

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 59 (28 October 2022)

SCA MA 27/2022

(Arising in SCA MA 18/2022)

In the matter Between

Beau Vallon Properties Limited,

(rep. by Mr. Serge Rouillon)

Applicant

And

Rahul Bhasin,

(rep. by Mrs. Alexia Amesbury)

Respondent

Neutral Citation: *Beau Vallon Properties Limited v Bhasin* (SCA MA 27/2022) [2022]

SCCA 59 (Arising in SCA MA 18/2022) (28 October 2022)

Before: Andre JA

Summary: **Amendment of affidavit and Motion to stay execution**

Heard: 20 September 2022

Delivered: 28 October 2022

ORDERS

The Court makes the following Orders:

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- (i) The Motion is dismissed.
 - (ii) Costs is awarded in favour of the Respondent.
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RULING

ANDRE, JA

INTRODUCTION

- [1] This Ruling arises out of the Notice of Motion filed on 2 June 2022 by Beau Vallon Properties Limited Trading, as Coral Strand Hotel (the Applicant), against Rahul Bhasin (the Respondent). The Notice of Motion seeks an Order for leave to amend the Motion for a Stay of Execution and the attached affidavit in support of the application in MA18 of 2022 arising out of case ET/61/17; CA 11/2018 delivered by the Supreme Court dated the 2 March 2022. The said Stay of Execution is sought pending the hearing and disposal of the Applicant's Appeal against the Supreme Court judgement.
- [2] An Affidavit in support of one Mr Aleksander Khlebnikov director of the Applicant is attached in support of the Application.
- [3] The Respondent objects to the application by way of filed submissions objecting to the same dated the 20 September 2022.

APPLICANT'S GROUNDS IN SUPPORT OF THE APPLICATION

- [4] The reasons advanced by the Applicant in support of the above-said Motion are found at paragraph 12 of the Affidavit in Support (supra), where it is averred that:

“During the hearing of the application referred to in Paragraph 11 her Ladyship S. Andre JA pointed out some issues in the Application and accompanying Affidavit which needed to be attended before the Application could proceed which included making amendments to both the Motion and Affidavit in support.”

- [5] This is in reference to when this Court pointed out to Counsel for the Applicant, Mr Serge Rouillon, that there is a lacuna in the Affidavit in support. Below is the record of proceedings dated 24 May 2022 at 9.00am, pages 2 – 3:

“Court: O.K. So, we will not go into the merits of the application as at now. Just to also point your attention that there is a deficiency, a lacuna in the Affidavit, paragraph 6, as read with your prayer (b). Again, the Court is in issue. Which

Court is in issue, as far as the impugned decision is concerned and the current application before this Court? O.K? These are really important issues that have to be dealt with, as prelims.

Mr. Rouillon: We have attached the copy Judgment, your Ladyship.

Court: Yes, paragraph 6 you made reference: “That following the remittance of the case to this court for a judgment on the facts the court, on 2nd March 2022 in CA 11 of 2018”, this is erroneous.

Mr. Rouillon: Yes.

Court: It is grossly erroneous and I cannot allow amendment to an Affidavit, by you.

Mr. Rouillon: No, but there are authorities from Africa, which basically, and which had been adopted in the Constitutional Court, your Ladyship, for correcting errors which are not fundamental.

Court: But this error is really fundamental, Mr. Rouillon, if you remember the last Ruling delivered in the case of Desouza, before the Supreme Court. I remember it very vividly in my mind. It was an Affidavit that your client had filed and I remember going through a lot of precedent, jut to try and differentiate what is fatal and what is not fatal. So, just bringing this to your attention, because this is really substantial when I look at the Affidavit. O.K? The Motion is something different, the Notice of Motion, but as for the Affidavit itself, this is something which has to be brought to your attention as a friend of the Court, in fact. O.K? So, you are moving as per your current Motion and Affidavit?

Mr. Rouillon: Yes, your Ladyship.”

- [6] It is erroneous for the Applicant, through its affidavit in support during these proceedings, to present as though this Court advised that amending of the Motion and Affidavit was necessary. The Court simply put it to Counsel’s attention that there are fundamental errors in the Affidavit. The Court also expressly said amendment to an affidavit will not be allowed. In the circumstances, Counsel is expected to apply themselves and act accordingly.

RESPONDENTS' OBJECTIONS TO THE APPLICATION

[7] The Respondent objects to the present application for leave to amend an affidavit, stating that it is trite law that an affidavit cannot be amended by virtue of it being a sworn testimony. It is the submission of the Respondent that it is improper to ask the Court to amend a testimony before it. As such, the remedy available is to seek leave to file a supplementary affidavit.

THE LAW

[8] Indeed, there must be serious concerns if an affidavit can be amended in view of it being a sworn testimony.

[9] Case law has been instructive on the appropriate approach on the question of whether or not an affidavit can be amended. In the Kenyan case of ***Swaleh Gheithan Saanun v Commissioner of Lands & 5 others* [2002] eKLR**, Onyancha J at page 2 held that: '*the more substantive parts of an affidavit cannot be amended, while minor changes to title may be acceptable given that they do not offend the substance of the oath given*'. In the cases of ***Phantom Modern Transport [1985] Limited vs. D.T. Dobie ((Tanzania) Limited and Dwarka Natha vs. Income Tax Officer Air 1966 SC81***, it was held that an affidavit can only be cured by filing of a fresh one with the correct averments or one which complies with the law. These two cases were relied on by Adeline J in ***Joubert v Joubert (MA 105 of 2022) [2022] SCSC 465 (02 June 2022)*** whereby his Lordship concluded that affidavits cannot be amended.

[10] In the present case, there are fundamental errors of substance in the Affidavit in Support. The option Counsel for the Applicant has is to cure such errors by, as submitted too by Counsel for the Respondent and on the reliance of previously cited cases, filing a supplementary affidavit.

[11] In terms of amending a Motion to Stay Execution, Counsel for the Applicant has not assisted the Court with the legal provision relied on which allows for a motion to amend another motion. I thus dismiss this Motion outright. If the motion is found lacking such

should be withdrawn and a fresh one is filed. It is beyond this Court's power to re-invent the law in this instance too.

DECISION

[12] It follows thus for reasons given, the Motion is dismissed in its entirety with costs in favour of the Respondent.

S. Andre, JA

Signed, dated, and delivered at Ile du Port on 28th October 2022.