SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
XP 172/2021

In the ex parte matter of:

JACQUES ANDRE FISHER **1st Applicant**

REUNERT NDIVHUHO KHARIVHE **2nd Applicant**
(rep. by Bernard Georges)

Before: Burhan J
Summary: Recognition and enforcement of South African Orders; winding up of estate and appointment of trustees; *Ablyazov* procedure; *Privatbanken* conditions; UNCITRAL Model Law on Cross-Border Insolvency
Heard: 13th January 2022
Delivered: 28th January 2022

ORDER

BURHAN J

[1] This is an ex-parte application for recognition as valid and enforcement of two (2) Orders of the High Court of South Africa, Limpopo Division, Polokwane:

- the Order made by Judge Muller on 20 July 2021 in Case No. 2368/2021 that the estate of Cornelius Johannes Steynberg be wound up ("First Order"); and

- the Order made by Judge President Makgoba on 13 August 2021 in Case No. 5725/2021 in terms of Article 15(2)(b) of the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvency seeking the assistance of the Supreme Court of Seychelles to act in aid of the High Court of South Africa in recognising the appointment of the

provisional joint trustees of the estate of Cornelius Johannes Steynberg and for actions arising therefrom ("Second Order").

[2] The Applicants Jacque Andre Fisher and Reunert Ndivhuho Kharivhe are provisional joint trustees of the estate of Cornelius Johanes Steynberg, whose estate is subject to a sequestration order made by the High Court of South Africa. There are no Respondents/Defendants listed in the Application.

Background

[3] It is averred by Mr Fisher in his Affidavit that Mr Steynberg is the sole director and controlling mind of Mirror Trading International (Pty) Ltd ("MTI"), both of which enjoyed significant media coverage.

[4] With regards to Mr Steynberg and cryptocurrency that is believed to be held by BitMEX in his name (as was uncovered by investigators appointed by the Applicants (paragraph 12 of the Affidavit), the Applicant seeks recognition of the Orders in order to collect crypto assets to which the insolvent estate is entitled (paragraph 8 of the Affidavit); and once the appointment of Applicants as provisional trustees and an order to wind up estate of Mr Steynberg are recognised, the Applicants intend to seek orders in terms of which BitMEX is required to disclose any other accounts in Mr Steynberg's name; and in addition seek to compel any and all crypto exchanges within Seychelles to provide them with the details of any account held by Steynberg and to suspend such accounts in order to obtain the assets for the benefit of creditors of Steynberg (paragraph 11 of the Affidavit).

[5] It is apparent that the Application has actually three (3) Court Orders enclosed. In addition to the Orders being sought to be registered, earlier Order made by Judge President Makgoba on 17 May 2021 in Case No. 3322/2021 is also enclosed but is not sought to be registered.

Application with no respondent

[6] It is to be noted that the application contains no respondent. The Application does not contain submissions regarding reasons for not stating Respondent. In *ex p Fonseka (SCA 28/2012) [2014] SCCA 42* (12 December 2014) the Court made several observations regarding ex parte applications and no respondent being mentioned. Although, the case was regarding judicial review and Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995, which are not applicable to this case, the observations however are worth noting.

[7] The Supreme Court dismissed the "petition" which was application for leave to apply for judicial review, ex parte. The "petition" did not contain the name and required details of the Respondent. The Trial Judge stated that, *". . . I do not find that the petition is properly before the court"* and dismissed it. The Counsel appealed arguing that, *"on an ex parte process, there is no need to cite the respondent/s in the application"*.

[8] The Court of Appeal decided that petition/application should have stated the name of the respondent but that also the trial judge should have set it aside instead of dismissing it, which would have enabled the applicant *"to come back after he had supplied the deficiencies by filling in the blanks"* instead of filing appeal. The Court of Appeal quashed the order for dismissal and substituted it by words 'set aside'.

Submissions

[9] The Second Order referred to in paragraph [1] was made under Article 15(2)(b) of the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvency. UNCITRAL Model Law was incorporated in Seychelles Insolvency Act 2013 in Part VIII of the Act, which relates to the Cross-Border Insolvency. However this part of the Act has not yet been brought into force.

[10] The Application is made under *Ablyazov* procedure (*Ablyazov v Outen & Ors* (SCA 56/2011 & 08/2013) [2015] SCCA 23 (28 August 2015)) for registration of foreign judgment/orders. It is submitted by learned Counsel for the Appplicant that *Ablyazov* is

an extension of the procedure set out in *Privatbanken Aktieselkab v Bantele* 1978 SLR 226, which is the proper procedure for registration of foreign judgments.

The Applicant submits in the Application that the South African High Court had jurisdiction to hear the application for the Orders and to grant the Orders, that it considered and applied the correct law and legal principles in respect of the evidence as presented orally and in writing before the Court and the rights of all parties were respected and the ex parte applications for the Order were lawful, necessary and appropriate in all the circumstances. It is further submitted that the duties of full and frank disclosure were complied with and the application and order was not contrary to any fundamental rules of public policy and were obtained in the proper manner and in the absence of any fraud.

Analysis

[11] The conditions for a foreign judgment to be declared executory under *Privatbanken* are:

> *"(1) The foreign judgment must be capable of execution in the country where it was delivered;*
>
> *(2) The foreign Court must have had jurisdiction to deal with the matter submitted to it;*
>
> *(3) The foreign Court must have applied the correct law ("la loi competente") to the case in accordance with the rules of the Seychelles private international law;*
>
> *(4) The rights of the defence must have been respected;*
>
> *(5) The foreign judgment must not be contrary to any fundamental rules of public policy; and*
>
> *(6) There must be absence of fraud."*
>
> *The authority for the above is to be found in Encyclopedic Dalloz, Droit International, Verbo Jugement Etranger (Matieres Civile et Commerciale) paragraph 193 to 248; Batiffol & Lagarde, Droit International Prive, 6eme Edition, Tome II, paragraphs 712 to 729."*

[12] While the Application states that conditions 2-6 were satisfied, the Applicant does not elaborate further how and why conditions are satisfied. With regards to the First Order (winding up of estate), Respondents were Mr Steynberg and his wife, Mrs

Steynberg. The order may satisfy the conditions as Mr Steynberg is resident in South Africa and the Court had jurisdiction over him. Further the Order can be executed in South Africa with regards to the assets situated there. The Order further states that counsels for both parties were heard (respecting rights of the Respondent); it also does not appear that the Order is contrary to public policy neither is there any indication of fraud in obtaining the Order. The winding up order, however, does not contain appointment of trustees of the estate.

[13] The Second Order seeking the assistance of the Supreme Court of Seychelles to act in aid of the High Court of South Africa in recognising the appointment of the provisional joint trustees of the estate of Cornelius Johannes Steynberg and for actions arising therefrom was granted ex parte. The Second Order does not have Respondents but it is an Order confirming existence of sequestration of Mr Steynberg and affirming appointment of the Applicants as Trustees.

[14] As the Second Order referred to herein as the said Order was ex-parte the rights of the defence being respected might be not satisfied. The present case is in a way similar to the *Ablyazov* case where application was brought to register appointment of receivers with the view to assist foreign receivers and protect from dissipation of assets. The similarity is in the "asset protection exercise". However, the Court of Appeal in *Ablyazov* stated that the orders in UK were granted after *"an adversarial hearing which lasted 4½ day"*, unlike the Second Order in the present case. *Ablyazov* procedure allowed ex parte application in Seychelles courts, not registration of foreign ex parte orders.

[15] Furthermore, Mr Ablyazov had an opportunity to make an application to set aside the Supreme Court orders granted in Seychelles. In the present case Mr Steynberg is not even named as a respondent. Further distinction therefore is that in the present case there is no Respondent and the Applicant believes that assets are held at the BitMEX which, as averred, is partially situated in Seychelles. However, while the Applicant states that they investigated and found that bitcoin assets are being held by BitMEX and it is partially registered in Seychelles, they have not provided any further supporting information.

[1] The Applicant submitted that ex parte application was lawful and necessary. While this might be the situation in matters relating to urgent cross-border asset tracing and/or freezing, nonetheless, procedure and conditions for its registration needs to be decided by enactment of specific legislation supporting the recognition of such orders, foreign ex parte orders.

[2] It was noted in *In Touch Sports Ltd v Persons Unknown & Ors* (MC 71/2021) [2021] SCSC 857 (09 December 2021) that, due to its nature, foreign interim orders might not always satisfy the requirements of *Privatbanken* conditions. *Privatbanken* conditions appear to be more suitable to cases where adversarial hearing between the parties took place. Therefore, it is desirable that specific legislation be enacted to provide international assistance. Unlike *In Touch Sports Limited* case, however in this instant case there actually is specific legislation, Part VIII of the Insolvency Act 2013, which provides for cross-border insolvency cases. However Part VIII is not yet in operation.

[3] Furthermore, section 1(2) of the Insolvency Act 2013 states that Part VIII (Cross-Border Insolvency) *"shall come into operation on such date as the Minister may, by notice i) n the Gazette, appoint"*. Sections 350-352 emphasise that prior to Part VIII coming into operation, the Minister needs to be satisfied that there is reciprocity and mutual agreement for the mutual recognition between jurisdictions. Registering such Orders by the Court at this stage therefore may interfere with the designated decision power of the Minister.

[4] The Court of Appeal in 2017 decision in *Vijay Construction (Proprietary) Ltd v Eastern European Engineering Ltd* (Civil Appeal SCA 15 & 18/2017) [2017] SCCA 41 (13 December 2017) discussed in length the problematic position where the law exist on the statute books but cannot be enforced because of Seychelles' decision not to ratify the New York Convention. Thereafter, in 2020, Seychelles acceded to the New York Convention. In the present case the law in statute exist but is not yet operational.

[5] The emphasis therefore is similar to those made in the *In Touch Sports Limited* decision, that it is the legislative and thereafter executive branches of the Government that need to

come to a decision whether orders in relation to cross-border insolvency shall be registered in Seychelles.

[6] In comparison, the BVI courts in *Broad Idea International Limited v Convoy Collateral Limited*, BVIHCMAP2019/0026, 29 May 2020 had prompted legislative response by its decision to refuse to grant injunctions in aid of foreign litigation without statutory authority to do so. The BVI court in *Broad Idea* overturned the precedent established in *Black Swan Investments ISA v Harvest View Limited and Anor*, BVIHCV 2009/399, 23 March 2010 and held that the BVI courts had no jurisdiction to grant injunctions in aid of foreign litigation without statutory authority to do so. The legislative response followed thereafter. This Court is also of the opinion that it does not have statutory power to register cross-border insolvency orders for the reasons that the statute in relation to Cross-Border Insolvency has not yet been made operational.

[7] Furthermore, it is worth noting in passing that the Applicant is not remediless until Part VIII of the Insolvency Act 2013 comes into operation as there are also other avenues available in Seychelles to assist in international matters relating to assets (see *Government of Seychelles v Huobi Global Limited & Ors* (MC 35/2021) [2021] SCSC 732 (09 November 2021).

[8] This Court is further of the opinion that even if the First Order can satisfy the conditions of *Privatbanken*, without registration of the Second Order, the appointment of trustees and recognition of their powers will not be enforceable and executory in Seychelles. Furthermore, unlike *Ablyazov* case, Mr Steynberg, against whom South African sequestration order is sought to be registered in a foreign jurisdiction, Seychelles, is not even mentioned as a Respondent. The Second Order, foreign ex parte order, due to its nature does not satisfy *Privatbanken* conditions. Finally, this Court is of the opinion that it does not have statutory power to register orders in relation to cross-border insolvency issues for the reasons that the statute has not yet been made operational. Upon consideration of all the factors in the present case, this Court is not satisfied that the orders can be registered.

[9] For the aforementioned reasons the application stands dismissed.

Signed, dated and delivered at Ile du Port on 28th January 2022.

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M Burhan J