

## SUPREME COURT OF SEYCHELLES

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### Reportable/Not Reportable/Redact

[2021] SCSC ... 236  
MC112/2020 &  
MA30/2021, MA31/2021  
(Arising in MC112/2020) &  
MC20/2021

In the matter between:

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

**Applicant**

and

**DARIA TODOROVA**

**1<sup>st</sup> Respondent**

**YURIY NESTERENKO**  
(rep. by Mr. Frank Elizabeth)

**2<sup>nd</sup> Respondent**

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**Neutral Citation:** *Savoy Development Limited v Todorova & Anor* (MC112/2020, MA30/2021, MA31/2021 & MC 20/2021) [2021] SCSC ... 236 (21 May 2021).

**Before:** E. Carolus J

**Summary:** Application for leave to appeal out of time

**Delivered:** 21 May 2021

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### **ORDER**

The application for leave to appeal out of time is dismissed with costs. In consequence all the motions in the present application namely MA30/2021 (for stay of execution) and MA31/2021 (for urgent hearing of Principal Application) also stand dismissed. MC 20/2021 (for deposit with the Supreme Court, of funds received by the respondents in execution of the judgment of the Employment Tribunal, pending determination of this application for leave to appeal out of time and the subsequent appeal to the Supreme Court), is also dismissed.

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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 £700 each per month for shelter.
- [2] 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.
- [3] Daria Todorova and Yuriy Nesterenko, the respondents in all the applications opposed the application for leave to appeal out of time in MC112/2020 and the application for stay of execution in MA30/2021 and filed pleas in *limine litis* in respect of both applications, reserving their defence on the merits. Written submissions were also filed by both parties in respect of the two applications.
- [4] On 17<sup>th</sup> March 2021 Savoy filed yet another application in MC 20/2021 for an order that the respondents deposit the funds received by them by way of cheque numbers 80993 and 80994 from Savoy in satisfaction of the judgment of the Employment Tribunal, into the Supreme Court account, pending the determination of the Principal Application for leave to appeal out of time and if it is granted, the subsequent appeal to the Supreme Court against the decision of the Employment Tribunal. The respondents did not file any affidavit in reply or pleas in *limine litis* in respect of this application.
- [5] Given that a refusal of leave to appeal out of time against the Employment Tribunal’s decision would also dispose of the other applications namely for stay of execution and reversal of execution, it was agreed by the parties that the Principal Application would be dealt with first.

### **Application for leave to appeal out of time**

- [6] In support of Principal Application for leave to appeal out of time, Savoy has filed an affidavit sworn to by Yuri Khlebnikov who avers that he is a director of Savoy and authorised to sign the said affidavit on its behalf.
- [7] In his affidavit Yuri Khlebnikov avers that the respondents had initiated a grievance procedure against Savoy before the Employment Tribunal for non-payment of their salaries and housing allowances and certain deductions from their salaries. Pursuant to this, on 22<sup>nd</sup> October 2020, the Tribunal made two orders in terms of which Savoy was ordered to pay each of the respondents the sum of £700 per month for shelter.
- [8] He avers that the orders were made ex parte on motion filed by the respondents. It was stated in the orders that service of the Notice of Motion filed by the respondents had been effected on the applicant's counsel, therefore the motion was heard ex parte and the orders made. He contends however that the service was in fact made to an email namely [manuella@plc.sc](mailto:manuella@plc.sc) which the registry erroneously thought belonged to the applicant's counsel. Further the respondents had claimed the sum of €700 in the proceedings before the Tribunal but Savoy was ordered to pay them £700 which was the wrong currency.
- [9] He avers that Savoy received a copy of the two orders on 28<sup>th</sup> October 2020. On 29<sup>th</sup> October 2020 its counsel filed a motion supported by affidavit to set aside the orders of the Tribunal. By Order delivered on 4<sup>th</sup> December 2020, the Tribunal dismissed the motion to set aside its orders due to a procedural irregularity.
- [10] Yuri Khlebnikov avers that Savoy has high chances of success on appeal since it never received proper notice of the Notice of Motion filed by the respondents. Further that the delay in appealing against the Tribunal's orders is not inordinate or unreasonable given that immediately after Savoy was informed of the Tribunal's decision it took necessary steps to remedy the issue. He also avers that if Savoy is granted leave to appeal out of time, it will not unduly prejudice the respondents, but on the other hand if leave is not granted Savoy will face severe prejudice. Further Savoy not having been given a fair opportunity to be heard will be denied a fair hearing.

- [11] In the alternative he avers that prescription has been interrupted by the filing before the Tribunal of the motion to set aside the Tribunal's orders.
- [12] Yuri Khlebnikov avers that it is therefore urgent and necessary, just, fair and in the best interests of justice that leave is granted to file the Notice of Appeal out of time.
- [13] A Memorandum of Appeal was exhibited in the affidavit which is averred will be filed if Savoy is granted leave to appeal out of time. The relief sought in terms of paragraph 2 of the Memorandum of Appeal is to quash the decision of the Employment Tribunal and allow the appellant the opportunity to defend the motion.
- [14] The grounds of appeal as set out in the Memorandum of Appeal are as follows:

*1. Grounds of Appeal*

- 1.1. The Employment Tribunal erred in law in proceeding with an ex-parte hearing without ensuring that proper service had been effected on the Applicant and further, that the Appellant was not granted the opportunity to respond to the application.*
- 1.2. The Employment Tribunal erred in law in ordering the Appellant to pay the Respondents the sum of £700 each per month, as this was not the proper currency sought.*

- [15] I note that although Savoy is seeking leave to appeal against two orders of the Employment Tribunal the two orders have not been exhibited to the supporting affidavit sworn by Yuri Khlebnikov.
- [16] I further note that as its intended grounds of appeal, Savoy is relying firstly on the Tribunal allegedly hearing the matter giving rise to the two orders ex parte, after making a finding that service had been effected on Savoy's counsel when service had been effected on an email address which did not belong to its counsel. The other intended ground of appeal is that the orders were made in the sum of £700 whereas the respondents claim had been for the sum of €700. However no documentary evidence has been produced in support of such averments. In fact the only document exhibited to the affidavit is the intended Memorandum of Appeal.

[17] This Court has many times stated that it is not sufficient for an applicant to simply aver facts in the affidavit in support of an application. Such facts have to be supported by documentary evidence where these exist. In the present case Savoy has not even bothered to exhibit the orders it is seeking leave to appeal against. In the circumstances the Court is unable to ascertain even the existence of such orders. I further note that documentary evidence of other matters averred and relied upon by Savoy pertaining to service could have been obtained from the court files and records with a minimum of diligence. The Order dated 4<sup>th</sup> December 2020 dismissing Savoy's motion to set aside its orders which is pertinent among other things, to the issue of prescription raised by the applicant was also not exhibited. Documentary evidence showing that the claim before the Tribunal was for €700 and that the respondents were awarded £700 has also not been exhibited.

[18] I find Robinson JA's observation in *Lablache de Charmoy v Lablache de Charmoy* SCA MA08/2019 [17 September 2019] at paragraph 11 of her Order apposite in the circumstances of the present matter. She stated:

*In Re Hinchcliffe, A Person of Unsound Mind, Deceased, [1895] 1Ch, 117, the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited to and filed with it. In the same light any document to be used in combination with an affidavit in support of an application [to stay execution] must be exhibited to and filed with it. Counsel for the applicant should be mindful that the affidavit stands in lieu of the testimony of the applicant.*

Emphasis added

[19] In *Laurette & Ors v Savy & Ors* SCA MA13/2019 [22 October 2019], an application seeking extension of time to file a notice of appeal against a judgment of the Supreme Court, Robinson JA mentioned at paragraph 5 of her Ruling that along with other deficiencies in the affidavit, "*the judgment had not been exhibited to the affidavit*", and stated "*Overall the deficiencies establish a lack of significance and urgency on the part of the applicants in making this application*". She went on to state the following at paragraph 6:

*In Aglae v Attorney General (2011) SLR 44 the Appellate Court guided by Ratnam v Cumarasamy and Another [1964] 3 All ER 933, stated: "[t]he rules of court must,*

*prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right of extension of time which would defeat the purpose of the rules which provide a timetable for the conduct of litigation.*

Emphasis added

- [20] In *Trevor Zialor v R* SCA MA16/2017 [17 October 2017] at paragraph 12 of its Order the Court of Appeal stated:

*Learned counsel states that he has the authority to swear to the affidavit on behalf of Appellant. I note that no such authority is exhibited to the affidavit. Any document to be used in combination with an affidavit must be exhibited to the affidavit. (See In Re Hinchliffe, A Person of Unsound Mind, Deceased, Court of Appeal, 5 November 1894 [1895] 1 Ch. 117).*

- [21] On the basis of the above, I find that the averments in the affidavit in support of the application were not sufficiently substantiated as the relevant documents were not exhibited to the affidavit. In consequence the Court does not have sufficient material before it to exercise its discretion to grant leave to appeal out of time. Having found thus the Court finds no necessity in considering the arguments of counsels on the pleas in limine or the merits of the application.

- [22] I therefore dismiss the application with costs. In consequence all the motions in the present application namely MA30/2021 (for stay of execution) and MA31/2021 (for urgent hearing of Principal Application), also stand dismissed. MC 20/2021 (for deposit with the Supreme Court, of funds received by the respondents in execution of the judgment of the Employment Tribunal, pending determination of this application for leave to appeal out of time and the subsequent appeal to the Supreme Court), is also dismissed.

Signed, dated and delivered at Ile du Port on 21 May 2021

E. Carolus.

E. Carolus J