

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC
XP 259/2022

In the ex parte matter of:

FAIR TRADING COMMISSION
(Represented by P. Ramruchaya)

Applicant

Neutral Citation: *Ex Parte: Fair Trading Commission* (XP 259/2022) [2023] SCSC
(19th January 2023)

Before: Adeline J

Summary: Application to prevent a person from leaving the jurisdiction during an investigation by the Fair Trading Commission/Section 43(1) of the Fair Trading Act.

Heard: 16 December 2022

Delivered: 19 January 2023

FINAL ORDER

Application is dismissed due to the deficiencies in the affidavit, in that, the affidavit discloses insufficient material to satisfy the court that it is necessary to make an order preventing the person from leaving Seychelles.

RULING

Adeline, J

[1] This is an application, filed in court on the 12th December 2022 pursuant to Section 43 of the Fair Trading Act 2022, (“the Act”), by which application, the Applicant, Fair Trading Commission seeks for an order of this court to prevent one Stephen Victor from leaving the jurisdiction of Seychelles.

[2] At the outset, it is worth stating that, Section 43(1) is couched in the following terms;
“Where the commission has reason to believe that a person may leave Seychelles during an investigation by the commission or hearing before the tribunal, the commission may, ex parte, or without notice to the person, apply to the Supreme Court for an order preventing the person from leaving Seychelles”

[3] Furthermore, Section 43(2) reads;

“An application under subsection (1) may be made to a Judge in Chambers, and shall be accompanied by an affidavit in support sworn by the Chief Executive Officer, Deputy Chief Executive Officer, or such authorised officer of the commission disclosing sufficient material to satisfy the judge that it is necessary to make an order preventing the person named in the application from leaving Seychelles”. (the underlined emphasis is mine).

[4] It is also necessary to spell out the terms of Section 43(8) of the Act, that reads as follows;

“(8) Nothing in this section shall prevent a judge from ordering the person to furnish sufficient and good security to meet any of his or her obligations under this Act in place of the grant of an order preventing the person from leaving Seychelles”. (Underlined emphasis is mine).

[5] In order to make an intelligible and the right decision on the merits of this application, it must be noted, that, the evidence laid before this court for such determination is by way of affidavit. That is compatible with the provisions of Articles 168, 169, and 170 of the Seychelles Code of Civil Procedure (“the SCCP”). Section 168 of the SCCP reads;

“The court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable, provided that where it appears to the

court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit”.

[6] Article 169 of the SCCP goes further as to say that;

“Upon any motion, petition or application evidence may be given by affidavit, but the court may, on application of either party, order the attendance for cross-examination of the person making any such affidavit”.

[7] Article 170 of the SCCP goes further as to say that;

“Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statements as to his belief, with the grounds thereof, may be determined”.

[8] Therefore, affidavit evidence adduced before the court has to be in compliance with the rules of evidence, and the averments made therein, have to meet the requirements of Article 170 of the SCCP. The importance and the use of affidavit evidence to prove one’s assertion has been discussed in a plethora of case law, and it is firmly established by a host of case law authorities.

[9] The proposition that affidavits are sworn evidence and that they have to be in compliance with the law of evidence to be made admissible, is well illustrated by Pillay J in *Michel vs Michel* (MA 399/2019) [2020] SCSC 303 (9th June 2020) relying on *Elmastry & Anor vs Hua Sun* (MA 197/2010) (arising in CC 13/2014) [2019] SCSC 96 (8th November 2019). In that case, the court relied on *Daniella Lablache De Charmoye vs Patrick Lablache De Charmoye* (Civil Appeal SCA MA 08/2019, SCSC 35 (17 September 2019) in which case, inter alia, Twomey CJ (as she then was) had said that;

“Affidavits are sworn evidence and evidential rules for admission cannot be waived”.

[10] It is also settled law, that it is not sufficient for an affidavit in support of an application before a court in this jurisdiction to simply contain averments made therein. The facts averred, have to be supported by documentary evidence which has to be exhibited to the affidavit. This case law requirement is in fact in line with Practice Direction 32 (supplement CPR Part 32) 4.3 (1) of the English White Book. This case law requirement was emphasised by Carolus J in MC 112/2020, MA 30/2021 and MA 31/2021 (arising in MC 112/2020 and MC 20/2021) in a matter between Savoy Development Limited and Davia Todorova and Yuriy Nesterenko, when her ladyship made the following comment at paragraph [15] of her Ruling;

“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 Khnebnikov”.

[11] This legal position, is also well articulated in the precedent case of Lablachhe De Charmoye vs Lablache De Charmoye SCA MA 08/2019 [17th September 2019] when Robinson J, stated the following;

“In rettinchliffe, a person of unsound mind, deceased [1895] 1 CH, 1117, the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited to and file with it. In the same light, any documents to be use 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 minful that affidavit stands in lieu of the oral testimony of the Applicant”

[12] In Laurette & Ors vs Savy & Ors SCA MA 13/2022 (22nd October 2017) the Applicant had applied to the court for an extension of time to file a notice of appeal against the judgment of the Supreme Court. In her ruling, noting deficiencies in the affidavit, Robinson J stated that;

“the judgment had not been exhibited to the affidavit”

[13] Therefore, based on both, statutory and case law, the affidavit in support of the application is clearly deficient. It lacks substance in the form of evidence to enable the court to grant the order being sought for in the interest of justice.

[14] Furthermore, to decide whether this application has any merit or not, I have paused to give thought to the right of movement afforded to every person lawfully present in Seychelles under Article 25 of the Seychellois Charter of Fundamental Human Rights and Freedoms under the constitution. This right includes, the right to leave the jurisdiction of Seychelles. I also note, that this right is not absolute given the provisions of Article 25(3) of the Constitution that reads;

“(3) The right under clause (1) may be subject to such restrictions as are prescribed by a law necessary in a democratic society”.

[15] This therefore, indicates that, Section 43 of the Fair Trading Act is consistent with Article 25(3) of the constitution and as such, is it not unconstitutional. Nonetheless, in determining this application, the affidavit sworn by one Nathalie Edmond, the Deputy Chief Executive Officer of the Fair Trading Commission, a body corporate established under Section 5(1) of the Act, has to be put under scrutiny.

[16] I have read the averments in the supporting affidavit to the application. I observe that, the affidavit evidence is a meagre one, in that, it does not seek to provide this court with the necessary evidence it requires to make a just decision. It contains averments that are not substantiated because they are not backed up with the evidence required. Simply say, the affidavit in support of the application lacks substance and is therefore deficient.

[17] In the circumstances, this application cannot succeed and is therefore hereby dismissed.

Signed, dated and delivered at Ile du Port 19 January 2023.

B Adeline, J