria Todorova avers that she was married to Yuriy Nesterenko on 26<sup>th</sup> August 2019 and that they were both employed by Savoy. As per their contracts of employment, the term of her employment was from 15<sup>th</sup> July 2016 to 11<sup>th</sup> July 2020 and Mr.Nesterenko’s was from 1<sup>st</sup> September 2019 to 14<sup>th</sup> August 2020. Her Gainful Occupation Permit (“GOP”) expired on 31<sup>st</sup> October 2020 and his expired on 14<sup>th</sup> November 2020.
- [4] She was informed by letter dated 9<sup>th</sup> June 2020 that Savoy did not intend to renew her contract of employment once it expired. On 12<sup>th</sup> August 2020 she filed a grievance against Savoy with the Ministry of Employment claiming various sums due to her by Savoy, which matter has been partly heard but which has been delayed because of the COVID19 pandemic and for which a continuation date has yet to be fixed. In the interim she has sought alternative employment but Savoy (as the applicant for her GOP) refused to approve her transfer and had to be ordered by the Tribunal to provide a “no objection” letter for her transfer to Six Senses Zil Pasyon (which later informed her that they had to withdraw their offer of employment to her because the Ministry of Employment had not approved their appeal concerning the position offered to her). She was subsequently offered employment by Criollo House (Seychelles) but avers that Savoy will refuse to provide her with a “no objection” letter out of malice unless ordered by the Court.
- [5] She also avers she has requested that Savoy regularise her GOP which expired on 31<sup>st</sup> October 2020 to prevent her from becoming a Prohibited Immigrant which they have failed to do, and which they will refuse to do out of malice unless ordered by the Court. Counsel explained in his oral submissions that she is unable to make an application for the extension of her GOP unless her expired GOP is brought up to date which has to be done by Savoy as the entity which applied for it in the first place.
- [6] The applicant avers that due to Savoy’s refusal to regularise her GOP she and her ten year old daughter are and remain susceptible to deportation, of which she is living in constant

fear and apprehension, and that it is therefore just and necessary for the Court to make the following orders forthwith and as a matter of extreme urgency:

- An Order for Savoy to regularise the seven months delay in the Applicant's GOP and to approve the transfer of her employment to Criollo House (Seychelles)
- An Order prohibiting the Minister of Internal Affairs and the Chief Immigration Officer from deporting or otherwise removing the applicant and her 10 year old daughter Sofia Olegovna Merkulova from the Republic until further notice of this Court.

[7] The situation is different concerning Mr. Nesterenko in that he has already been deported since 20<sup>th</sup> March 2021 as a Prohibited Immigrant, his GOP having expired since 14<sup>th</sup> November 2020, while the applicant and her ten year old daughter remain in Seychelles.

[8] Similarly to the applicant, it is averred that prior to the expiry of his contract of employment he was given notice that Savoy did not intend to renew the contract once it expired. On 11<sup>th</sup> August 2020, he also filed a grievance with the Tribunal against Savoy claiming various sums averred to be due to him, which case is also awaiting a continuation date.

[9] The applicant avers that on 20<sup>th</sup> March 2021 whilst leaving Seychelles for Dubai on an urgent matter Mr. Nesterenko was served with a "Notice to Prohibited Immigrant to Leave Seychelles", at the Seychelles International Airport because his GOP had not been regularised by Savoy. The Notice was appealed against by an email and letter dated 22<sup>nd</sup> March 2021 from Attorney-at-Law Frank Elizabeth, counsel in this matter. The appeal was rejected on the ground that Mr. Nesterenko left the country without a valid GOP, and counsel informed of the same by letter dated 23<sup>rd</sup> March 2021 from Mr. Alain Volcere, Principal Secretary, Immigration and Civil Status Department.

[10] The applicant avers that Mr. Nesterenko had made an application for variation of the conditions/period of validity of his GOP stating in his application that the reason for the variation was to regularise the seven months delay of the GOP and that he was transferring to his own company. On 16<sup>th</sup> March 2021, Mr. Nesterenko paid a fee of SCR5000.00 to

the Department of Internal Affairs, Immigration Division for the regularisation of his GOP which was accepted and for which he was issued with a receipt.

[11] The applicant avers that the presence of Mr. Nesterenko in Seychelles is essential and necessary for him to proceed with his application before the Tribunal and defend the three motions before this Court and further that the result of the applications will affect his interest in the matter before the Tribunal.

[12] She avers that unless the Court makes the following orders he will be unable to return to Seychelles to put his affairs in order and pursue his cases against Savoy:

- An Order directing the Minister of Internal Affairs and the Chief Immigration Officer to allow Yuriy Nesterenko to enter Seychelles to pursue his cases against Savoy and to remain in Seychelles until such time as his cases are completed or until further notice of this Court.
- An Order for Savoy to regularise the seven months delay in Yuriy Nesterenko's GOP and to approve the transfer of his employment to EasyIt (Pty) Ltd.

[13] In addition the applicant prays for any further Orders the Court deems fit in the circumstances of this case.

[14] Savoy opposes the present application and has filed an affidavit in response sworn to by Yuri Khlebnikov who avers that he is a director of Savoy and authorised to sign the said affidavit.

### **Analysis**

[15] Mr. Khlebnikov raises the following points against the granting of the motion, each of which will be dealt with below.

#### *Lack of Jurisdiction of Supreme Court*

[16] Mr. Khlebnikov firstly argues that this Court in its appellate jurisdiction, is only dealing with the applications filed by Savoy in MC112/2020 (application for leave to appeal out of time for an incidental order of the Tribunal regarding housing allowance), MA30/2021 (application for a stay of execution) and MA31/2021 (application for urgent hearing of

MC112/2020) and has no jurisdiction to make the orders prayed for by the applicant. He avers that the Tribunal has exclusive jurisdiction to hear and determine employment and labour and related matters as per paragraph 3(1) of Schedule 6 of the Employment Act and that the Supreme Court can only intervene in an appeal against the decision of that Tribunal under paragraph 4 of Schedule 6 of that Act.

[17] He further avers that this Court as an appellate Court cannot usurp the Tribunal's jurisdiction by dealing with a fresh application unrelated to the appeal before it and that any incidental demands of the applicant in a case before the Tribunal should be addressed to the Tribunal as it is dealing with that case. This Court can only deal with a final decision of the Tribunal.

[18] He also avers that according to Article 125(1)(c) of the Constitution the Supreme Court merely has supervisory jurisdiction over the Tribunal with powers to "*issue injunctions, directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto as may be appropriate for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction*", and since none of these remedies are being sought, the Supreme Court does not have jurisdiction to hear this motion. It is his view that the Supreme Court can only intervene if the Tribunal is unable or lacks the powers to grant the prayers in an incidental demand which is not the case in the present matter.

[19] In dealing with the issue of jurisdiction it is essential to make a distinction between the cases from which the Orders sought by the applicant arise. The Orders sought arise from two sets of cases: first two partly heard matters before the Tribunal in which the applicant and Yuriy Nesterenko are claiming various sums of money averred to be due to them by Savoy; and second the applications before this Court in MC112/2020, MA30/2021 and MA31/2021 which arise from a decision of the same Tribunal in a matter in which it has already made a determination and which Savoy now seeks leave to appeal against, thereby invoking the appellate jurisdiction of the Supreme Court.

[20] I agree with Mr. Khlebnikov that this Court lacks jurisdiction to make the Orders sought in respect of matters still before the Tribunal, and which are unrelated to the matters before

this Court. Orders relating to the matters pending before the Tribunal would be more properly dealt with by the Tribunal itself which is actually dealing with the merits of the matter and is therefore in a better position to decide whether such orders should be made. To decide otherwise would indeed amount to a usurpation of the jurisdiction of the Tribunal which has the power to make such Orders. As such this Court declines to make any Order for Savoy to regularise Yuriy Nesterenko's GOP and to approve the transfer of his employment to EasyIt (Pty) Ltd, and to regularise the applicant's GOP and to approve the transfer of her employment to Criollo House (Seychelles). This Court also declines to issue any directions to allow Yuriy Nesterenko to enter and remain in Seychelles to pursue his cases against Savoy insofar as those cases are being dealt with by the Tribunal. Any application for such directions should be made to the Tribunal. This Court will only consider such application insofar as it concerns the matters before it. Similarly I am of the view that that any Order prohibiting the deportation or removal of the applicant and her daughter from the Republic can only be made by this Court to allow the applicant to deal with matters before this Court.

[21] The Principal Application before this Court is an application for leave to appeal from an Order of the Tribunal outside the prescribed time limit in MC112/2020. The two other matters are incidental to the principal application namely an application for a stay of execution in MA30/2021 and an application for urgent hearing of Principal Application in MA31/2021. These applications are made to this Court in its appellate jurisdiction under Article 125(1)(d) of the Constitution "*as may be conferred on it by or under an Act*". Paragraph 4 of Schedule 6 of the Employment Act empowers the Supreme Court to hear and determine appeals from a judgment of the Tribunal . It is clear therefore that the applications are not made pursuant to the supervisory jurisdiction of the Supreme Court over subordinate courts, tribunals and adjudicating authority for the purpose of enforcing or securing the enforcement of its supervisory jurisdiction under Article 125(1)(c) as contended by Savoy's representative.

[22] Counsel for the applicant argues that the present application was made invoking the original jurisdiction of this Court. As stated the Principal Application seeks to invoke the appellate jurisdiction of this Court. It follows that any incidental application filed as a

motion in the Principal Application should relate to the Principal Application and will therefore be dealt with by the Court in terms of the same jurisdiction as it is dealing with the Principal Application.

[23] Related to the issue of jurisdiction is Mr. Khlebnikov's contention that Mr. Nesterenko should have proceeded by way of Judicial Review of the decision denying his appeal against the "Notice to Prohibited Immigrant to Leave Seychelles" and not by way of the present application. In my view the present application was properly filed in the present proceedings because this Court is not being asked to review the decision of the Immigration Authorities to compel Mr. Nesterenko to leave Seychelles as a Prohibited Immigrant on the permitted grounds for Judicial Review, but this Court is being asked to allow him back in the country to defend the matters filed by Savoy against him in those same proceedings and only for as long these proceedings last, despite being a Prohibited Immigrant. It is to be noted that the Immigration Decree does provide in its section 18 for issuing of a temporary permit to a prohibited immigrant by the Director of Immigration.

[24] This Court therefore finds that it has jurisdiction to make the Orders prayed for insofar as they relate to the matters before this Court namely MC112/2020, MA30/2021 and MA31/2021.

*Mr. Nesterenko, Minister of Internal Affairs and the Chief Immigration Officer are not parties*

[25] Mr. Khlebnikov further argued that Mr. Nesterenko, the Minister of Internal Affairs and the Chief Immigration Officer not being parties to the present motion, the Court cannot entertain the applicant's prayer for an Order directing the latter persons to allow Mr. Nesterenko to enter and remain in Seychelles to pursue his cases against Savoy.

[26] It is true that in the present application MA66/2021 which is made by way of Notice of Motion signed by the attorney for the applicant Mr. Elizabeth, only Daria Todorova is cited as the applicant and Savoy as the respondent. Further the affidavit in support of the application is sworn by the said Daria Todorova. However this Court is being asked to make Orders which concern not only her but also Mr. Nesterenko. Logically Mr. Nesterenko should have been a co-applicant together with Daria Todorova as some of the Orders sought clearly affects his interest. However this Court is mindful that in the present



circumstances, Mr. Nesterenko having been served with a notice to leave Seychelles as a Prohibited Immigrant on 20<sup>th</sup> March 2021, although he can instruct counsel, is not in a position to sign any documents or swear any affidavit in a matter in which time is clearly of the essence, taking into account that Savoy has applied for the application for leave to be heard as a matter of extreme urgency. I also note that the factual matters stated on oath by Daria Todorova in her affidavit are matters which are within her knowledge and are moreover supported by documentary evidence. Furthermore both Daria Todorova and Yuriy Nesterenko being respondents in the Principal Application (MC112/2020) as well as MA30/2021 and MA31/2021, I hold that the fact that Mr Nesterenko is not a party to the present application should not invalidate the application insofar as it concerns him. To hold otherwise would result in him being prejudiced in his defence of the applications filed against him by Savoy before this Court which would clearly not be in the interests of justice and would be in breach of his right to a fair hearing under Article 18 of the Constitution.

[27] This Court has the option of exercising its powers under section 112 of the Seychelles Code of Civil Procedure to order the joinder of Mr. Nesterenko as an applicant in the present application. However the presence of Mr. Nesterenko would still be necessary in order to sign any documents or swear any affidavits. Similarly, if the applicant were to act as the agent of Mr. Nesterenko or on his behalf under a power of attorney, certain documentation requiring his signature would be necessary which in the circumstances is not practicable

[28] As for the Minister of Internal Affairs and the Chief Immigration Officer not being parties to the present application, this Court finds that there is no necessity for the same as the applicant is not appealing against or seeking a review of their decision to serve him with a notice to leave Seychelles as a Prohibited Immigrant or to deny his appeal against such decision, but is rather asking the Court to allow Mr. Nesterenko back in the country to defend the matters filed by Savoy against him despite being a Prohibited Immigrant, and only for as long these proceedings last.

[29] In the case of Haron Ondicho Sagwe v the Attorney General & Ors (CP07/2014) [2015] SCCC 04 (28 July 2015) Mr. Sagwe a Kenyan national had been convicted before the Supreme Court and his conviction overturned on appeal. He filed a petition before the Constitutional Court against the Attorney General and the Government of Seychelles

claiming to have been a victim of a serious miscarriage of justice having spent three years in prison after his conviction and claimed compensation therefor. After his conviction, his GOP had been cancelled and the immigration authorities allowed him to stay in Seychelles on a visitor's permit for which he had to pay a fee every time it was renewed. He sought a waiver of the fees. The Constitutional Court made an order (23<sup>rd</sup> June 2015) that he could remain in Seychelles until the date of delivery of judgment in the case. By a further order (7<sup>th</sup> July 2015) it held that the petitioner being permitted to remain in Seychelles pursuant to orders of the Court, the immigration decree more particularly the provisions dealing with "visitor's permit" did not apply to the petitioner and that therefore the question of waiver of fees did not apply. Neither the Minister of Internal Affairs nor the Chief Immigration Officer were parties to that case.

*Necessity for physical presence of Mr Nesterenko and Daria Todorova in Seychelles*

[30] As for Mr. Khlebnikov's contention that virtual hearings are now possible and that the physical presence of Mr. Nesterenko and Daria Todorova is not necessary and will not cause them any prejudice, it is our view that it is up to them to choose whether to physically attend the hearings or to participate virtually. Further the respondent is not in a position to know whether this would cause them any prejudice or not in the conduct of their cases.

[31] Further given that the main ground advanced by Savoy for the urgent hearing of the Principal Application is that Daria Todorova and Yuriy Nesterenko being non-Seychellois could decide to leave Seychelles at any time, I fail to understand why it is now objecting to their application to be allowed to remain in Seychelles pending the determination of the matters before this Court.

*Reason for which Mr Nesterenko and Daria Todorova were allowed to remain in Seychelles after expiry of his GOP*

[32] Mr. Khlebnikov contends that the only reason Mr. Nesterenko and Daria Todorova were permitted to remain in Seychelles after the expiry of their GOP was because of the restriction of international movement to and from Seychelles and the allowances made by the Ministry of Employment during that time for non-Seychellois workers. They have not provided any evidence of the same.

- [33] I further note that Mr. Nesterenko's GOP expired on 14<sup>th</sup> November 2020 and that it was possible at that time to leave Seychelles. However for some reason, he was allowed to remain in Seychelles despite becoming a Prohibited Immigrant upon the expiry of his GOP in accordance with section 19(1)(d) of the immigration Decree. It was open to the immigration authorities to exempt him from that provision with the result that he would not be deemed to be a Prohibited Immigrant despite the expiry of his GOP under section 19(2) of the Decree, or to issue him a temporary permit as a Prohibited Immigrant under section 18 of the Decree. There is no evidence that they did either.
- [34] I also take into account Savoy's application for variation of Mr. Nesterenko's GOP which expired on 14<sup>th</sup> November 2020, for the purpose of extending it from 15<sup>th</sup> August 2020 to 14<sup>th</sup> March 2021, and the payment of SCR5000.00 for the same.
- [35] This Court will not however speculate as to the reasons why the immigration authorities left it to the 20<sup>th</sup> March 2021 when Mr. Nesterenko was leaving Seychelles to serve him with a Notice to leave Seychelles as a Prohibited Immigrant when they were entitled to do so since 14<sup>th</sup> November 2020.
- [36] In the same vein, I fail to understand why the applicant Daria Todorova has been allowed to remain in Seychelles although her GOP expired on 31<sup>st</sup> October 2020 without being exempted from being a prohibited immigrant or being granted a temporary permit, while Mr. Nesterenko has been forced to leave on those very same grounds.
- [37] Both Mr. Nesterenko and Daria Todorova having been allowed to remain in Seychelles despite the expiry of their GOP on 14<sup>th</sup> November 2020 and 31<sup>st</sup> October 2020, and only Mr. Nesterenko having been compelled to leave Seychelles on 20<sup>th</sup> March 2021, I find no reason why they cannot be allowed to remain in Seychelles until the determination of the matters before this Court.

### **Decision**

- [38] For the reasons stated above, this Court finds that in the interests of justice the presence of both Yuriy Nesterenko and Daria Todorova in Seychelles is necessary for them to defend the three applications filed by Savoy against them in MC112/2020, MA30/2021 and

MA31/2021 as well as any appeal filed in the event that leave to appeal out of time is granted in MC112/2020. Accordingly the Court makes the following Orders:

- (a) The Minister of Internal Affairs and the Chief Immigration Officer are hereby directed to allow Yuriy Nesterenko to re-enter Seychelles forthwith for the purpose of defending the above mentioned matters and to remain in Seychelles until final determination of those matters or further order of this Court.
- (b) The Minister of Internal Affairs and the Chief Immigration Officer are hereby directed to allow Daria Todorova and her daughter Sofia Olegovna Merkulova to remain in Seychelles for the said Daria Todorova to defend the above mentioned matters until final determination of those matters or further order of this Court.
- (c) Further the Orders stipulated at (a) and (b) above are subject to Yuriy Nesterenko and Daria Todorova proving to the satisfaction of this Court that they have sufficient funds to cover their and the child Sofia Olegovna Merkulova's expenses for the duration of their stay in Seychelles for the purposes stated in this Order, and to cover the cost of their airfare to leave Seychelles.

[39] For the avoidance of doubt, this Court states that these Orders are only to enable Mr. Nesterenko and Daria Todorova to remain in Seychelles to defend the abovementioned matters and to prevent their deportation and/or removal from the jurisdiction pending the determination of those matters. These Orders do not purport to allow them to be gainfully employed in Seychelles. The decision as to whether or not to extend the validity period of or vary or modify the terms of their respective GOPs, or issue them with new GOPs rests entirely on the immigration authorities subject to the applicable law and current Government policies on the subject. The same applies to whether to allow the parties to obtain alternative employment in Seychelles which decision lies with the Employment Ministry. These last observations are of course subject to any order of the Employment Tribunal or any Court.

[40] A copy of this Order is to be served on the Minister of Internal Affairs and the Chief Immigration Officer.

Signed, dated and delivered at Ile du Port on 07 April 2021

Carolus.

E. Carolus J