SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2024]
MA 135/2024
(Arising in CS 54/2024)

In the matter between:

EXECUJET AVIATION (PROPRIETARY) LIMITED **Applicant**
(rep. by Mr. Divino Sabino)

and

EURO AVIATION LIMITED **1st Respondent**

SEYCHELLES REVENUE COMMISSIONER **2nd Respondent**
(both unrepresented)

Neutral Citation: *Execujet Aviation Pty Ltd vs Euro Aviation Ltd & Anor (MA 135/2024*) [2024] (5th July 2024**)**

Summary: Application for Interlocutory Injunction - Affidavit in support defective and struck out - Order 41 White Book Supreme Court Practice Rules.

Before: Carolus J

Delivered: 5th July 2024

RULING

Carolus J

[1] This ruling arises out of a Notice of Motion filed by Execujet Aviation (Proprietary) Limited ("the applicant") against Euro Aviation Limited the 1st respondent, and the Seychelles Revenue Commission ("SRC") the 2nd respondent, seeking an interlocutory injunction prohibiting the SRC from effecting VAT return payments to the bank account of the 1st respondent until final disposition of the main suit or further order of this Court. The main suit in which the Notice of Motion arises is CS54/2024 in which the applicant is the plaintiff and the 1st and 2nd respondents are cited as the 1st and 2nd defendants respectively.

[2] It is stated in the plaint that the 1st defendant has a fixed base operation ("FBO") license from the Seychelles Civil Aviation Authority to manage, inter alia the ground handling of private jets that land at the Seychelles International Airport. The plaintiff and 1st defendant entered into a Management Agreement extending from 1st August 2017 to 15th February 2024, for the purpose of the plaintiff operating the 1st defendant's FBO aviation services business as an agent. Under the terms of the agreement the plaintiff agreed to pay the 1st defendant's annual license fees USD500,000 until 2021 and thereafter USD600,000 annually until 2026. It was also a term of the agreement that all moneys collected by the plaintiff would be deposited into a special bank account opened for the purpose of conducting the business as agent, and over which the plaintiff would have full control and could make withdrawals for business purposes. It was also stipulated that the credit amounts on that account would vest in the plaintiff.

[3] Under the terms of the agreement, the plaintiff as agent also had the obligation to pay taxes, which it did. VAT payments were made through a separate bank account held at ABSA Bank (Seychelles) Ltd in the sole name of the 1st defendant, which the 1st defendant had given the plaintiff a power of attorney to open. The SRC's record of the taxpayer was therefore the 1st defendant despite all payments having been made by the plaintiff. In March 2024, the auditors of the 1st defendant were informed by the SRC that the business would be allowed a VAT refund of SCR5,219, 752.30 which according to the auditors was to be paid into a different account - Nouvobanq bank account held in the name of the 1st defendant.

[4] It is averred in the plaint that upon learning of the VAT refund, the 1st defendant informed the SRC to pay the VAT refund into an alternate bank account of theirs in breach of the Management Agreement and that as a result of the breach, the 1st defendant is seeking to obtain the VAT refund for which the original VAT payments were made by the plaintiff. In the alternative, it is averred that the 1st defendant seeks to be unjustly enriched at the expense of the plaintiff. The plaintiff further avers that despite communications, the 1st defendant has refused or failed to acknowledge the breach and is actively seeking to obtain the funds for itself. It prays for the following remedies:

1. *a declaration that the VAT refund payment be paid to the Plaintiff; and*
2. *for an order that the 1st Defendant inform the 2nd Defendant to make the VAT refund payment to the Plaintiff; or*
3. *Ordering the 2nd Defendant to make the VAT refund payment to the Plaintiff; and*
4. *any other Order that the Court sees fit; and*
5. *costs.*

[5] The respondents having been served with the motion for interlocutory injunction did not appear in Court on the returnable date for this matter namely 21st June 2024, and the matter was heard ex-parte. On the same date, the Court made an Interim Order that no payment of the said VAT Return payments was to made by the SRC to the 1st respondent until determination of this motion or further order of this Court.

[6] The Notice of Motion is supported by an affidavit (Annexure A) purporting to be sworn by Gavin Marke Kiggen on 23rd May 2024 in Johannesburg before Notary Public Omi Salma Leclaire, which contains the grounds for the order of interlocutory injunction prayed for. Supporting documents are exhibited thereto. The affidavit and other supporting documents form part of a bundle bearing an apostille certificate (NO: 5787/2024) issued in the Republic of South Africa on 24th May 2023 by the Registrar of the High Court (Johannesburg) certifying that *"This public document [h]as been signed by OMI SALMA LECLAIRE [a]cting in the capacity of NOTARY PUBLIC"* and *"[b]ears the seal/stamp of the said OMI SALMA LECLAIRE*".

[7] Before dealing with the merits of the motion , I wish to address an irregularity in the form of the affidavit. Under section 17 of the Courts Act, where laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice are followed as far as practicable. Our Courts have had recourse to the White Book Supreme Court Practice Rules in numerous cases in regards to affidavits. Order 41 of the White Book (1970) provides in relevant part as follows:

Form of affidavit *(O. 41, r. 1)*

1. *Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.*
   […]

5. *Every affidavit must be in book form, following continuously from page to page, both sides of the paper being used.*
6. *Every affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.*
[…]
8. *Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.*

[8] O. 41, r. 1/7, further provides:

> *Jurat - The jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavits should never end on one page with the jurat following overleaf. The jurat should follow immediately after the end of the text. The signature of the Commissioner for Oaths should be written immediately below the words "Before me". (Emphasis added)*

[9] In *Bordino and Anor v Government of Seychelles* (SCA 67 of 2022) [2022] SCCA 76 (16 December 2022) one of the grounds of appeal was that the trial judge had erred in admitting and relying on a defective affidavit, the defect being in respect of the jurat appearing on a different page from the text of the averments made by the deponent. The court, in Bordino (supra) considered the case of *Daniella Lablache de Charmoy v Patrick Lablache Lablache de Charmoy* (SCA 8 of 2019) [2019] SCCA 35 (16 September 2019) and stated as follows in regards to that case:

> *24. In that case, Counsel for the Respondent raised an objection on appeal to the effect that the affidavit should not be admitted in evidence because of a defect in the jurat. He stated that the jurat must follow immediately on from the text and not be put on a separate page …. The Court considered the said objections and held as follows:*
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> > *"The Court considers the submissions of Counsel to be well founded. Irregularities in the form of the jurat cannot be waived by the parties. In Pilkington v. Himsworth, 1 Y. & C. Ex. 612), the court held that: "[j]urats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause. That is a universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court ..." (Emphasis of Court)*

25. Consequently, the Court in the above case accepted the submissions of Counsel that the affidavit was bad in law and refused to admit the defective affidavit as evidence.

[10] In *Bordino* (supra) the Court of Appeal found that even if the second affidavit, in regards to which objections had been raised, was struck out for being defective, the first affidavit which supported the Notice of Motion was not irregular and contained sufficient evidence for granting the orders sought.

[11] The Court of appeal in *Lau-Tee v Lau-Tee* (SCA MA 42/2023 [2023] (Arising in SCA 8 and 9/ 2023) (Out of MA 176/2019) and (DC 134/2018) (18 December 2023) again had recourse to Order 41 and relied on *Bordino* (supra). It stated:

13. There has been consistent case law concerning affidavits in this jurisdiction. I need not reiterate it all here save to state that *Bordino and Anor v Government of Seychelles (SCA 67 of 2022) [2022] SCCA 76 (16 December 2022) is authority for the proposition that jurats should follow immediately after the end of the text of the Affidavit failing which the Affidavit is deemed defective.*

14. In the circumstances, we deem this Affidavit defective. The end result is that we have no explanation, excuse, or cause as to why Mrs. Hoareau breached the court order. Counsel could have been more helpful.

[12] The affidavit of Gavin Marke Kiggen in the present case differs somewhat from the affidavits in the aforementioned cases in that in the latter (Lablache de Charmoy, Bordino and Lau-tee) the whole of the jurat appeared on a completely different page from that of the text of the affidavit. In the present case, the jurat starts on the same page where the text of the affidavit ends after the signature of the deponent on the page before last. The following words of the jurat appear on that page:

Thus Done and Sworn to before me at Johannesburg on this the 23rd day of May 2024, by the Deponent having acknowledged that he knows and understands the contents of this Affidavit, and considers the oath to be binding on his conscience and has no objection to taking the oath.

[13] The remainder of the jurat appears on the last page. It consists of the signature of the Notary Public before whom the affidavit was sworn, her full name, the address at which the affidavit was sworn and the area, as well as her occupation.

[14] It is my view that the fact that the jurat is split between two pages with only the first part appearing on the page where the affidavit ends renders it defective in the same way as if the whole of the jurat appears on a page other than where the affidavit ends, especially as the signature of the person before whom the affidavit was sworn appears on a seperate page.

[15] Although the matter was heard ex-parte and no objections could be raised by the respondents as to the validity of the affidavit I am mindful of what was said in *Lablache de Charmoy* (supra) that:

> *"Irregularities in the form of the jurat cannot be waived by the parties. In Pilkington v. Himsworth, 1 Y. & C. Ex. 612), the court held that: "[j]urats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause. That is a universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court"..."*

[16] For the reasons stated above, I find that the affidavit in support of the Notice of Motion is defective for non-compliance with the applicable rules of procedure, and the Notice of Motion is therefore unsupported by any evidence and must be dismissed

[17] Despite my findings at paragraph [16] above, I still wish to make a few brief observations on the merits of this application. The case of *American Cynamid Co. v Ethicon Ltd* [1975] A.C. 396 (05 February 1975) sets out the three considerations by which a court must be guided in determining whether to grant an interlocutory injunction or not. These are: (1) whether there is a serious question to be determined in the main suit; (2) inadequacy of damages to either side; and (3) the balance of convenience. These same matters were taken into consideration in *Techno International v Georges* SSC 147/2002 (31 July 2002), *Laporte & Anor v Lablache* [1956 -1962] SLR 41 and *France Bonte v Innovative Publication* (1993) SLR 138.

[18] In *Dhanjee vs The Electoral Commission* (2011) SLR 141, the Court interpreted the balance of convenience test to include the consideration of the following factors:

i. *Whether more harm would be done by granting or refusing the injunction.*
ii. *Whether the risk of injustice would be greater if the injunction was granted, than the risk of injustice if it was refused, and*
iii. *Whether the breach of the parties' rights would outweigh the rights of others in society.*

[19] In his affidavit Gavin Marke Kiggen states:

> *32. … in the event that the SRC effects payment of such VAT refund to the newly nominated account of the Respondent, such funds will be lost to the Applicant, as funds that are truly due, owing and payable to the Applicant, in terms of the structure of the Management Agreement, would be paid to a bank account over which the Applicant has no control, and the Applicant would be required to institute an action against the Respondent to recover such funds, when such process can be circumvented.*
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> *33. Due to the fact that it has been established that the Respondent has, subsequent to the termination date of the Management Agreement, reneged on their obligations in terms of the Exit Checklist process, which includes accounting for funds within the ABSA Bank Account which rightfully belong to the Applicant, and the fact that the Respondent has expressly changed the bank SRC knowing full well that a VAT refund is due to be repaid by the Respondent (which, as the facts set out above show and which the Respondent has acknowledge in the Exit Checklist that such funds rightfully belong to the Applicant), the Respondent has the intention of repatriating such funds with no intention of repaying same to the Applicant.*
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> *34. It is for this reason, and taking into account the prejudice that will be suffered by the Applicant should the VAT refund be paid into the new account nominated by the 1st Respondent, or any account operated or elected by the 1st Respondent, the Applicant has been required to launch this application to the above Honourable Court, for an order declaring to whom such VAT refund rightfully belongs and/or ordering that such VAT refund be paid by the SRC into a bank account of the Applicant, as set out in paragraph 29.2, any other order that the Court sees fit and costs.*

[20] At this stage, the Court is not required to make a determination on the merits of the main suit that is, which party is entitled to the VAT refund and consequently whether the Court should make the orders prayed for. It is only required to determine whether there is a serious question to be determined in the main suit. It is clear on the face of the plaint that

this is the case. However the Court is not convinced that the tests of balance of convenience and inadequacy of damages have been met.

[21] If the injunction application is not granted, the SRC will be able to disburse the VAT refund payments to the 1st respondent's bank account. However, it is clear that if this done, the plaintiff/applicant will not be without a remedy as it can still recover the money if the Court finds that it is the rightful owner of the funds. Furthermore any loss or damage caused to the applicant/plaintiff can be adequately compensated for in damages.

[22] The Notice of Motion is therefore dismissed. The Interim Order made on 21st June 2024 also falls.

Signed, dated and delivered at Ile du Port on 5th July 2024.

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Carolus J