

COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 40 (25 August 2023)

SCA 37/2021

(Arising in EXP 27/2008)

Ailee Development Corporation
(rep. by Mr. Olivier Chang-Leng)

Appellant

And

EODC Operations Limited
(rep. by Mr. Frank Elizabeth.)

Respondent

Neutral Citation: *Ailee Development Corporation v EODC Operations Limited* (SCA 37/2021)
[2023] SCCA 40 (Arising in EXP 27/2008 (25 August 2023))

Before: Robinson, Tibatemwa-Ekirikubinza, Esparon, JJA

Heard: 9 and 16 August 2023

Summary: **Official Receiver's report and outstanding matters following a court ordered liquidation - court ruling based on the report. Essential for the court to conduct a hearing specifically on the issues in contention.**

Delivered: 25 August 2023

ORDER

- (i) Pursuant to Rule 31 (5) of the Court of Appeal Rules, I remit the case to the Learned Chief Justice so that he conducts a hearing on the specific issue in contention with respect to the overpayments.
- (ii) Costs of the application in favour of the Appellant.

JUDGMENT

Dr. L. Tibatemwa-Ekirikubinza
(Robinson JA, Esparon JA concurring)

The background

1. This is an appeal from an interlocutory ruling of a trial Judge of the Supreme Court delivered on 6 October 2021 (hereinafter referred to as the "*Ruling*").
2. To better understand the issues addressed in the Ruling, it is important to have an understanding of the relevant background material. There were no disputes at the appeal regarding the background material stated by the learned Chief justice, which are repeated below —

"[1] The 16th October 2019 [XP 27/2008] and 18th September 2020 [MA72/2020 arising in CS27/2009] Rulings in this matter denied the Liquidators application to be released until the Official Receiver had satisfactorily accounted for all matters relating to the winding up of Ailee Development Corporation Limited.

[2] The 16th October 2019 decision, in its paragraph 242 requested the Liquidator to specifically address and give an account of the following issues to the Official Receiver:

- i. a statement of affairs relating to Ailee on 8 February 2008;*
- ii. details of money paid in and out of Account Number 01002001197005 in the name of Plantation Club with Nouvobanq;*
- iii. details of Liquidator's fees paid after July 2011 which bill needs to be taxed according to Regulation 2, (Winding Up) (Fees and Costs) Regulations 1975, and/ or approved by the Court;*
- iv. details of Liquidator's running expenses paid after July 2011 need to be taxed or approved by the Court;*
- v. confirmation from the Seychelles Revenue Commissioner that the Liquidators fees are not subject to taxation in Seychelles under the Double Taxation Agreement existing between Mauritius and Seychelles;*
- vi. details of legal and professional expenses after July 2011 which need to be taxed or approved by the Court; and v. confirmation from the Seychelles Revenue Commissioner that the Liquidators fees are not subject to taxation in Seychelles under the Double Taxation Agreement existing between Mauritius and Seychelles;*

vii. *confirmation by the secured creditors that they have received the amounts in full disbursed by the Liquidator.*

[...]

[8] *The 18 September 2020 [MA72/2020 arising in CS27/2009] decision, in paragraph 29, outlined that the only matters outstanding are the liquidator fees, legal fees and costs which had not been taxed and or sanctioned by the Court, and called upon the Official Receiver to exercise his powers to tax the same and or ask the court to authorise their payment if deemed reasonable.*

[9] *The Official Receiver's report was provided to this Court on 22 October 2020 and his findings on these outstanding matters are outlined below."*

3. On the 22 October 2020, the Official Receiver submitted his final report in which he stated that he had been directed by the learned Chief Justice in accordance with the judgment dated 16 September 2020 as follows: "*[t]he only matters outstanding are the Liquidators fees and costs which had not been taxed and/or sanctioned by my predecessor. In this regard the Official receiver is directed to exercise his powers to tax the same and/or ask the Court to authorise their payment if he deems reasonable*".
4. The Official receiver stated in the Report that: "*the powers of taxing fees and costs is the domain of the Registrar of the Supreme Court (section 157 of the Companies (Winding Up) Regulations 1975). I will therefore restrict myself to addressing whether the fees and costs are deemed reasonable so the Court may sanction or otherwise.*"
5. Based on the report of the Official Receiver, the Ruling addressed the following issues —
 - (i) *"Statement of affairs"*
 - (ii) *"Liquidator's fee"*
 - (iii) *"Legal fees"*
 - (iv) *"Fees to ACM Consultants"*
 - (v) *"Other costs"*
 - (vi) *"Advances from the Government"*
 - (vii) *"Taxation"*
 - (viii) *"Confirmation by secured creditors of amounts disbursed by Liquidator"*.

6. The focus of this appeal is solely on the conclusions made by the learned Chief Justice regarding the fees of the liquidator and legal fees.
7. The learned Chief Justice provided the following conclusions regarding the fees of the liquidator. The liquidator's fee of SCR21,267,042 is deemed reasonable by the Official Receiver. The Court has approved an additional fee of SCR14,420,500. An overpayment of SCR 5,979,500 was made due to an incorrect rate of exchange. The Liquidator must refund this amount to the Court.
8. The learned Chief Justice determined that the Appellant overpaid legal fees in the amount of SCR180,000/- due to an incorrect exchange rate used based on the report of the Official Receiver

Grounds of Appeal

9. The Appellant disagreed with the findings of the learned Chief Justice that there were overpayments of SCR 5,979,500 and SCR180,000. The Appellant has filed an appeal on the following grounds —

- "1. *The Learned Chief Justice erred when he ordered the Appellant to pay the amount of SR 5,979,50.00 to the Registry of the Supreme Court based on the recommendation of the Official Receiver that the Appellant had been overpaid due to the incorrect exchange rate being used.*
2. *The Learned Chief Justice erred when he did not take into account that the Appellant, being a non-Seychellois, could only be paid his liquidator fees in foreign exchange, and that the appropriate exchange rate to be used, is that on the day that the Appellant paid himself those fees.*
3. *The Learned Chief Justice, having accepted the Official Receiver's recommendation to order that the Appellant's fees were reasonable and ought to be sanctioned, failed to consider that per the formula used by the Appellant to pay himself his fees, a portion of his fees were payable upon disposal of the assets of the company in liquidation.*
4. *The Learned Chief Justice erred when he failed to consider that the Appellant had agreed to waive a portion of his fees on the interest accrued from the investment of the sale of the proceeds of the disposal of the main asset of the company in liquidation, namely, the land comprised in T147, and that even if there was an overpayment of his fees, this ought to be offset against the sum which he had agreed to waive.*

5. *The Learned Chief Justice erred when he ordered the Appellant to pay the amount of SR180,000.00 to the Registry of the Supreme Court based on the recommendation of the Official Receiver that the Appellant had used the incorrect interest rate when paying legal fees.*
6. *The Learned Chief Justice erred by failing to allow the Appellant an opportunity to make submissions or representations on the recommendations of the Official Receiver in his report dated 22nd October 2020, or to allow his views to be heard thereon before the delivery of the Ruling.*
7. *The Learned Chief Justice erred when he failed to consider the Appellant's liquidator fees and legal fees had been sanctioned by the court and approved by the creditors of the company in liquidation and that the only outstanding issue related thereof, was in relation to taxation by the Registrar of the Supreme Court."*

10. The Appellant claimed the following relief from this Court

- a. That the appeal be allowed and the orders of the Supreme Court in the Ruling, to the extent it relates to the grounds afore-mentioned, are set aside.
- b. That the Respondent pays the costs in the Supreme Court and Court of Appeal."

Grounds one, two, three, four, five, six and seven

11. This appeal concerns overpayments. Reproducing the numerous submissions from both Counsel on this narrow issue would be futile.
12. As far as I understand, the skeleton heads of argument presented on behalf of the Appellant claimed *inter alia* that the Appellant followed a formula and paid himself during the relevant periods. It is stated that the Appellant paid himself the first tranche of fees in 2008 after disposing of the asset, and that in 2011, the distribution occurred and he paid himself the second tranche of fees in accordance with the Head IV of the Schedule to the Companies Act . Counsel for the Appellant contended that during both of these instances, the Appellant used the exchange rate that was applicable at the time, which he argued was the correct rate.

13. Counsel for the Appellant also contended that the issue of the exchange rate is irrelevant. The question that the Official Receiver was tasked by Twomey CJ to determine is whether the fees were reasonable and *inter alia* could be sanctioned. He has determined that they were reasonable in line with the Fees and Costs Regulations.
14. Counsel for the Appellant also contended with respect to the overpayment of the sum of SCR180,000 that the Appellant disagrees with the term overpayment as the payment was made at the exchange rate applicable on the day of payment.
15. Counsel for the Respondent in his skeleton heads of argument agreed with the findings of the learned Chief Justice that there were overpayments and presented numerous submissions in his skeleton heads of argument to support the finding. He also had multiple complaints about the report of the Official Receiver.
16. I refer to the explanation given by the learned Chief Justice regarding the overpayment. —

"[13] The Official Receiver confirmed that the scale of fees laid down in the Companies (Winding up Regulations 1Q75) applicable to the Official receiver when he acts as Liquidator are the same rate of fees applicable to the Liquidator and that the quantum of the fees payable as remuneration to the liquidator in the sum of R 21,267,042 are reasonable. He therefore recommends that the Court should sanction the additional fee not previously sanctioned by the Court in the amount of R14,420,500.' Accordingly, this Court sanctions the additional fee in the amount of R14, 420, 500.

[14] The level of fees is calculated on the proceeds of sale which was stated in SCR and claimed in SCR. The Official Receiver recommended that since payment of the fee had not been approved by the Court at the time of payment, that the rate of exchange to be used in converting the payment of US\$ 1,700,000 which had already been drawn should therefore be US\$ 1=SCR 12/00, the rate used by the liquidator on completion of winding up.

[15] He found that consequently, the overpayment of the fee arising as a result of the incorrect rate of exchange used in the amount of R 5,979,500 should be refunded to the Court and used to defray any further costs, with the remainder to be paid to the secured creditors in their agreed ratio.

[16] The Liquidator is therefore ordered to pay the amount of R 5,979,500 with the Registry of the Supreme Court."

17. It is acknowledged by the parties that the Court has approved the payment of SCR21,267,042 (in two tranches) and that the Appellant has received the funds. There is no dispute regarding this matter. The Official Receiver made the following recommendation in his report —

"a) the quantum of fees as calculated by the Liquidator in the sum of R21,267,042/- is reasonable and that the Court should sanction the additional fee not previously sanctioned by the Court i.e. R14,420,500/- (section 220(2) of the Companies Act 1972)."

18. I observe that the learned Chief Justice, in the Ruling, did not raise any concerns about the Appellant receiving payment in United States Dollars. The only point of contention pertained to the exchange rate to be used by the Appellant. The learned Chief Justice determined that the rate of exchange — *"in converting the payment of US\$ 1,700,000 which had already been drawn should therefore be US\$ 1=SCR 12/00, the rate used by the liquidator on completion of winding up."*

19. The Official receiver stated the following in his report under the recommendation concerning liquidator's fee —

"iii) While the proceeds of the sale of assets were in Seychelles Rupees, the liquidator without any express or implied agreement of the Court or the parties thereto pays himself in US\$ a commodity (asset of liquidation) in very short supply in Seychelles at the time. In actual fact, coincidentally, the payment of the fee of US\$ was effected only 4 days before the Government of Seychelles floated the Seychelles rupee and 3 days after the liquidator managed to purchase US\$ 5,000,000/- from the SR proceeds. This action appears to be in breach of Regulations 165 (1) & (3) of the (Winding Up) Regulation 1975 referred to by the Chief Justice in her original judgment dated 16th October 2019."

20. I have considered the Ruling in light of the report of the Official Receiver and am uncertain as to why the Official receiver recommended a conversion rate of *"US\$ 1=SCR 12/00 on completion of winding up"*. According to recommendation [iii] stated at paragraph [22] hereof, the Appellant had used the exchange rate available *"4 days before the Government of Seychelles floated the Seychelles rupee"*. However, it was unclear on the record what this

exchange rate was and whether the Appellant had valid reasoning for using it

21. The following reasoning behind the Official Receiver's recommendation was also unclear

—

"b) The level of fee is calculated on the proceeds of sale which was stated in SR and claimed in SR. Bearing in mind that payment of the fee had not been approved by the Court at the time of payment I am of the view that the rate of exchange to be used in converting the payment of US\$ 1,700000/- fee should therefore be US\$ 1/- = SR 12/00 the rate used by the liquidator on completion of winding up.

c) *that the overpayment of the fee arising as a result of the incorrect rate of exchange used (R5,979,500) be refunded to the Court and used to defray any further costs with the remainder to be paid to the secured creditors in their agreed ratio.* [Emphasis is mine]

22. The learned Chief Justice accepted the Official Receiver's recommendation in full, without examining the recommendations further and without holding a hearing.

23. Counsel for the Appellant also contended that the learned Chief Justice should have heard the parties before making the Ruling. He submitted that the learned Chief Justice had stated that the case would be set for mention and that the parties would have the opportunity to receive and read the Commission of Enquiry's report, which may have a bearing on the liquidation.

24. After considering the record of appeal and the numerous written and oral submissions of Counsel for the Appellant and Respondent, I am uncertain how to make a decision on the issues raised since they were not made live before the Supreme Court as the learned Chief Justice did not order a hearing on the report of the Official receiver.

25. It is my considered view that the learned Chief Justice should have conducted a hearing on the report of the Official Receiver. However, as the issue in contention concerned specifically overpayments which the Appellant is disputing, I hold that the Court a quo is required to hold a hearing only on that specific issue. Hence, ground six of the grounds of appeal succeeds.

26. For the reasons stated above, I quash the order of the learned Chief Justice ordering the Appellant to pay the amount of SCR5,979,500 with the Registry of the Supreme Court. I also quash the order of the learned Chief Justice ordering the Appellant to pay the amount of SCR180,000 with the Registry of the Supreme Court.

Decision and Orders.

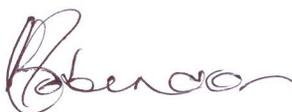
27. Pursuant to Rule 31 (5) of the Court of Appeal Rules, I remit the case to the Learned Chief Justice so that he conducts a hearing on the specific issue in contention with respect to the overpayments.

28. Costs of the application in favour of the Appellant.



Dr. L. Tibatemwa-Ekirikubinza JA

I concur: -



F. Robinson JA

I concur: -



D. Esparon JA

Signed, dated and delivered at Ile du Port on 25 August 2023.