IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2022] SCCA 57 (21 October 2022)
SCA MA 34/2022
(Arising in SCA MA 24/2020)
Out of SCA 28/2020 / CC 23/2019

In the matter between

Vijay Construction (Proprietary) Limited **Applicant**
(rep. by Mr. Bernard Georges, with Mr. Leon Siegfried Kuschke)

and

Eastern European Engineering Limited **Respondent**
(rep. by Mr. Basil Hoareau)

Neutral Citation:	*Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited* SCA MA 34/2022 [2022] SCCA 57. (Arising in SCA MA 24/2020) Out of SCA 28/2020 / CC23/2019 (21 October 2022)
Before:	**Anderson JA (Presiding), Young JA, Singh JA**
Summary:	**Application for leave to file additional grounds.**
Heard:	12 October 2022
Delivered:	21 October 2022

ORDER

Leave is granted to file Additional Grounds of Appeal subject to Condition

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RULING

ANDERSON JA

Introduction

[1] On 12 October 2022, this Court heard an application by the appellant in the appeal *de novo*, Vijay Construction (Pty) (applicant in this application, hereinafter referred to as 'Vijay'). The application was opposed by Eastern European Engineering Limited (the

respondent in this application, hereinafter referred to as 'EEEL'). After the hearing, we granted leave for Vijay to file additional grounds. We did not then give reasons for our decision. We do so now.

Pleadings

[2] On 27th of September 2022, Vijay through their Counsel Mr Bernard Georges filed a motion before this Court (MA/34 of 2022) to ask for leave to file additional six grounds to their Memorandum of Appeal. The six grounds read verbatim as follows:

> "*1. The petition of the Respondent to the Supreme Court seeking leave to have the 2015 Cooke J Order registered in the Court of Seychelles was made out of time in that the period of twelve months within which it ought by law to have been made had expired and no application for extension of time had been brought by the Respondent, or an extension granted by the Court.*
>
> *2. The Supreme Court erred in granting the relief sought by the Respondent in the 2015 Cooke J Order produced to be registered was neither an original, nor a validated or certified or otherwise duly authenticated copy, as required by the law, but a copy certified by a Seychelles Notary who was not proved to have had access to the original order. In any event, the Orders sought to be registered had not been annexed to the Plaint, as required by law, and the action should have been summarily dismissed for that omission.*
>
> *3. The Respondent used the wrong procedure to bring the action seeking registration of the 2015 Cooke J Order and based its application on the wrong legal provision.*
>
> *4. The pre-conditions for the court to exercise its powers to permit the issue for the initiating Plaint at the ex parte stage were not met because (a) neither the original England High Court Orders nor duly authenticated or certified copies were filed in the Supreme Court of Seychelles (b) twelve months' time limit had expired without any extension having been sought from or granted by the Court and (c) there was a fundamental and material procedural failure caused in and/or*

induced by the omission on the part of the Respondent's representative to disclose to the Court the applicable legal and procedural requirements and/or (d) the judgment of Carolus J is unsafe because of the a proliferation of procedural irregularities of which the Honourable Judge was not made aware of or which were not considered by the Judge.

5. One or more of the matters set out in paragraphs 1 to 4 above compromised the integrity of the judicial process in Seychelles and/or constituted abuse of the powers of the Seychelles Court, such as to enjoin or justify the refusal of the enforcement order sought as a matter of Seychelles public policy and/or discretion because it is not just to grant such order in the circumstances of the case.

6. Further, and in any event, the resort to the Supreme Court for permission to execute orders arising from Paris arbitration award via a British court mechanism after the substantive and definitive refusal by the Seychelles Court of Appeal to recognize that same award is (a) an abuse of process generally, (b) an impermissible subversion of that refusal by way of a collateral challenge, and/or (c) precluded by the principle established in Henderson v Henderson (1843) 3 hare 100 that a party is not to be harassed by staggered and fragmented suits in a court of justice."

[3] A supporting affidavit by Mr Kaushalkumar Patel, Director of Vijay was attached to the Motion. In it, Mr Patel averred that during the hearing of the appeal, the President of the Court of Appeal (PCA) raised matters which had not been raised by the appellant. It was those same grounds on which the PCA relied to allow the appeal. It was also averred that this Court, in the appeal *de novo*, should engage with the matters raised by the PCA and the proper manner to do so was by filing these issues as additional grounds to be considered by this Court. Finally, it was averred that ground 6 raised a pivotal point of law in the matter which ought to be considered.

[4] EEEL, (the respondent in the appeal *de novo*) opposed the Motion with an affidavit in reply by Mr Vadim Zalsonov, Director of EEEL. That affidavit was filed on 7th October

2022 and averred that the Amended grounds in the present Motion sought to raise issues that were raised by the PCA and not by the Vijay or its Counsel. Furthermore, it is averred that the points of law that are now canvased as additional grounds of appeal were not raised in the Trial Court. Moreover, it was averred that Vijay was estopped from setting up alleged irregularities on the basis that Vijay allowed proceedings to continue even when it had knowledge of such irregularities. Finally, it was averred that considering the relevant factors of this case and the consideration of administration of justice, Vijay should not be permitted to Amend its Grounds of Appeal.

Court's analysis

[5] Rule 18 (8) of the Court of Appeal Rules is instructive. It states that:

> *"The appellant shall* ***not without leave of the Court*** *be permitted, on the hearing of that appeal, to rely on any grounds of appeal other than those set forth in the notice of appeal:*
>
> *Provided that* ***nothing in this sub-rule shall restrict the power of the Court to make such order as the justice of the case may require****." (Emphasis added)*

[6] This simply means that it is permissible for an appellant to amend his grounds provided leave is sought and is granted by the Court. Where a party seeks to amend his grounds of appeal and it is unopposed, the Court may very well allow the amendment: see generally *Wavel Ramkalawan v Lizanne Reddy & Anor* (SCA 7 of 2016) [2018] SCCA 24 (30 August 2018) at paragraph 8. However, where, as in this case, the proposed amendment is opposed, the Court would have to exercise its discretion to a higher degree and be satisfied that the justice of the case requires that the amendment be allowed.

[7] EEEL opposed the application citing among other things that the new points of law that have been raised and canvassed on the *de novo* appeal were in fact raised by the PCA. It was also the submission of EEEL through their Counsel that Vijay is estopped from raising irregularities when they allowed proceedings in the trial court to continue when they had knowledge of the irregularities.

[8] We have considered the opposing arguments carefully. Suffice to say that we are not convinced that Vijay should be debarred from filing the additional grounds it seeks to file. We are guided by the proviso in Rule 18 (8), which empowers us to make orders as the justice of the case may require. Considering that the parties have previously submitted on these issues when they were raised by the PCA *proprio muto*, the issues catch no one by surprise. There is no prejudice to either side should leave be granted to amend grounds of appeal to formally include these issues.

[9] The questions raised by the PCA are indeed points of law as submitted by Vijay, and evidently considered worthy of consideration by the PCA. This fits into the consensus that courts are empowered to raise points of law on their own motion, a principle illustrated in the cases of *Banane v Lefevre* (1986) SLR 110; *Desire Fred v Denise Fred & Anor* (SCA 18 of 2015) [2018] SCCA 29 (30 August 2018); and *Public Utilities Company v Chelle Medical Limited* (SCA 42 of 2019) [2021] SCCA 78 (17 December 2021). A thread running through these cases seems to be that a court can entertain a point of law even where it was not raised by the parties, if to ignore the same would mean a failure to act fairly or to err in law.

[10] In the special circumstances of this case where a member of the Court of Appeal entertained serious reservations about whether he would be able to decide the appeal fairly without clarification of certain points of law, and where those clarifications were in fact sought and were the subject of submissions by both parties, it would appear artificial to debar the raising of these issues and the submission on them by the same parties in a new consideration of the appeal.

[11] In all the circumstances, therefore, we considered that we should allow the application to Amend the grounds of appeal, except in one respect. Vijay had sought in the new grounds to take the point that EEEL had failed to have requested recognition of the UK Order of 2015 by Cooke J within the 12-months limitation period allowed by the law. In all the circumstances of the case, including for reasons that we go into in the judgment on the *de novo* hearing, we consider that it would be highly prejudicial and unjust to EEEL to include this as a new ground of appeal. To its credit, Vijay did not resist this point, and

readily agreed to the condition that the new grounds would not include the 12-month limitation period point.

[12] Accordingly, the application for leave to amend was granted subject to the condition that the applicant could not argue that the 12-month limitation period was not complied with by the respondent.

[13] We therefore conclude that the application for leave to amend is granted subject to the condition aforesaid.

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Anderson JA

I concur _____

Young JA

I concur _____

Singh JA

Signed, dated, and delivered at Ile du Port on 21 October 2022.