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COUR DE JUSTICE

COMESA

COURT OF JUSTICE

COMESA COURT OF JUSTICE
محكمة العدل
NYAMBURA L. MBATIA
COMMISSIONER
FOR OATHS
P.O. Box 12222 KHARTOUM, SUDAN

IN THE APPELLATE DIVISION OF THE COURT OF JUSTICE OF THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA
VIRTUAL SITTING

APPLICATION NO. 1 OF 2021

(Arising from APPEAL NO. 1 OF 2021)

IN THE MATTER OF

AGILISS LTD..... APPLICANT

VERSUS

THE REPUBLIC OF MAURITIUS..... RESPONDENT

COMMON MARKET FOR EASTERN AND

SOUTHERN AFRICA.....CO-RESPONDENT NO.1

SECRETARY- GENERAL OF COMMON MARKET

FOR EASTERN AND SOUTHER AFRICA.....CO-RESPONDENT NO.2

MINISTER OF FOREIGN AFFAIRS, REGIONAL

INTEGRATION AND INTERNATIONAL TRADE OF

THE REPUBLIC OF MAURITIUS .....CO-RESPONDENT NO.3

MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT OF

THE REPUBLIC OF MAURITIUS.....NO 4 CO-RESPONDENT

MAURITIUS OIL REFINERIES LTD .....INTERVENER

EX PARTE:

AGILLIS LTD.....APPLICANT

F4

CORAM

Hon. Lady Justice Lombe P. Chibesakunda – Judge President

REGISTRY

Hon. Nyambura L. Mbatia - Registrar

Mr. Asiimwe Anthony - Clerk of Court

COUNSEL

Mr. Razi Daureeawo - for the Applicant

Mr. Yvan Caril Jean Louis – for the Respondent and Co-Respondent 3 & 4

Mr. Gabriel Masuku and Mr. Sepo Nalumino – for Co-Respondent 1 & 2

Mr. Yves Hein – for the Intervener

RULING
Notice of Motion by the Applicant (Agillis Limited) dated 06 April 2021 and brought under (Rules 41(4) and 90(2)) of the Rules of Procedure of the COMESA Court of Justice (2016)

Introduction

1. The applicant, Agillis Ltd, came to this court on an *ex-parte* Notice of Motion under Rule 41(4) and 90(2) seeking orders to stay two Rulings of the First Instance Division dated 14 January 2020 (Ruling No. 1) and 19 January 2021 (Ruling No. 2) arising from Reference No.1 of 2019, pending the hearing and determination of Appeal No.1 of 2021.

2. The Notice of Motion was heard *ex-parte* on 08 April 2021, upon which the Court issued an order, *inter alia*, that *'the Rulings of the First Instance Division dated dated 14 January 2020 and 19 January 2021 are hereby stayed pending the hearing inter partes of this Application.'*

3. The Notice of Motion came up for *inter partes* hearing on 29 April 2021, and Counsel for the applicant, the Respondent, Co-Respondents, and the Intervener made their submissions.

Summary of Events Leading up to the Application

4. As directed by the Honourable Principal Judge, on 6 August 2019, Mauritius Oil Refineries Ltd ('MOROIL') filed a Notice of Motion seeking leave to intervene in Reference No. 1 of 2019, Agillis Ltd v the Republic of Mauritius & Others, which was pending before the First Instance Division ('FID'). The Application for Intervention was heard on 08 January 2020 by the full bench of the First Instance Division and a Ruling was delivered on 14 January 2020 granting the Intervener, MOROIL, leave to intervene in the Reference.

5. Counsel for the applicant submits that, after the hearing of the Application for Intervention, it came to its attention that Honourable Mr Justice Bernard Georges, who was part of the Bench that heard the Application for Intervention, was closely acquainted with MOROIL's Chief Executive Officer and its Counsel on a personal level.

6. By a letter dated 27 February 2020, the applicant requested the recusal of Honourable Mr Justice Bernard Georges from the proceedings in connection with the Reference under Rule 9(6) of the COMESA Court Rules of Procedure on the basis that the impartiality of Honourable Mr Justice Bernard Georges could reasonably be questioned. By a letter dated 6 March 2020, MOROIL admitted that its CEO and its Counsel were acquainted with His Lordship but denied that there was any close proximity with him. It urged the Court to disallow the request.

7. On 11 March 2020, the FID issued a Notification informing the parties of the recusal of Honourable Mr Justice Bernard Georges *sua sponte 'on the*

principle that the Court should at all times be above criticism from any perception of bias and that the decision is by no means an admission of the issues raised in the request'. On 25 March 2020, the applicant requested that the FID hears the application for Intervention *de novo* before a reconstituted bench, but the Intervener objected to this request by a letter dated 28 April 2020.

8. The matter appears to have delayed from February 2020 as evidenced by various requests for extension of time from the parties. Later travel restrictions and curfews imposed in the Republic of Mauritius to check the spread the COVID-19 Pandemic caused considerable delays as well.

9. As directed by the Honourable Principal Judge, on 6 August 2020, the applicant filed Application No.1 of 2020 for hearing anew of the Application for Intervention before a reconstituted bench. The First Instance Division granted the prayers sought on 27 October 2020 on the basis that the application was unopposed. However, that Notification was later vacated and the Respondent, Co-Respondents and the Intervener were allowed to file their replies to the application for hearing anew.

10. The application was heard by a reconstituted Bench excluding Honourable Justice Georges. The issue for determination in that application was whether the recusal of Honourable Justice Georges rendered the Application for Intervention irregular such that it ought to have been heard anew by a reconstituted bench. The FID delivered a Ruling on 19 January 2021 and dismissed the application by Agillis on its merits and on the ground that the Court lacked jurisdiction to entertain the same.

11. On 17 February 2021, the applicant filed a Notice of Appeal against the Ruling of 19 January 2021 to the Appellate Division and subsequently filed a Memorandum of Appeal and a Record of Appeal. On 14 April 2021, the Registrar issued the Certificate of Record of Appeal.

12. On 6 April 2021, the applicant filed an *ex parte* application to the Appellate Division seeking to stay the Ruling (Ruling No. 1) granting the Intervener leave to intervene and the Ruling (Ruling No. 2) dismissing the application for hearing anew of the Application for Leave to Intervene pending

the determination of the Appeal. The FID further ruled that it lacked jurisdiction to entertain the application. The Appellate Division granted a stay of execution on 8 April 2021 pending the *inter partes* hearing of the application and as a result, the FID stayed the proceedings before it in the Reference and in the Injunction.

13. The application came up for *inter partes* hearing on 29 April 2021 and a summary of submissions received from all parties is outlined here below.

Submissions by the Applicant (Agillis Ltd)

14. The Application for Stay is premised on the grounds that:

(i) the Appeal would be rendered a nugatory if MOROIL were allowed to offer submissions in the Reference and in the injunction as the very presence of MOROIL is being challenged in the Appeal;

(ii) in view of the nature of the Appeal, irreparable prejudice would be caused to the Applicant and the proceedings in the Reference if MOROIL were allowed to intervene in the Reference and in the injunction; and

(iii) the Appeal has reasonable prospects of successes in particular because the Court departed from established case law and erred in holding that there was no reasonable apprehension of bias from the conduct of the Honourable Mr. Justice Bernard Georges and his failure to disclose his acquaintance with the MOROIL Chief Executive Officer and its Counsel right from the beginning.

15. Counsel for the applicant, Mr. Razi Daureeawo, in his submissions, relied on the supporting affidavit of Ms Sharon Ramdenee, the Chief Executive Officer of Agillis Ltd, and took the Court through a chronology of events leading up to this application as briefly laid out in paragraphs 4 to 12 above.

16. Counsel cited various authorities in support of the Application for Stay among them the English cases of *Polini v. Gray [1879 12 Ch. D 438 (C.A.)]* where the Court stated *'that when there is an appeal about to be prosecuted the*

litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree ..... would make the appeal nugatory, ...then it is the duty of the court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights.....'

17. Counsel further cited Wilson v. Church (No. 2) [1879 12 Ch. D. 454] where the Court stated that *"....when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal, if successful is not nugatory."* In the case of *Hardy Brigitte & Anor v. Harel Jean Claude & Ors [2003 SCJ 22]*, the Mauritian Supreme Court held that a stay should only be refused if it is found that *'the grounds of appeal are frivolous or unreasonable or there is some special circumstance that would justify the refusal of such a stay.'*

18. Counsel for the applicant also relied on the decision of the East African Court of Justice in the case of *The Attorney-General of the Republic of Uganda v. The East African Law Society and Anor [Application No.1 of 2013]* in which the EACJ granted a stay pending appeal in order not to render the appeal that had been filed against Reference No. 2 of 2012, nugatory.

19. He further submitted that the guiding principles for the grant of stay pending appeal are, firstly, that the appeal should not be frivolous, it ought to disclose reasonable prospects of success; and, secondly, that an applicant should not be deprived of his undoubted right to appeal and an appeal ought not to be rendered nugatory.

20. To determine whether the application was frivolous or if it had reasonable prospects of success, Counsel for the applicant urged the Court to consider the Memorandum of Appeal and contended that the applicant was challenging Ruling No. 2 on the grounds that:

(a) in law and in particular by virtue of the provisions of Article 20 of the COMESA Treaty and Rule 9(5) of the COMESA Court Rules of Procedure, there is a perception of bias on the part of Honourable Mr Justice Bernard Georges.

(b) the FID erred in holding that the proceedings in Application No.1 of 2020 were procedurally irregular.

(c) the FID erred in holding that it did not have jurisdiction to adjudicate on the rehearing of the Application for Intervention.

21. Counsel for the applicant cited the decision of the COMESA Court of Justice in the case of *Eastern and Southern African Trade and Development Bank (PTA) Bank and Dr. Michael Gondwe v. Martin Ogang [Ref. No. 1B/2000]* in which, while holding that Mr. Justice Ogoola should have recused himself or disclosed his interest in the matter, the Court stated that *'justice should not only be done, but should be manifestly and undoubtedly be seen to be done....'*

22. The Privy Council decision in *Marie Joseph Charles Robert Lesage v The Mauritius Commercial Bank Ltd [2012 UKPC 41],* was cited extensively by Counsel for the applicant. The court therein held, similarly to the Ogang case (supra), that where it is established that there is a perception of bias on the part of a judge, that judge shall not take part in the proceedings and any proceedings in which that judge participated ought to be heard anew. The court went further to state that any inconvenience that might occur as a result of hearing such a matter anew *'cannot outweigh the unanswerable need to ensure that a trial which is free from even the appearance of unfairness is the indispensable right of all parties and is fundamental to the proper administration of justice'.*

23. In the applicant's view, the admission by MOROIL that it was acquainted with Honourable Justice Georges, and the reasons given by His Lordship for his *sua sponte* recusal, to the effect that *'His Lordship has reached this decision based on the principle that the Court must at all times be above criticism from any perception of bias and that the decision is by no means an admission of the issued raised in the request'* support the applicant's contention that there was a justifiable reason for a perception of bias. Counsel for the applicant therefore submitted that Honourable Justice Georges ought not to have participated in the proceedings in Application No. 2 of 2019, and that he should have informed the parties at the hearing of his relationship with the Intervener and its Counsel. For the foregoing reasons, Counsel for the applicant submitted that the Appeal had reasonable prospects of success.

24. Counsel for the applicant submitted that failure to grant the stay would render the Appeal nugatory since the very participation of the Intervener is being challenged on Appeal and that the Intervener was unlikely to suffer any prejudice if the stay were granted.

25. On whether the applicant had *locus standi,* submissions were received from the applicant but as stated elsewhere in this Ruling, this is not relevant for the purposes of the current application.

Submissions by the Respondent, Co-Respondent 3 and 4

26. Counsel for the Respondent, Co-Respondent 3 and 4, Mr. Yvan Caril Jean Louis, submitted that the entire proceedings initiated by the applicant both before the FID and the Appellate Division are an abuse of the process of the Court and that the Appellant had no legal standing to be and to appear before the Court. To demonstrate the abuse of the process of court, he stated that the Application for Stay was filed before the Appellate Division was seized of the Appeal, as no Memorandum of Appeal had been filed by then.

27. Counsel also made extensive submissions on whether the applicant had exhausted domestic remedies or not and contended that the Supreme Court of Mauritius had never held that the COMESA Treaty was not enforceable in the domestic courts of Mauritius. He cited several authorities, some from the COMESA Court of Justice.

28. He urged the Court to set aside the Application for Stay and Appeal No. 1 of 2021 and prayed that the proceedings in Reference No. 1 of 2019 be permanently stayed. I have taken note of Counsel's submissions.

Submissions by Co-Respondent 1 and 2

29. Mr Gabriel Masuku, Counsel for Co-Respondent 1 and 2, made submissions in which he requested that Co-Respondent 1 and 2 be expunged from taking part in the proceedings. He made no submissions on the application for stay.

Submissions by the Intervener

30. The Intervener, MOROIL, submitted through Mr. Yves Hein, that the Application for Stay was an abuse of the process of court in so far as no appeal lies from a ruling and that the provisions of Rule 86 of the Rules of Procedure apply to a final decision of the First Instance Division. Counsel further stated that the applicant did not, in fact, appeal against Ruling No.1 dated 14 January 2020.

31. Counsel further submitted that should the Court conclude that an appeal may proceed against a ruling, such an appeal should have been made within the time prescribed after Ruling No.1 and that the applicant was trying to suspend the execution of Ruling No.1 through the application for stay of execution of Ruling No. 2, twelve (12) months after Ruling No. 1 was delivered. He submitted that the applicant had systematically put forward objections, motions to set aside, lodged an appeal and a stay of execution application throughout the case. The second part of the submissions by the Intervener was on issues related to the Appeal.

32. Counsel for the Intervener urged the Court to set aside the Application for Stay and allow the main case to proceed with the participation of the Intervener. That would enable the First Instance Division to hear the arguments on jurisdiction and injunction that were scheduled for the 9 April 2021.

SUMMARY OF FINDINGS

33. I have considered the submissions by all Counsel as well as the authorities cited. I wish to thank Counsel for their industry and research in this matter. The arguments tendered have been very helpful in assisting the Court arrive at a decision.

34. At the outset, it is important for the Court to isolate issues that relate to the Reference from those that relate to the Appeal. Further, issues that relate to the Appeal must be separated from those that concern the Application for Stay. It is important to mention that, although some of these issues may be interlinked, addressing some of them at this stage would be tantamount to

prematurely determining the Appeal.

35. Submissions on whether the applicant had exhausted domestic remedies before filing the Reference pending before the FID is not a matter that can be determined in this application. This is a matter that should, ideally, be determined in the Reference by the Court of First Instance.

36. The Court will therefore confine itself to the question whether the Application for Stay is merited or if there is a likelihood that the Appeal might be rendered nugatory. The applicant is aggrieved by the two Rulings of the FID stated supra. One is the Ruling that allowed MOROIL to intervene. The second is the Ruling that dismissed the application for hearing anew of the Application for Leave to Intervene premised on the fact that Honourable Justice Georges had participated in the first application.

37. Ruling No. 2 meant that Ruling No. 1 remained intact, and the Intervener could consequently take part in the Reference and the Application for Injunction that were due to be heard by the FID. The Intervener had acquired the right to intervene through a process which, according to the applicant, was tainted by the perception of lack of impartiality due to the participation of Honourable Justice Georges. It is contended by the applicant that His Lordship never disclosed his acquaintance with the Intervener and its Counsel during the hearing of the Application for Leave to Intervene. The Intervener admitted the acquaintance but contended that it was not such a close relationship as to affect the impartiality of the Judge.

38. The applicant's submission, therefore, is that the two Rulings should be stayed pending the hearing and determination of the Appeal. To clarify the issues before the Court, I pose some rhetorical questions - what would happen if the Court did not stay the said Rulings? The result would be that the FID would be able to continue hearing the matters before it, with the full participation of the Intervener. Suppose thereafter, the Appeal were to succeed, and the FID was directed to hear the Application for Intervention anew? The result would be that such orders would already have been overtaken by events and the Appeal would have been rendered nugatory.

39. I agree with the finding that courts should, as far as possible, allow applications for stay pending appeal in order not to render appeals nugatory as was well articulated in *Polini* and *Wilson* (supra). I am also cognisant of Rule 90(2) of the Court's Rules of Procedure (2016) which states that an appeal shall not operate as a stay of execution. Therefore, the only way a party can get a stay to maintain the status quo pending appeal is through an application such as the current one.

40. A contention was made by the Intervener that no stay may be granted against a ruling of the FID. I find nothing in the Rules to support this contention. Article 23(3) of the COMESA Treaty and Rule 86 of the Rules of Procedure (2016) provide the grounds upon which an appeal may lie to the Appellate Division. Rule 86 states as follows:

> 'Pursuant to Article 23 (3) of the Treaty, an appeal shall lie to the Appellate Division on-
>
> (a) points of law;
> (b) grounds of lack of jurisdiction; or
> (c) procedural irregularity.'

41. Nothing therein indicates that appeals shall only lie against final judgements and not interim decisions or rulings. Furthermore, Rule 93 which provides the reliefs that an aggrieved party may seek on appeal, talks about decisions of the First Instance Division, not 'final' decisions, or judgments. Therefore, if a party can appeal against any decision of the FID, then, it goes without saying that a party can apply for the stay of such a decision pending appeal. In any event, a restrictive interpretation such as that proposed by the Intervener would be a gross miscarriage of justice because a party aggrieved by any decision of the FID that is not a final decision would have no further recourse.

42. An issue was raised by Counsel for the Respondent and Co-Respondents 3 and 4 to the effect that the Application for Stay was made before an appeal was filed. It is my finding that the time frame for filing of the Memorandum of Appeal and the record of appeal had not lapsed, and the fact that the applicant had already filed a Notice of Appeal is sufficient proof of the intention to appeal.

I am persuaded by the decision of the East African Court of Justice in the case of *The Attorney-General of the Republic of Uganda v. The East African Law Society and Anor (supra)*, to the effect that a notice of appeal is sufficient to support an application for stay pending appeal.

43. Rule 90(2) makes no suggestion that a Notice of Appeal is not sufficient to found an application for stay pending appeal or that a party can only apply for a stay upon filing an appeal. Rule 90(1) gives a party sixty days upon which to file a Memorandum of Appeal together with the record of appeal. This provision is cognisant of the fact that it takes time to put together a record of appeal as is clear from the requirements set down under Rule 92. Therefore, if a party had to wait until they have complied with Rule 91 and 92 before applying for a stay, there would be a high likelihood that appeals would be rendered nugatory.

44. It is my finding therefore that the applicant has presented valid grounds for the grant of a stay pending appeal. The applicant did request for the recusal of Honourable Justice Georges in compliance with Rule 90(6). The questions to be determined by the Appellate Division will be whether Honourable Justice Georges should have disclosed his acquaintance with the Intervener and its Counsel at the beginning of the hearing of the Application for Leave to Intervene. Secondly, if, after his recusal, the Application for Leave to Intervene should have been heard *de novo*.

45. Furthermore, the Appellate Division will have to decide whether the FID was correct in dismissing the application for hearing anew of the Application for Leave to Intervene, and for holding that it had no jurisdiction to hear the application for hearing anew. The applications pending before the FID cannot be heard before these issues are resolved.

46. An allegation was made that the application is an abuse of the process of Court, and merely meant to delay the hearing of the Reference. I have looked at the chronology of events, the various Notifications issued by the FID as well the correspondence exchanged between the Parties and the FID. I find that there is no evidence of abuse of the process of Court. I must hasten to add that, seeking directions from the Court through letters, as appears to be prevalent in

the case before the FID, must be discouraged, particularly when such letters are eventually presented as evidence in Court. This is not only unprocedural, but it also makes it difficult to separate formal applications by parties from mere correspondence.

47. Regarding the request by Co-Respondent 1 and 2 to be expunged from these proceedings, this was a strange request that is, respectfully, not relevant for purposes of the current application. The Court is therefore unable to make any finding on the issue raised by Counsel at this stage of the proceedings.

48. Finally, the Intervener submitted that the Applicant should be ordered to provide security for costs. It is my finding that the CCJ Rules of Procedure do not make deposit of security for costs mandatory. The intervener did not adduce evidence to show that the Applicant had deliberately delayed the matter. As mentioned, there was general delay in this case occasioned by factors that affected all the parties. I therefore find no justification for this request and disallow the same.

DECISION

49. In view of the foregoing, the Application for Stay of Ruling No. 1, and Ruling No. 2 of the First Instance Division is allowed to the extent that the entire proceedings before the First Instance Division are stayed pending the hearing and determination of the Appeal.

50. Costs of this application shall be in the cause.

DATED and **DELIVERED** at **LUSAKA, ZAMBIA** this 5 day of MAY 2021.

COMESA COURT OF JUSTICE
NYAMBURA L. MEATIA
COMMISSIONER
FOR OATHS
P.O. Box 12222 KHARTOUM, SUDAN

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HON. LADY JUSTICE LOMBE P. CHIBESAKUNDA
JUDGE PRESIDENT