SUPREME COURT OF SEYCHELLES

Reportable
MC 90/2023

In the matter between:

SHIELD SECURITY **Applicant**
(Herein rep by Jemmy Pascal Volcere
Of Baie Ste Anne Praslin, Praslin)
(*Represented by Mr France Bonte)*

and

ROYNA DUBIGNON **Respondent**
Zimbabwe
Praslin

Neutral Citation:	*Shield Security vs Dubignon* (MC 90/2023) (21st March 2024)
Before:	Adeline J
Summary:	Application for leave to file appeal out of time
Heard:	19th February 2024
Delivered:	21st March 2024

FINAL ORDER

Application for leave to appeal out of time is dismissed for the reason that no evidence has been laid before this court to adjudicate over the matter, given that the supporting affidavit to the application is fraught with deficiencies and is therefore defective. As a consequence, thereof, the motion pertaining to MA 348/2023 for an order of stay of execution of the impugn judgment of the Employment Tribunal in ET 177/2022 is equally dismissed for the reason that there is no notice of appeal filed.

RULING ON MOTION

Adeline, J

[1] By notice of motion supported by an affidavit deposed by one Jemmy Pascal Volcere of Baie Ste Anne, Praslin ("the Applicant"), Shield Security, which doesn't appear to be a

legal entity, applies to this court for leave to appeal to the Supreme Court against the impugn judgment of the Employment Tribunal in ET 177/2022.

[2] The Respondent, one Royna Dubignon of Zimbabwe, Praslin who was present in court on the 6th December 2023, and who had indicated to the court that she would instruct counsel to oppose the application, failed to put appearance in court in person or otherwise, in the proceedings that followed, thus effectively waiving her right to be heard.

[3] In the affidavit in support of the application, the said Jemmy, Pascal, Volcere depones by making the following averments;

"1. *That I was the Respondent in ET 177/2022.*
2. Judgment was delivered on 26th September 2023, whereby I was ordered to pay the Applicant (now Respondent) a total sum of SCR 150,746.54.
3. That I am not satisfied with the decision given in the said case and I will seek relief from the Supreme Court of Seychelles.
4. That I only obtained the judgment on the 10th November 2023 and I am not in contact with my lawyer to discuss the matter so as to lodge the appeal.
5. That the time given for the appeal has now lapsed.
6. That I humbly pray that this Honourable Court that I be granted leave to appeal out of time".

[4] By another application filed in court by way of notice of motion as MA 384/2023 (arising in MC 90/2023) the Applicant applies to this court for an order for stay of execution of the said judgment of the Employment Tribunal pertaining to ET 177/2022.

[5] In the supporting affidavit to the application for stay of execution, the Applicant makes the following averments;

"1. That I am the deponent above named.

2. That I am representing Shield Security, the Respondent in Employment Tribunal, Praslin ET 177/2022.

3. That we are appealing against the Employment Tribunal decision of 26th September 2023.

4. That we have a very high chance of succeeding in the appeal.

5. That if a stay of execution is not granted, the whole appeal if given in our favour will be rendered a nugatory.

6. That it is therefore just and necessary to apply for special leave for the stay of the Employment Tribunal decision dated 26th September 2023 pending the hearing of the appeal to the Supreme Court of Seychelles".

[6] The Respondent, Royna Dubignon who appeared before the Court on the 6th December 2023, and who had indicated to the court that she would retain counsel to oppose the application, failed to appear in court in person, or otherwise, in subsequent proceedings.

[7] I take judicial notice, that learned counsel for the Applicant has not made any oral or written submissions in respect of the reliefs being sought for by either of the two applications, and that as such, the court has not heard from him his arguments on the facts and the law for the grant of leave to appeal out of time and the stay of execution being sought for.

[8] In my considered opinion, the application for a stay of execution of the judgment of the Employment Tribunal in ET 177/2022 is fundamentally and procedurally flawed. I say so, because by implication, upon reading Section 230 of the Seychelles Code of Civil Procedure, an application for a stay of execution should be made after proceedings for appeal have commenced which have to be by way of Notice of Appeal as required by Rule 6(1) of the Appeal Rules (SI 27th February 1961). In the instant case, there is no appeal before the Supreme Court. By his application, the Applicant has effectively put the cart before the horse.

[9] For ease of reference, the provisions of Section 230 of the Seychelles Code of Civil Procedure, Cap 213, reads;

"An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court or the appellate court so orders and subject to such terms as it may impose. No intermediate act or proceedings shall be invalidated except so far as the appellate court may direct"

[10] The provisions of Rule 6(1) of the Appeal Rules reads;

"6 (1) Every appeal shall be commenced by a notice of appeal"

[11] Given that it is a judgment of the Employment Tribunal that the Applicant endeavours to appeal against, Rule 6 (1) has to be read with Rule 27 (1) of the Rules. The provisions of Rule 27 (1) reads;

"Where and act allows an appeal to the Supreme Court from an order or decision of any commissioner or other tribunal or officer, the procedure in such an appeal shall be in accordance with such Act and regulations there under and subject thereto, and in respect of all matters for which they do not provide, in accordance with these Rules. (emphasis is mine)

[12] In essence, therefore, given that there is no pending appeal before the Supreme Court against the judgment of the Employment Tribunal, and that it is only now that an application to appeal out of time is under consideration, the application for a stay of execution is premature, and consequently stands to be dismissed.

[13] Proceedings for leave to appeal out of time, having been initiated by an application made by notice of motion, means, that sworn evidence is required to determine the application, which evidence, the Applicant gives by affidavit in support of the application. The focus of attention, therefore, is on the affidavit. Whilst the discussion to follow revolves around the affidavit in support of the application, I take recognizance of the fact, that there has

been significant development in our jurisprudence as regards to affidavit evidence. Therefore, as I scrutinise Mr Volcere's affidavit in support of the application, I find, without going into the merits of the application, that the affidavit itself is fraught with deficiencies that makes it defective.

[14] Two provisions that prescribe for affidavit evidence under the Seychelles Code of Civil Procedure that have to be fully complied with, are Sections 170 and 171. Section 170 is couched in the following terms;

"170. Affidavit shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, on which statement as to his belief, with the grounds thereof, may be admitted.

171. Affidavits may be sworn in Seychelles
(a) before a Judge, Magistrate, a Justice of the Peace, a Notary or the Registrar, and
(b) in any cause or matter, in addition to those mentioned in paragraph (a) before any person specially appointed for the purpose by the court".

[15] I am satisfied, that the affidavit in support of the application does comply with these two statutory requirements.

[16] Furthermore, it is well settled by case law in our jurisprudence, in line with the provisions of Section 17 of the Courts Act, that on matters pertaining to rules of procedure in civil cases, whenever the law and rules of procedure are silent, the court has to mandatorily resort to the procedure, rules and practice of the High Court of Justice in England. For that matter, and to be in compliance with the rules governing affidavit, there is a plethora of case law authorities offering guidance.

[17] In the instant case, the deponent of the affidavit in support of the application for leave to appeal out of time does not even aver whether the averments therein are based on information, knowledge and belief. In Union Estate Management (Proprietary) Limited v

Herbert Mittermeyer [1979] SCR 140, Sauzier J when expounding on what constitute a good and proper affidavit had this to say;

"… an affidavit which is based on information and belief must disclose the source of the information and the grounds of belief. It is therefore necessary for the validity of an affidavit that the affidavit should distinguish what part of the statement is based on information and belief and that the sourse of the information and grounds of belief should be disclosed".

[18] Clearly, therefore, measured against the requirements set by Union Estate Management (Pty) Ltd v Herbert Mittermeyer (Supra) the affidavit in support of this application for leave to appeal out of time is not valid. The judgment against whom the Applicant seeks to appeal is not even exhibited to the affidavit which the Applicant relies on to make out his case.

[19] It must therefore be borne in mind, that affidavits are written evidence and are therefore subject to the same rules of admissibility as oral evidence. It may well be, for example, that the deponent have personal knowledge of the facts avers, but he fails to state that in his affidavit.

[20] At this juncture, it is worth mentioning order 41 Rule 1) of the Supreme Court Rules of England 1965, which mandatorily requires that;

"(1) Subject to paragraph (2) and ( ), every affidavit sworn in a cause or matter must be entitled in that cause or matter
2…..
(5) Every affidavit must be in book from, following continuously from page to page both sides being used
…..
(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".

[21] Rule 41(1) 6 then provides as follows.

"*Jurat – The jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavit should never end on one page with the jurat following over leaf. The jurat should follow immediately after the end of the test. The signature of the commissioner for oaths should be written immediately below the words "Before me".*

[22] We must also be reminded, that in Lablache de Charmoy v Lablache de Charmoy SCA 9/2019 [2019] SCCA 35 (17th September 2019) the court held that irregular affidavits cannot be waived by the parties and is bad in law. We must further be reminded, that in Ashraf Elmasry and Elena Kozlova v Margaret Hua Sun MA 195/2019 (Arising in CS 13/2014), Twomey CJ (as she then was) did say, that "*Affidavits are sworn evidence and evidential rules for their admission cannot be waived*".

[23] Robinson, JA expounded on the law when she stated the following;

"*In re Hinchchiffle, A person of unsound mind, Deceased, [1895] 1 ch, 117, the Court of Appeal held that any document to be used in continuation with an affidavit must be exhibited to and file 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*".

[24] This rule, expounded by case law, was reiterated by Robinson JA in Laurette & Ors v Savy & Ors SCA, MA 13/2019 [22nd October 2019] when ruling on an application seeking for extension of time to file notice of appeal against a judgment of the Supreme Court, she remarked that "*the judgment has not been exhibited to the affidavit*", and then went on as to say, that "*overall the deficiencies establish a lack of significance and urgency on the part of the applicants in making this application*"

[25] In the instant case, as observed earlier, the judgment which the Applicant seeks to appeal against is not exhibited as a piece of evidence as the rule requires. In Laurette & Ors v Savy & Ors (Supra) Robinson JA, went further as to say that;

"*In Aglae v Attorney General [2011] SLR 44 the Appellate Court guided by Ratnam v Cumarasamy and Another [1964] All ER 933, state "[t] 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 time table for the conduct of litigation".*

[26] In an English case, Revici Prentice Hall Incorporated, [1967] ALLER 772 Lord Denning M.R, made similar statement when at Page 774, he had this to say;

"Counsel for the Plaintiff referred us to the old cases in the last Century of Eaton v Storer (1) and Atwood v Chischester (2), and urged that time does not matter as long as the costs are paid. Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed".

[27] At page 774, Edmund Davies Lj, remained on the same frequency as he echoed the following view;

"On the contrary, the rules are there to be observed, and if there is non-compliance (other than of minimal kind) that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted".

[28] In the light of the discussion of the law in the preceding paragraphs of this ruling as regards to affidavit evidence, it can hardly be argued against the proposition, that the affidavit in support of this application for leave to appeal out of time is fraught with

deficiencies and not up to standard. As such, it is admittedly, a defective affidavit which the court cannot rely on and admit in evidence to determine this application. It follows, therefore, that by implication, no evidence has been laid before this court to address the issues which is called for to adjudicate on this application.

[29] Furthermore, the affidavit being defective for not being in compliance with the procedural rules, means that, for that particular reason alone, the application cannot succeed. It follows, that there is no need for this court to give consideration to the substantive merits of the application. Therefore, the application for leave to appeal out of time against the judgment of the Employment Tribunal in ET 177/2022 is dismissed. Equally, the application for a stay of execution of the said judgment is dismissed for the reason that there is no notice of appeal filed before the Supreme Court to initiate the appeal proceedings.

Signed, dated and delivered at Ile du Port 21 March 2024.

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B Adeline, J