

SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC
MA 195/2022
(Arising in CS 96/2022)

In the ex parte matter of:

LIQUIDITY TECHNOLOGIES LTD
Represented by, Mr. Malcolm Moller
through Power of Attorney
(rep. by Audric Govinden)

Applicant

Neutral Citation: *Ex parte Liquidity Technologies Ltd* (MA 195/2022) [2022] SCSC
(22nd September 2022).

Before: Burhan J
Summary: Writ of Injunction *pendent lite* declined.
Heard: 09th and 19th September 2022
Delivered: 22 September 2022

ORDER

Writ of injunction *pendent lite* declined. No order in respect of costs.

BURHAN J

[1] This is an *ex parte* application in which the Applicant Liquidity Technologies Limited seeks the following interim order:

- (a) For the matter to be heard urgently;
- (b) For the matter to be heard initially *ex parte* and subsequently *inter partes*;
- (c) Issue a writ of injunction, *pendent lite* to restrain the Respondent from the repetition or continuance of the wrongful act or breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right; and,
- (d) For the writ of injunction to apply nationally and internationally.

[2] The ex parte application arises in respect of a plaint filed CS 96/22 where the Applicant's prayer is similar to paragraphs (c) and (d) set out in paragraph [1] herein and seeks the court to grant a Writ of Injunction to restrain:

(a) the Defendant from the repetition or continuance of the wrongful act or breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right; and,

(b) For the writ of injunction to apply nationally and internationally.

The Law

Writ of Injunction

[3] The Applicant has requested that a writ of injunction be granted against the Respondent pending litigation. In the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 the court developed guidelines to ascertain whether an interlocutory injunction shall be granted. The court should consider:

(a) Whether there is a serious question to be tried;

(b) Whether an award of damages would be an adequate remedy;

(c) Where does that balance of convenience lie and who does it favour?

(d) Whether there are any special factors.

[4] The guidelines were followed by Seychelles courts in the cases of *Pest Control v Gill* (1992) SLR 177; *Delorie v Dubel* (1993) SLR 193; *Techno International v George SSC* 147/2002, 31 July 2002; and, *Dhanjee v Electoral Commissioner* (2011) SLR 141). The principles and considerations were summarized in *Exeter Trust Com v Indian Ocean Tuna Limited* (253 of 2009) [2010] SCSC 89 (26 May 2010) thus:

“ . . . in matters of interlocutory injunctions, the Court must be satisfied prima facie that the claim is bona fide, not frivolous or vexatious; in other words, that there is a serious question to be tried vide:... Unless the materials available to the

court at the hearing of the application for an interlocutory injunction, disclose that the petitioner has a real prospect of succeeding in his claim at the trial, the court should not go on to consider whether the balance of convenience lies in favour of granting or refusing the interim relief that is sought. In considering the balance of convenience, the governing principle is whether the petitioner would be adequately compensated by an award of damages, which the respondent would be in a financial position to pay, and if so, the interim injunction should not be granted. Where there is doubt as to the adequacy of remedies in damages available to a party, the court would lean to such measures as are calculated to preserve the status quo.”

[5] The Judge also pointed out that as the injunction is an equitable remedy:

“[t]he possibility of irreparable loss, hardship and injury if any, the plaintiff may suffer during the inevitable interval between the commencement of the action and the judgment in the main case, should also be taken into consideration as an important factor in the determination of injunctions.”

[6] The case of ***Roselie v Seychelles Chamber of Commerce and Industry (MA34/2015 (arising in CS15/2015)) [2015] SCSC 48 (25 February 2015)*** cited the passage from *Exeter Trust Com* case. The Judge was also of the opinion that, “it is paramount to revert directly to the law that governs the granting of injunction in section 304 of the SCCP.” Section 304 of the Seychelles Code of Civil Procedure provides:

“It shall be lawful for any plaintiff, after the commencement of his action and before or after judgment, to apply to court for a writ of injunction to issue to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right, and such writ may be granted or denied by the said court upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as shall seem reasonable and just.”

[7] The background facts are that the Applicant, Liquidity Technologies Ltd/CoinFlex is an international business company and platform trading in crypto currencies incorporated in the Seychelles. The Applicant has one director, Mr. Mark David Lamb, a United States of America national, whose residential address at the time of incorporation is in the United Kingdom. Since 25 April 2022, Liquidity Technologies Holdings Limited has 100 per

cent shareholding in the Applicant company. The holding company has a registered address at the Cayman Islands. In paragraph 10 of the affidavit, deponent avers that the Applicant entered into an Agreement with a Mr. Roger Ver. No details are provided on the Respondent except that he is a billionaire resident of 858 Zenway Blvd, Frigate Bay, St Kitts in the United States of America.

[8] According to the Applicant's affidavit, the Respondent entered into a written manual margin agreement with the Applicant. That unlike normal users who are automatically liquidated when their margin ration goes below minimum requirements, that users on manual margin have a grace period to send more collateral in support of their positions prior to being liquidated. That during the course of effecting certain strategies in trading of crypto currencies, some loss was occasioned to the Applicant. Applicant alleges that in terms of the agreement, the Respondent was supposed to personally indemnify the Applicant for shortfalls in his account following liquidation of his positions. Applicant argues that Respondent failed to honour his obligations, resulting in a "Contractual Liability" owed by the Respondent.

[9] It is to be observed other than the somewhat sketchy description given by the Applicant the purported Agreement, is however, not included in the documents before the Court. The Applicant argues that the terms of the contract provided that the Respondent would be personally liable for the shortfall amounting to US\$83,840,578.53, which contract he has reneged on, and the amount remains unpaid. Applicant asserts that Respondent's conduct has resulted in Applicant's indebtedness.

[10] This court will first deal with the issue of a legal representative acting for and on behalf of the Applicant in instituting these proceedings. Section 70 of the Seychelles Code of Civil Procedure states that "*A party not resident within Seychelles may appoint some other person by power of attorney to appear on his behalf.*" This position was confirmed in ***Jumeau v Jumeau (1985) SLR 140***. The situation in the case of a company, being a legal person is different. Section 128 (a) of the International Business Companies Act ("IBC Act") (as amended) provides that "*Subject to any modifications or limitations in the company's memorandum or articles –(a) the business and affairs of a company shall*

be managed by, or under the direction or supervision of, the directors of the company; . . .”.

[11] Thus the directors have all the powers of the company not reserved for members under the Act, the Memorandum or Articles.

[12] Section 39 of the IBC Act applies to Power of attorney:

“Power of attorney

39. (1) Subject to its memorandum and articles, a company may by an instrument in writing appoint a person as its attorney either generally or in relation to a specific matter.

(2) An act of an attorney appointed under subsection (1) in accordance with the instrument under which he was appointed binds the company.

(3) An instrument appointing an attorney under subsection (1) may either be –

(a) executed as a deed; or

(b) signed by a person acting under the express or implied authority of the company.”

[13] Under section 39 a company may appoint a person as its attorney by instrument in writing. As management is vested in directors of the company, such instrument in writing shall be signed by the director of the company.

[14] The deponent to the Applicant’s affidavit, Mr. Malcome Moller, a Managing Partner of Appleby International Services Limited (Seychelles), states as follows in paragraph 1 of the affidavit:

“I have conduct of this matter on behalf of the Applicant, LIQUIDITY TECHNOLOGIES LTD (the “Company”) and I am duly authorized under the Power of Attorney dated 5th August 2022.”

[15] Mr. Moller refers to Annexure “A” comprising of a notarized power of attorney (POA) executed by Mr. Sudhaman Thirumal Arumugam (a co-founder of the Applicant) as proof of such authority granted to himself to act for and on behalf of the Applicant. These facts raise the question of whether Mr. Moller is lawfully endowed with the authority to launch this action on behalf of the Applicant by virtue of such notarized power of attorney. The case of ***JB Cooling and Refrigeration CC v Dean Jacques Willemse t/a Armature Winding and Others t/a Windhoek Armature Winding and Others*** [2016]

NAHCMD 8 is informative for the proposition that a party that brings proceedings on behalf of a legal person must state that he or she is authorized to bring the said proceedings.

[16] The Applicant rightly states that he is given authority, but such authority is defective as the instrument in writing is not signed by the director of the company. Contrarily, the POA was executed by the said Mr. Arumugam, who is not a director in the Applicant company. Instead, per Annexure “E”, Mr. Arumugam was a member of the Applicant but ceased such shareholding on the 25th April 2022. Neither does Mr. Arumugam’s status as co-founder bestow him the privilege to effect such instrument. Accordingly, the director Mr. Mark David Lamb ought to have signed Power of Attorney.

[17] Emphasizing the importance of valid authorization, Masuku J in ***Standard Bank of Namibia Limited v Nekwaya*** [2020] NAHCCMD 122, stated:

“Authorisation of proceedings is a serious matter and is not just an idle incantation required for fastidious reasons. The court must know, before it lends its processes, that the proceedings before it are properly authorized. This is done by a statement on oath, where applicable, with evidence thereof, that the person who institutes or defends the proceedings is properly authorized and is not on a reckless, self-serving frolic of his or her own.”

[18] It is a trite principle of law that a party stands or falls on its founding affidavit. In the instant case, the Applicant did not make out a case for the authority in the affidavit. The court is accordingly not entitled, in the circumstances to have regard to this deficient application.

Valid Contract/Agreements between the parties

[19] This court further enquired into the contract which gave rise to these proceedings. In paragraph 10 of the affidavit, Mr. Moller states:

“The issue at hand is that the Respondent owes the Applicant \$US83,840,578.53 due to breaches of his contractual obligations as a result of trading losses suffered in the recent market downtown...unfortunately the Respondent failed to honour his obligations pursuant to the written agreement.”

[20] In the papers filed with this court, the Applicant’s allegations with regards to the existence of a contract/agreement, and breach thereof, are summarized in the affidavit of Mr. Moller. Barring the already established fact of Mr. Moller’s lack of authority to act on behalf of the Applicant, the application and the plaint filed is not accompanied by the contract or agreement that delineates the contract terms for this court to weigh the evidence presented before it and to determine whether the given facts exist based on the persuasive burden that must be met.

[21] Section 74 of the Seychelles Code of Civil Procedure reads as follows:

“If the plaintiff sues upon a document other than a document transcribed in the Mortgage Officer of Seychelles, he shall annex a copy thereof to his plaint. If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall annex a list thereof to his plaint and shall state where the same may be seen a reasonable time before the hearing.”

[22] In ***Phil Enterprises v Castle Peak (1973) SLR 327***, it was held that where an action has been instituted by a plaintiff for breach of contract on a certain aspect of the contract, an injunction may be granted to restrain the defendant from committing further breaches of the same contract. The alleged breach of contract must, however, be clear. The Applicant’s Plaint states that:

“Documents which may be relied upon by the Plaintiff and which may be inspected at the Plaintiff’s attorney at Site 209, Shem Peng Tong Plaza, Victoria, Maye during office hours:...

(4) Manual Margin Arrangement

(5) *Agreement between the parties...*”

- [23] This statement does not absolve the Applicant from presenting the agreement before this court as has been established above. A party looking for relief from a court should file the requisite documents in support of their claim especially when the Applicant is applying for interim relief such as a writ of injunction as when deciding on the interim relief it is essential that the necessary documents be made available for scrutiny by court and not merely listed. (emphasis added).
- [24] This court is of the view that a party wishing to rely on a breach of contract must allege, and then prove such breach of contract. The test to be applied is not whether the evidence led by the Applicant established what would finally be required to be established, but whether there is evidence upon which this court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the Applicant (*Claude Neon Lights (SA) Ltd v Daniel* 1976(4) SA 403 (A)). In applying its mind, the court will not apply the evidence *in vacuo* but to consider the admissible evidence in relation to the affidavit, and in relation to the requirements of the law applicable to the particular case (*Uvanga v Steenkamp and Others* [2017] NAHCMD 341).

Arbitration Agreement

- [25] Paragraph 11 of deponent’s affidavit states that as a result of the Respondent’s breach of the agreement, that it commenced arbitration in the Hong Kong International Arbitration Centre (HKIAC) for recovery of the contractual liability owed by the Respondent.
- [26] It is settled law that a valid arbitration clause ousts the court’s jurisdiction if the arbitration agreement is valid and subsisting under the proper law of the agreement (per *Emerald Cove v Intour SRL (2000-2001) SCAR 83* and *Wartsila NSD Finland v United Concrete Products (2004-2005) SCAR 223*). However, the deponent alleges that it has obtained evidence of Mr. Ver removing funds from Bit.com, and attempts to ascertain confirmation of such from Bit.com were rejected by the latter without the necessary court order. The affidavit states that given the Respondent’s refusal to honour

his obligations in terms of the agreement, that he may strip himself of assets so as to make any prospective award unenforceable.

[27] The question now relates to whether this court can “oust” the HKIAC’s jurisdiction and issue the injunction, *pendent lite* to restrain the Respondent from the repetition or continuance of the wrongful act or breach of contract or injury arising out of the same property or right; and for it to be enforceable worldwide.

[28] A party will have this option, however, if the arbitration agreement does not provide for emergency relief, because the different arbitration associations rules provide for them. Since 2013, some of the major arbitral institutions amended their rules to include emergency measures, including appointment of an emergency arbitrator with the power to grant injunctive relief before the arbitrator is appointed. The International Chamber of Commerce (ICC) was one of the first arbitration organizations to adopt rules for emergency relief [Mullin, Conwell & Howard, “Injunctive Relief Pending Arbitration: The Evolving Role of Judicial Action” *Franchise Law Journal*, Spring 2019, 557.] The Applicant has cited the HKIAC as the centre at which the arbitration is being held. According to Article 111(2) of the Commercial Code, 2014:

“If, in an arbitration agreement, the parties have referred to a particular arbitration procedure, that procedure shall be deemed to be included in the agreement.” [Emphasis added]

[29] As notable from the above cited articles 113(2) and 111(2) of the Commercial Code as well as the cases of *Emerald Cove* and *Wartsila NSD Finland*, access to court for injunctive relief is triggered by the contents of the “arbitration agreement” or clause. An arbitration clause in a written agreement is a collateral agreement in its own right which is separate and severable from the main agreement. The challenge again for this court is the failure to file the arbitration agreement or clause within the main agreement applicable in the present circumstances. This would enlighten the court on the terms of the arbitration and if it provided for such emergency relief and the Law and Rules

applicable to the arbitration. Without this insight due to lack of information, the court cannot assist the Applicant.

[30] It is to be borne in mind that permanent injunctions can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby permanently enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff. An interim relief is granted to a person on the footing that the person is *prima facie* entitled to the right on which is based the claim for the main relief as well as the interim relief. In the absence of the aforementioned documents, it is not possible for this court to ascertain whether the Applicant is *prima facie* entitled to the right it claims and even the interim relief claimed.

[31] In the present case, it is unknown what the rights of the parties are other than what has been asserted by the Applicant. The court therefore cannot determine or “balance” any rights in vacuum not knowing what the impact of each will be. The Applicant has to take the court into its confidence and furnish the necessary documents. As has been established above, there cannot be any recourse where the court has no records to substantiate Applicant’s claim.

[32] It is clear that what the Applicant is seeking is a Mandatory Interlocutory injunction prior to his final relief which is a mandatory injunction. Case law has determined that in such instance when interim relief is being asked for which amounts to granting the final relief special circumstances must exist. In the case of **Hammad Ahmed Vs. Abdul Majeed & Ors.** CIVIL APPEAL NOS. 3382-3383 OF 2019 9 July, 2019 it was held:

“the balance of the case totally in favour of the applicant may persuade the court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases.”

In the case of ***Dorab Cawasji Warden vs Coomi Sorab Warden & Or*** 1990 (2) SCC 117 the court held the following factors should exist:

- a) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.(emphasis added)
- b) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
- c) The balance of convenience is in favour of the one seeking such relief.

[33] Giving due consideration to the aforementioned factors, I am of the view the Applicant has failed to convince this Court that interim relief in the form of an injunction *pendente lite* should be granted.

[34] I therefore dismiss the said application. No order is made in respect of costs.

Signed, dated and delivered at Ile du Port on 22nd September 2022.

M Burhan J