

SUPREME COURT OF SEYCHELLES

Reportable

MA309/2024

(Arising in CS125/2023)

In the matter between:

AUX CAYES FINTECH CO. LTD

(Represented by Mr. Divino Sabino)

Applicant

And

DR SAMSON LIU

(Represented by Mr Audric Govinden)

Respondent

Neutral Citation: *Aux Cayes Fintech Co. Ltd v. Samson Liu* (MA309/2024) (arising in CS125/2023) (12th June 2025)

Before: A. Madeleine, J

Summary: *Application for Leave to appeal interlocutory Judgment or Order of Supreme Court – Section 12(2)(b) Courts Act*

Heard: Written Submissions

Delivered: 12th June 2025

ORDER

I therefore grant the application.

RULING

Introduction

[1.] This is an application for leave to appeal an interlocutory Order of this court in MA No. 81 of 2024 made on 31st October 2024, by which the Plaintiff in the main suit (now Respondent) was ordered to pay security for costs in the sum of SCR.5000/- on or before 30th November 2024.

[2.] According to counsel for the Applicant and Respondent, a copy of the order in MA No. 81 of 2024 was only received on 13th November 2024¹. On 5th December 2024, the Applicant herein filed the current application for leave to appeal the Order of 31st October, 2024.

¹ Transcript of proceedings of 13 November 2024

[3.] The application is opposed by the Respondent.

Applicant's Affidavit

[4.] The grounds for the application are made out the Affidavit of Judith Mebella Louis made on 5th December 2024. In brief, the grounds in support of the application are as follows.

[5.] The Plaintiff is misconceived in that it makes allegations without proper particulars and wrongly claims against the Plaintiff instead of against the alleged fraudster. As a result, the Applicant has to incur significant costs to defend such misconceived plaintiff and even if successful, the Applicant will only recover a fraction of the costs associated with its Defence. Attorney's fees and fees in respect of expert evidence are necessary for the Defendant to support its defence rebut the claim of the Respondent and its 'soi-disant expert', and to assist the court in understanding the weaknesses of the Plaintiff's evidence on assets tracing. Given the curious nature of the plaintiff, the Applicant will wish to examine witnesses in person to assess their genuineness and good faith, and will oppose any moves for evidence to be taken virtually by the Respondent or any of its witnesses. The Applicant also states that the court ought to be mindful of the issues that virtual oral evidence presents, such as coaching or virtual witnesses and access to external materials whilst giving oral evidence which has happened in this jurisdiction.

[6.] The Applicant is advised by counsel that since the Respondent resides in St. Louis, USA and has admitted that he has no assets in Seychelles and the court has already decided that the Respondent should provide security, there are good reasons to order the Respondent to furnish sufficient security. At least a significant portion of the Applicant's travel and accommodation costs ought to have been granted based on the quotes attached to the Applicant's affidavit in support of the application for security for costs obtained from relevant websites. According to the Applicant, these figures can be easily double checked and verified.

[7.] The Applicant also states that any slight delay in filing the present application is due to the fact that they only obtained a copy of the Order on 13th November 2024.

[8.] Further, the Applicant states that there are matters that ought to be the subject of an appeal as the amount awarded is insufficient for its purpose. According to the Applicant, with the increasing number of cases being filed against the Applicant, and the costs of defending such claims, Plaintiffs in these matters, who are not residents in Seychelles and who have no assets in the country, and who appear to be of means, ought to pay in greater, and fairer, amount as security for costs. The funds will be returned to them if they win their case but the Applicant should not be made to pay such high costs with no reasonable means to recover them. The aim is not to stifle the claim, but to ensure just security for costs.

[9.] An indicative draft grounds of appeal exhibited in the affidavit as JL3 show that –

- “1) The learned Judge failed to appreciate that the Applicant will have to adduce an expert report and expert testimony to defend against the misconceived claim, even if it is weak on/lacking in evidence, so that the Applicant can appraise the court on technical issues involving virtual asset’s tracing, especially where the Respondent has referred to and pleaded his reliance of a blockchain investigation agency’s services, CipherBlade in his Complaint.*
- 2) The Learned Judge failed to appreciate that to defend the claim, the Applicant is required to fly in factual and/or expert witnesses to the country and therefore security for costs ought to be granted for travel and accommodation expenses.*
- 3) The Learned Judge erred in granting insufficient amount as security for costs as the amount awarded will only cover a fraction of the costs necessary for the Applicant to defend against the Complaint.*
- 4) The Learned Judge erred in granting insufficient security for costs as the Respondent is not a resident of Seychelles and has no assets in Seychelles and the Learned Judge failed to consider that the Applicant will have no means to recover costs as the Respondent has no assets in Seychelles.”*

(Emphasis added)

Respondent's Affidavit

- [10.] The grounds for opposing the application are made out in the Affidavit of Dr. Samson Liu made on 23rd January before notary public in the State of Missouri, United States of America and duly apostilled under The Hague Convention of 5th October 1961. In brief, the grounds of opposition are as follows.
- [11.] The Respondent disputes that the Applicant had prayed for security for costs in the sum of SCR427,023.23/-. The Applicant had asked for security for costs in the sum of SCR.442,023.46/- or such other amount as the Courts considers reasonable in the circumstances. According to the Respondent, the quotations obtained for export report in the sum of USD35,000/- and USD30,000/- for two experts had not been proved to the satisfaction of the Court and were deemed to be oppressive, unreasonable, prohibitive and intended to stifle the claim in the main suit.
- [12.] The Respondent further opposed the application on the ground that it would be unfair for him to pay business class flight ticket fees for 2 experts from Alix partners and a representative of the Applicant. Cheaper flight tickets would have been available in economy class and fees for return flights can be avoided if the Applicant considers the possibility of its witnesses to give evidence outside the court room through video link, which would avoid the need for the witnesses to travel to Seychelles for the purpose of testifying.
- [13.] Furthermore, the number of experts being appointed and the costs of their flights and stay are exaggerated and unjustified. The Applicant should have provided quotations for the accommodation issued by the savoy hotel. At any rate accommodation fees can be avoided if the Applicant considered the possibility for its witnesses to give evidence outside the court room through video-link.
- [14.] The Respondent denies that court costs had been estimated by counsel at SCR15,000/-. The Respondent states that he had already settled the court costs of SCR5,000/- awarded by the Court.
- [15.] The plaint is not misconceived as alleged by the Applicant. The grounds for the Applicant's allegation as well as Respondent's allegation of *faute* on the part of the

Applicant are to be thrashed out and determined in the main suit and not in the present application.

[16.] The Respondent states that if the token have indeed left the Applicant's platform as alleged in the supporting affidavit, then the Applicant would be in sheer bad faith and in blatant breach of the provisional seizure order delivered by the court in January 2024.

[17.] Based on legal advice obtained from his counsel, the Respondent states that he has the right to bring an action against the exchange, being a company registered in Seychelles, and the question of any legal action against the scammer is irrelevant, and even if the Respondent didn't bring an action, and does not debar the Respondent from pursuing this action to trace his cryptocurrency back.

[18.] The allegation that the plaint in the main suit is misconceived cannot be determined in the present application for leave to appeal and must be left to the trial court. It is denied that the fees and expert report are necessary for the Applicant to support its defence against the claim. It also denied that the Respondent's case in the main suit is weak and that the Applicant thus needs to rebut the Respondent's expert and assist the court in understanding the alleged weaknesses in the Respondent's evidence.

[19.] The question of whether to allow witnesses to be examined virtually is one for the court to determine as is the normal procedure in the Seychelles. Coaching of witnesses and access to oral evidence are mere apprehension of the Applicant and there are no cogent reasons advanced by the Applicant to disallow the taking of evidence virtually.

[20.] The Respondent has paid the security for costs in the sum of SCR5000/- in good faith and this appears reasonable to cater for the costs of the Applicant. The Respondent states that he cannot afford to pay a higher amount as this will stifle his ability to proceed with his claim, the more so that the Applicant has failed to substantiate its claims with relevant and accurate documentation.

[21.] Based upon legal advice, even if not domiciled and resident and having no assets in Seychelles do not constitute reasons to furnish sufficient security. Non-residency is not a determinant factor for granting security for cost. Security for costs is at the discretion of the Court and that by attempting to file an application for leave to appeal at a late stage, causes prejudice to the Respondent and deprives him from a trial within a reasonable

time. Further, the additional costs claimed by the Applicant are exaggerated and extremely high. The Applicant is in fact using delaying tactics and its application for leave is being used to wear the Respondent down and prevent him from progressing with the case.

[22.] The proposed grounds of appeal are devoid of merits and have no prospects of success. The Applicant has failed to show good cause for the Court to grant leave to appeal.

[23.] The Respondent prays that the Court declines to grant leave to appeal.

[24.] The parties submitted on their respective position vis the application. The Applicant and Respondent filed their respective written submissions² which have been fully considered by the Court although not reproduced in full herein.

Law and Analysis

[25.] Section 12(2) of the Courts Act provides for appeals from any interlocutory judgment or order of the Supreme Court in civil matters. It stipulates that –

“12. Appeals in civil matters

(1).....

(2)(a)In civil matters no appeal shall lie as of right—

(i)from any interlocutory judgment or order of the Supreme Court;
or

(ii)from any final judgment or order of the Supreme Court where the only subject matter of the appeal has a monetary value and that value does not exceed ten thousand rupees.

(b)In any such cases as aforesaid the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the appeal is one which ought to be the subject matter of an appeal.

(Emphasis added)

² Applicant’s written submissions were filed on 25th February 2025 and the Respondent’s written submissions on 18th March 2024.

[26.] The criterion for the court's exercise of its discretion under section 12(2)(b) is *whether the court is of the opinion that the question involved in the appeal is one which ought to be the subject matter of an appeal.*

[27.] In *re Ailee Development Corporation Ltd*³ the Supreme Court per Perera ACJ (as he then was) endorsed the following pronouncement in the English case of *Smith v Gosworth Casting Processes Ltd*⁴ –

“There can be many reasons for granting leave even if the Court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises an issue where the law requires clarifying.”

(Emphasis added)

[28.] Questions which raise matters of public interest or seek to clarify a law would fulfil the qualification as “*one which ought to be the subject matter of an appeal*” notwithstanding that the chances of success of the appeal on the merits are, in the opinion of the Supreme Court, slim or unlikely.

[29.] In *The Seychelles Human Rights Commission & Others v The Speaker of the National Assembly of Seychelles & Others*⁵ the Seychelles Court of Appeal granted special leave to appeal an interlocutory order of the Constitutional Court which refused an application for recusal. The Court of Appeal considered the following cases on special leave to appeal an interlocutory order or judgment after the Supreme Court has refused leave to appeal its own interlocutory judgment –

“40. In *Gangadoo* (supra.) the Court sought to (at paragraph 18) elucidate what is meant as exceptional as follows:

“[T]o treat a case as exceptional which would necessitate special leave of this Court to bring the interlocutory judgment or order of the

³(CS 27/2008) [2008] SCSC 107 (19 September 2008)

⁴[1997] 1 WLR 1538

⁵(SCA MA 21/2023) ((SCA MA 21/2023) [2023] (Arising in MA 230/2022, Out of CC 07/2022) (18 December 2023)) [2023] SCCA 58 (18 December 2023)

Supreme Court under review, the applicant must be able to show that the interlocutory judgment or order is manifestly wrong and irreparable loss would be caused to him or her if the case proper were to proceed without the interlocutory judgment or order being corrected”.

41. On the other hand, the learned counsel for the Applicants submitted that in **Morel v. Registrar Supreme Court [(2005) SLR 16]** it was suggested that for leave to be granted, the proposed appeal must not only raise a matter of public interest but must also have a reasonable chance of success.

42. However, it was submitted that in **Re: Ailee Development Corporation Ltd. and the Companies Act 1972 Liquidator of Ailee Development Corporation Ltd. [(2008) SLR 87]** there was a notable departure from the position expressed in **Morel** (*supra.*) and that it was possible for the Court to grant leave for a number of reasons, even if it is not satisfied that the appeal is likely to succeed. The following grounds expounded by Lord Wolf in **Smith v. Cosworth Casting Processes Ltd. [(1997) 1 WLR 1538, EWCA Civ 1099 (1997)]**, cited with approval therein, was held to be consistent with section 12(2)(b) of the Courts Act:

1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding in the appeal.
2. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should, in the public interest, be examined by the court or, to be more specific, the court may take the view that the case raises an issue where the law requires clarifying.”

[30.] After considering the facts giving rise to the application, the Court Appeal held that

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“52 “The indicative grounds of appeal raise significant constitutional issues of great public interest. They are arguable and not frivolous. They have a reasonable chance of success for the Applicants. Irreparable harm would be caused to the Applicants if the case proper were to proceed.”

[31.] Ex-facie the draft grounds of appeal exhibited in the Applicant’s affidavit in support of the motion, the questions involved in the proposed appeal concerns the court’s appreciation of the Applicant’s need for expert report and testimony and

the need to fly in and accommodate factual witnesses to defend the alleged misconceived plaint. The proposed appeal also challenges the court's assessment of, and award of insufficient, security for costs in the circumstances where the Plaintiff in the main suit is domiciled and resident outside Seychelles with no assets in Seychelles.

[32.] I also consider the parties' respective position on the taking of evidence virtually via video link. The Applicant will oppose any move by the Respondent to give evidence virtually. The Respondent is of the view that the costs of accommodation and travel of the witnesses will be reduced by giving evidence via video link.

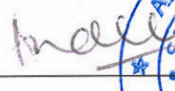
[33.] For the purposes of this application, I am mindful that in considering the questions involved in the appeal (whether they are arguable or frivolous, have reasonable chances of success or whether they raise matters of public interest or legal clarification), I am restricted to taking only a cursory look at the grounds without delving into their merits. The merits are for the Court of Appeal.

[34.] Taking a cursory look at the grounds, I am of the view that the questions involved in the grounds of appeal ought to be the subject matter of an appeal. Although they do not raise any issues of public interest or clarifying a law they are, in my view, arguable and not frivolous. I refrain from making any determination on their chances of success and whether it will cause irreparable harm to the Applicant if the case were to proceed with the alleged insufficient security for costs.

Order

[35.] I, therefore, grant the application.

Signed, dated and delivered at Ile Du Port, Mahe, on this 12th day of June 2025.


A. Madeleine, J.
