IN THE COURT OF APPEAL OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2026] (SCA 26 of 2025)
SCA MA 03/2026
(Arising in CC 25/2025)

In the Matter Between

Allied Builders (Seychelles) Limited — Applicant
(rep. by Mr. Bernard Georges)

And

Jonathan Francois Michel Pinchart — Respondent
(rep. by Mr. Basil Hoareau)

Neutral Citation: *Allied Builders v Pinchart* (SCA 26 of 2025) [2026] (Arising in CC 25/2025) (2025)
Before: De Silva, Sharpe-Phiri, Sichinga, JJA
Summary: Whether the decision on an application under Article 113(1) of the Commercial Code application constitutes an interlocutory order, necessitating leave to appeal to the Court of Appeal
Heard: 14 April 2026
Delivered: 27 April 2026

ORDER

The Ruling on the application under Article 113(1) of the Commercial Code constitutes an interlocutory order requiring leave under Section 12(2)(b) and 12(2)(c) of the Courts Act. In the absence of such leave, the appeal is incompetent and stands dismissed with costs.

JUDGMENT

SHARPE-PHIRI JA

(De Silva JA, Sichinga JA, concurring)

Factual background

1. By a written contract dated 16 October 2023, Jonathan Francois Michel Pinchart ('The respondent'), a Seychellois National engaged Allied Builders (Seychelles) Limited ('The appellant'), a building contractor, to construct a three-bedroom house and a one-bedroom bedsitter, associated external works, mechanical, electrical and plumbing services on parcel V21440, and a temporary access road.

2. The respondent averred that he had performed his obligations, whereas the appellant had repudiated the contract and failed to proceed diligently with the works. The respondent (as 'plaintiff below') commenced proceedings against the appellant ('defendant') in the Supreme Court (CC 25/2025), claiming SCR 1,264,682.91 in damages, interest and costs.

Plea in Limine Litis

3. Prior to the matter being set down for hearing, the appellant raised a preliminary objection *(plea in limine litis)*, pursuant to *Article 113(1) of the Commercial Code* asserting that the Court lacked jurisdiction over the matter, on the basis that the dispute arose from an agreement containing an arbitration clause mandating that all disputes between the parties be referred to arbitration.

4. The appellant referenced clause 20.10 of the arbitration clause and argued that the parties had agreed that '.. *a dispute shall be settled by arbitration.* The appellant maintained that the parties had, '*...irrevocably and unconditionally agreed to refer any such dispute to arbitration in accordance with the UNCITRAL Arbitration Rules'* and that '*there shall be 3 arbitrators, and the appointing authority shall be the London Court of International Arbitration.'*

5. The appellant argued that the arbitration clause remained valid and enforceable and that it was ready and willingness to submit the dispute to arbitration in accordance with the agreement.

6. The respondent opposed the application, contending that the arbitration agreement in the contract was inconsistent and invalid, such that the Court ought to decline jurisdiction on that basis.

7. The preliminary objection was heard on 11 August 2025. By ruling dated 11 September 2025, CC25/2025 [2025]), the learned Judge dismissed the *plea in limine litis* and directed the appellant to file a defence on the merits. Although accepting the existence of a valid and subsisting arbitration agreement between the parties, the Judge found that the appellant had failed to evince genuine readiness and willingness to proceed to arbitration through its conduct.

8. In particular, the learned Judge found that a bare averment of willingness in the supporting affidavit, without concrete steps or evidence of arbitral commencement, was insufficient to oust the Court's jurisdiction. The Judge placed considerable reliance on ***Bajrang Builders (Pty) Ltd v Harini & Company (Pty) Ltd [2017] SCSC 470.***

Application for leave before Supreme Court

9. On 14 October 2025, the appellant filed an application before the Supreme Court pursuant to Section 12(2) of the Courts Act, seeking leave to appeal against the ruling (MA224/2025) dismissing the preliminary objection. The application was supported by an affidavit of Kalyan Kurji Patel dated 15 October 2025.

10. The respondent opposed the application by affidavit in reply dated 3 December 2025, contending that the appellant's affidavit disclosed no sufficient or valid grounds upon which the Court could grant leave to appeal to the Court of Appeal against an interlocutory judgment of the Supreme Court. It further averred that the interlocutory decision of 11 September 2025 did not determine the principal matters in issue to the extent that only ancillary issues remained for adjudication; rather, all substantive questions raised in the suit remain unresolved and extant.

11. The application was heard on 16 December 2025 and reserved for determination.

Notice of Appeal to the Court of Appeal

12. Whilst the application for leave to appeal remained pending undetermined before the Supreme Court, the appellant filed a notice of appeal on 22 October 2025 before this Court (SCA 26 of 2025) seeking to set aside the '*interlocutory judgment of learned Judge Burian delivered in the Commercial Court on 11 September 2025 and ordering the Court to decline jurisdiction and stay proceedings in CC25/2025 pending hearing of the arbitration.*' Notably, the appellant's counsel refers to the ruling of the Supreme Court (the subject of the present appeal) as an '*interlocutory judgment.*'

13. The appeal assails the entirety of Judge Burian's decision, under MA224/2025 arguing that the learned Judge erred in law and fact by:

i. finding insufficient or no evidence of the defendant's genuine willingness or readiness to arbitrate;

ii. failing to properly evaluate the parties; correspondence against the backdrop of the two-tier dispute resolution clause, particularly given that arbitration was first invoked upon filing of the plaint; and

iii. overlooking that the designated appointing authority lay outside the jurisdiction, thereby precluding unilateral arbitrator appointments.

Refusal of leave to appeal

14. On 15 January 2026, Judge N. Burian refused leave to appeal (MA224/2025 [2026]), holding that the appellant had failed to establish exceptional circumstances justifying such leave and that the ruling was not manifestly wrong. At this time, the appellant's Counsel had already filed a notice of appeal.

Notice of Motion before this Court

15. On 11 February 2026, the appellant filed a notice of motion (MA3/ 2026) seeking special leave to appeal the ruling in *CC 25/2025*, pursuant to *Section 12(2)(c) of the Courts Act*, which empowers this Court to grant such leave where it has been refused by the Supreme Court. The motion was supported by an affidavit sworn by Kalyan Kurji Patel, Managing Director of the appellant, dated 12 February 2026. The respondent filed an affidavit in reply sworn on 25 March 2026 opposing the application on several grounds, including procedural matters.

16. The motion (SCA MA03/2026) (arising in SCA26/2025 out of CS25/2025) and the appeal (SCA 26/2025) were listed for hearing before this Court in the April 2026 Session.

The Court of Appeal hearing

17. At the outset of the hearing, counsel for the appellant withdrew the notice of motion filed on 12 February 2026, acknowledging that it had been filed *out of time*. The motion (SCA MA 03/2026) accordingly stands abandoned and shall not be considered.

18. Counsel for the appellant sought leave to proceed with the hearing of the appeal (SCA26/2025 arising in CC 25/2025) submitting that the assailed ruling of the lower Court constitutes a final order, thereby conferring an automatic right of appeal without the need for prior permission under the Court of Appeal Rules. Learned counsel for the respondent opposed, contending that the ruling is interlocutory in nature and that, consequently, the appellant was required to obtain special leave to appeal, rendering the appeal incompetent in its absence.

19. The Court, exercising its inherent jurisdiction to determine questions of competency and appealability as a threshold preliminary issue, permitted the parties to address all substantive and procedural issues, including the distinction between final and interlocutory orders with the assurance that this Court would fully adjudicate thereon in its judgment.

20. The appellant placed primary reliance on its written heads of argument dated 6 March 2026. The respondent relied on its arguments of 24 March 2026, together with the accompanying authorities. This Court has duly considered the parties' respective oral and written arguments, evidence, and cited precedents.

21. Having carefully reviewed the records of the proceedings below, the parties' respective written and oral arguments and noting the appellant's withdrawal of its notice of motion seeking leave to appeal, a threshold preliminary issue framed for determination is whether the notice of appeal dated 22 October 2025 is competently and properly before this Court. More particularly, *whether the impugned order of the court below constitutes a final order*, in which case the right of appeal accrues automatically as of right without the need for prior leave, or alternatively, *an interlocutory order,* requiring the appellant to obtain special leave to appeal, such leave not having been sought or granted, thereby rendering the appeal incompetent, as strenuously contended by the respondent.

22. Therefore, the preliminary consideration of whether the ruling of Judge N. Burian dated 11 September 2025 in *Pinchart v Allied Builders* CC 25/2025, dismissing the *plea in limine litis* predicated on the arbitration clause in Clause 20.10 of the FIDIC contract, is final or interlocutory is paramount.

23. The classification of an order as final or interlocutory is not merely procedural or technical but jurisdictionally decisive, dictating the competency of the appeal and the permissible appellate route. As a preliminary matter logically paramount to any substantive adjudication, it must be resolved first.

24. The right of appeal to the Court of Appeal governed by *Articles 120(1) and 120(2) of the Constitution*, read together with *section 12 of the Courts Act. Article 120(2)* creates a broadly framed right of appeal from any judgment, direction, decision, declaration, decree, writ or order of the Supreme Court, but expressly subjects that right to modification by statute: *"Except as this Constitution or an Act otherwise provides."*

25. *Section 12(1) of the Courts Act* provides that: '.. *the Court of Appeal shall, in civil matters, have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in its original or appellate jurisdiction.'*

26. Section 12(2)(a)(i) of the Courts Act implements the constitutional qualification by providing that *"no appeal shall lie as of right from any interlocutory judgment or order of the Supreme Court."* Section 12(2)(b) empowers the Supreme Court to grant leave to appeal where the issue raised ought properly to be the subject of an appeal. Section 12(2)(c) further enables this Court, upon refusal of such leave by the Supreme Court, to grant special leave to appeal.

27. The Courts Act furnishes no statutory definition of an "*interlocutory*" judgment or order. Consequently, the critical distinction between a *final* order and an *interlocutory* one needs to be established by Appellate Courts. Accordingly, whether the ruling of 11 September 2025 is a *final order* (attracting an appeal as a right under *s12(2)(a))* or an *interlocutory order* (necessitating special leave under *ss12(2)(b)-(c)* read with the Court Rules, falls to be judicially determined this Court by reference to common law principles.

28. As affirmed by this Court in ***Seychelles Human Rights Commission & Ors v The Speaker of the National Assembly*** **SCA MA 21/2023 [2023] SCCA 58 (18 December 2023) ("*SHRC*")**, where De Silva JA, delivering the judgment of the Court, identified two principal tests applied in this and other jurisdictions. The two English tests for distinguishing whether an order is final or interlocutory, will be elaborated below.

29. Further, in ***SHRC***, De Silva JA reviewed the English and Sri Lankan authorities and the Seychellois precedents in ***Delcy v Camille*** **(2005) SLR 87,** ***Financial Intelligence Unit v Mares Corp*** **SCA 48 of 2011, and** ***Vijay Construction (Pty) Ltd v Eastern European Engineering Limited*** **(2020) SCCA 22** and held that both tests are applied in this jurisdiction. The Court expressed no preference between them because, on the facts of ***SHRC***, both produced the same result.

The Order Approach Test

30. Under the order approach, the court examines the order in isolation and determines whether it finally disposes of the parties' rights in the litigation. An order is final if it leaves no live claim or defence extant and prevents the suit from continuing. Conversely, if the suit remains viable, the order is interlocutory.

31. This test was formulated by Lord Alverstone CJ in ***Bozson v Altrincham Urban District Council*** **[1903] 1 KB 547 at 548**: *"Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order."*

32. The phrase "rights of the parties" refers to the substantive rights in dispute in the particular action - not the broader commercial or practical consequences of the order. This was confirmed in ***Rank Xerox (Singapore) Pte Ltd v Ultra Marketing*** **[1991] 2 SLR(R) 912,** cited with approval in ***SHRC.***

Applying the Order approach to this case

33. The ruling of 11 September 2025 dismissed the appellant's *plea in limine litis*, asserting a valid arbitration agreement under clause 20.10 of the FIDIC contract and invoking *Article 113(1) of the Commercial Code* to challenge jurisdiction and directed the appellant to file a defence on the merits.

34. The order, taken as made, does *not* finally dispose of the *rights of the parties* in the litigation. The following matters remain entirely open and undetermined before the Commercial Court:

(a) *Whether the respondent's claim for breach of contract is made out;*
(b) *Whether the appellant is liable for losses totalling SR 1,264,682.91;*
(c) *All questions of causation, quantum, and any defences on the merits.*

35. The suit was not terminated but expressly directed to proceed. The order thus left the *lis* not merely extant but wholly unresolved. Under the order approach, the ruling is accordingly interlocutory.

The Application Approach Test

36. Under the application approach, the court assesses the nature of the originating application rather than the terms of the resulting order. The test is whether granting or refusing the application, whichever the outcome, would finally determine the parties' rights.

37. Lord Esher MR formulated the test in ***Salaman v Warner*** **[1891] 1 QB 734 at 735:**
"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

38. Under the application approach, an order is interlocutory, rather than final, if its outcome diverges: granting the application in one direction achieves finality (e.g., dismissing the action), while refusing it in the other sustains the action (e.g., allowing it to proceed). Finality requires that either outcome conclusively determines the parties' rights.

Applying the Application approach to this case

39. Applying this approach, the application before the learned Judge, a *plea in limine litis*, seeking a declaration of the Commercial Court's lack of jurisdiction by virtue of the arbitration clause, would yield divergent outcomes. Success would have declared its lack of jurisdiction, terminated the proceedings, referred the parties to arbitration, and disposed of the action. Its failure, as occurred, permitted the action to proceed to trial on the merits.

40. This exemplifies the precise pattern under the application approach that yields an interlocutory order. The outcomes diverge asymmetrically: success terminates the proceedings; failure permits continuation. Per ***Salaman v Warner***, finality requires both outcomes to conclusively determine the rights of the parties. That condition is plainly not met here.

41. The application approach thus yields the same conclusion as the order approach: the ruling of 11 September 2025 is an interlocutory order.

42. The appellant argued that the ruling is final because it permanently extinguished the contractual right to arbitrate, a right irrecoverable on any subsequent appeal from final judgment. While commercially intuitive, this argument conflates the ruling's consequences with its *juridical character*. The authorities confirm that an order's classification as final or interlocutory turns not on the significance or irreversibility of its effects, but on its effect within the litigation itself.

43. In the *SHRC case*, the recusal determination conclusively resolved the bench structure, an issue irremediable at the main case's conclusion, yet the Court deemed it interlocutory, as the Tenth Amendment's constitutionality remained to be determined. The same reasoning applies here. The ruling's permanence or commercial significance does not alter its character; the inquiry concerns its dispositive effect *within the litigation*, not its external consequences.

44. This principle finds further support in the reasoning of Lord Denning MR in ***Salter Rex & Co v Ghosh*** **[1971] 2 All ER 865 at 86**, where the Court held that an order dismissing an action as frivolous or vexatious, conclusively determining that claim, is nonetheless *interlocutory* when assessed by reference to the originating application. The focus there remained on the ruling's juridical character, not its consequences. "*An appeal from an order striking out an action as being frivolous or vexatious or as disclosing no reasonable cause of action or dismissing it for want of prosecution, every such order is regarded as interlocutory: See Hunt V Allied Bakeries Ltd [1956]3 All ER 513, [1956] 1 WLR 1326.*"

45. Applied here, the analysis is straightforward. Even assuming the ruling carries serious or irreversible consequences, as the appellant contends regarding the loss of the arbitration avenue, this does not alter its juridical character. The determinative factor remains that the underlying dispute is existing and remains unresolved. Where, as here, the proceedings continue with substantive issues outstanding, the order is interlocutory, notwithstanding any broader implications.

46. For the reasons set out above, I hold the view that the ruling of Judge Burian of 11 September 2025 is properly characterised as an interlocutory order. This conclusion follows from the application of both tests recognised in this jurisdiction, is consistent with the weight of Seychellois authority, and is reinforced by the appellant's own procedural conduct.

47. Before concluding on this issue, it is worth observing that following delivery of the ruling of 11 September 2025, the appellant applied for leave to appeal an '*interlocutory judgment*' under section 12(2)(b) of the Courts Act (MA224/2025). In so doing, the appellant implicitly accepted, at least at that juncture, that the ruling was interlocutory in nature. It has been said that a litigant cannot approbate and reprobate. As the House of Lords held in ***Lissenden v CAV Bosch Ltd AC 412 at 418***, a party may not adopt inconsistent positions in the same proceedings to gain successive advantages. Having invoked the leave procedure applicable to interlocutory orders, the appellant ought not contend before this Court that no leave was required on the basis that the order was final.

Final Determination and Orders

48. I have determined that the impugned ruling, dismissing the appellant's *plea in limine litis* under Article 113(1) of the Commercial Code is interlocutory, not final. Consequently, an interlocutory order attracts no automatic right of appeal. Special leave was mandatorily required under sections 12(2)(b) and 12(2)(c) of the Courts Act. The absence of such prior leave renders the appeal filed on 22 October 2025 (SCA26/2025) fundamentally incompetent, depriving this Court of jurisdiction to adjudicate its merits.

Orders:

49. The notice of appeal is accordingly dismissed as incompetent.

50. The appellant shall pay the respondent's costs of the appeal, taxed if not agreed.

Sharpe-Phiri JA

I concur:

De Silva JA

I concur:

Sichinga JA

Signed, dated and delivered at Ile du Port on 27 April 2026.