IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 46

Court of Appeal / Civil Appeal No 22 of 2024 (Summons No 28 of 2024)

Between

Karan Chandur Tilani

… *Applicant*

And

(1) Maarten Hein Bernard Koedijk
(2) Gevali Pte Ltd

… *Respondents*

In the matter of Civil Appeal No 22 of 2024

Karan Chandur Tilani

… *Appellant*

And

(1) Maarten Hein Bernard Koedijk
(2) Gevali Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Arbitration — Confidentiality — Privacy]
[Civil Procedure — Inherent powers]

Karan Chandur Tilani
v
Maarten Hein Bernard Koedijk and another

[2024] SGCA 46

Court of Appeal — Civil Appeal No 22 of 2024 (Summons No 28 of 2024)
Sundaresh Menon CJ, Steven Chong JCA and Belinda Ang Saw Ean JCA
2 September 2024

30 October 2024

Belinda Ang Saw Ean JCA (delivering the grounds of decision of the court):

Introduction

1 CA/SUM 28/2024 ("SUM 28") was a contested application brought by Mr Karan Chandur Tilani (the "appellant") on 12 July 2024 in CA/CA 22/2024 ("CA 22"). CA 22 arose from the decision of the General Division of the High Court in HC/OA 591/2023 ("OA 591") (see *DDI v DDJ and another* [2024] SGHC 68), wherein the judge below (the "Judge") refused the appellant's application to set aside an arbitral award under s 48 of the Arbitration Act 2001 (2020 Rev Ed) (the "AA") on the grounds of excess of jurisdiction, bias, and breach of the fair hearing rule.

2 By SUM 28, the appellant sought orders, pending the hearing of CA 22 on 4 September 2024, for any information relating to CA 22 and all applications filed thereunder not to be published, save that any related written judgments be

duly amended to conceal the identity of the parties in CA 22 and for the court file relating to CA 22 to be sealed. On 1 August 2024, the appellant indicated at a case management conference that he wished to amend the prayers in SUM 28 for the reliefs sought to be final and continuing instead of only operating in the interim pending the hearing of CA 22. On 5 August 2024, the appellant applied for amendment by way of letter (the "Amendment Application"). Notably, the prayers in SUM 28 for court documents to be sealed to preserve the confidentiality of the arbitration were sought well after the full arbitral award in question had been disclosed and became part of the record in non-arbitration-related proceedings in court and, above all, the court record was unprotected by sealing order(s) (see [5]–[7] below). In these circumstances, SUM 28 raised the question of the extent to which confidentiality of the arbitration was maintained and, as a corollary, the availability of court-ordered confidentiality protection in the form of a sealing order. Having considered the parties' submissions, we dismissed SUM 28 on 30 August 2024. These are the written grounds of our decision.

Facts

Background to the dispute

3 The appellant is Mr Karan Chandur Tilani. The first respondent, Mr Maarten Hein Bernard Koedjik, is a Dutch businessman who resides in Singapore and was, at all material times, the sole director and sole shareholder of the second respondent, Gevali Pte Ltd, a Singapore-incorporated company.

4 The appellant commenced arbitration proceedings against the respondents for non-payment under two contracts, a sale and purchase agreement and an option agreement, concerning an investment into a synthetic diamond which the appellant allegedly owned (the "Arbitration"). The

respondents counterclaimed against the appellant for fraudulent misrepresentation. On 20 April 2023, the arbitrator issued the final award (the "Final Award") dismissing the appellant's claim and allowing the respondents' counterclaim.

Disclosure of the Final Award in non-arbitration-related proceedings in HC/OSB 54/2024 and HC/RA 117/2024

5 OA 591 was the appellant's application to set aside the Final Award on various grounds. As OA 591 was an arbitration-related proceeding in court, a sealing order of the same nature as that sought in SUM 28 was granted by the Judge by consent. OA 591 was dismissed by the Judge on 14 March 2024 with costs fixed at $25,000 excluding reasonable disbursements to the respondents. The appellant filed his appeal on 1 April 2024.

6 Separately, the first respondent served on the appellant a statutory demand for the non-payment of the costs of OA 591 which amounted to $26,383.31 inclusive of disbursements (the "Statutory Demand"). On 6 June 2024, the appellant filed HC/OSB 54/2024 ("OSB 54") to set aside the Statutory Demand. In his affidavit dated 5 June 2024 filed in support of OSB 54, the appellant exhibited a full copy of the Final Award. No concurrent formal application of the nature in SUM 28 was made to seal the case file in OSB 54. At the hearing of OSB 54, the appellant who appeared in person sought to make a late oral application for a sealing order which was refused by the learned Assistant Registrar in the absence of a formal application. The appellant's application to set aside the Statutory Demand was also dismissed.

7 On 5 July 2024, the appellant appealed against the decision in OSB 54 by way of HC/RA 117/2024 ("RA 117"). It is material that the appellant, who was unrepresented in OSB 54, engaged WongPartnership LLP on 9 July 2024

to represent him in RA 117. WongPartnership LLP had earlier represented the appellant in OA 591. Despite having the benefit of legal representation, the appellant continued to rely on the Final Award contained in his affidavit in RA 117. There was no formal application at all to seal the court documents in either OSB 54 or RA 117 (collectively, the "Statutory Demand Proceedings"). RA 117 was dismissed on 5 August 2024. Up to the time SUM 28 was dismissed on 30 August 2024, there was no order sealing the court documents in the Statutory Demand Proceedings. To set the timeline in perspective, by 25 June 2024 it must have been beyond doubt, following the ruling of the Assistant Registrar in OSB 54, that the appellant was clearly apprised of the concept of a sealing order, including the need for a formal application to be made.

SUM 28

8 CA 22 was filed on 1 April 2024. Slightly more than three months later, SUM 28 was filed on 12 July 2024. The reliefs sought by the appellant in SUM 28 were premised on two grounds: (a) ss 56 and 57 of the AA read with O 34 r 3(1)(*h*) of the Rules of Court 2021 ("ROC 2021") and/or (b) the inherent jurisdiction of the court. The original prayers of the appellant in SUM 28 were that:

> Pending the hearing of the [appellant's] appeal in CA/CA 22/2024 (the "Appeal"):
>
> > i. Any information relating to the Appeal and all applications filed thereunder shall not be published, save that any related written judgments be duly amended so as not to reveal the identity of the parties and/or any information that may identify the parties;
> >
> > ii. The court file relating to the Appeal and all its contents that are made here/thereon, shall be sealed;

9 The Amendment Application followed close to a month thereafter on 5 August 2024, wherein the appellant sought leave to amend the prayers in SUM 28 in the following manner:

> ~~Pending the hearing of the [appellant's] appeal in CA/CA 22/2024 (the "**Appeal**"):~~
>
> > i. Any information relating to the ~~Appeal~~ appeal in CA/CA/22/2024 (the "**Appeal**") and all applications filed thereunder shall not be published, save that any related written judgments be duly amended so as not to reveal the identity of the parties and/or any information that may identify the parties and/or make any reference to the matters set out in Annex A to this summons (whether in entirety or any part thereof);
> >
> > ii. The court file relating to the Appeal and all its contents that are made here/thereon, shall be sealed;

The parties' cases

10 The appellant submitted that the court should grant the application under the AA because the confidentiality of the Arbitration remained intact and remained of paramount importance. The appellant submitted that no countervailing reasons of public interest in favour of open justice existed. The appellant submitted in the alternative that the court should exercise its inherent jurisdiction to grant SUM 28.

11 The respondents objected to SUM 28 and the Amendment Application on procedural and substantive grounds. The respondents took issue with the appellant's undue delay in bringing the sealing application, which they say amounted to an abuse of the court's processes. As for the Amendment Application, the respondents submitted that the application was not brought in the stipulated manner under the ROC 2021 and that the proposed amendments were plagued by unworkability.

12 The respondents further submitted that the confidentiality of the Arbitration had been lost because of the appellant's disclosure of the Final Award in the Statutory Demand Proceedings. Moreover, they submitted that there was a strong public interest in favour of open justice because the Arbitrator had found that the appellant had defrauded the first respondent and other purported members of the public. There was therefore a risk that the appellant would otherwise defraud other innocent parties.

Discussion and Decision

13 The appellant relies primarily on ss 56 and 57 of the AA which provide as follows:

> **Proceedings to be heard in private**
>
> **56.—**(1) Subject to subsection (2), proceedings under this Act in any court are to be heard in private.
>
> (2) Proceedings under this Act in any court are to be heard in open court if the court, on its own motion or upon the application of any person (including a person who is not a party to the proceedings), so orders.
>
> **Restrictions on reporting of proceedings heard in private**
>
> **57.**—(1) This section applies to proceedings under this Act in any court heard in private.
>
> (2) A court hearing any proceedings to which this section applies is, on the application of any party to the proceedings, to give directions as to whether any and, if so, what information relating to the proceedings may be published.
>
> (3) A court is not to give a direction under subsection (2) permitting information to be published unless –
>
> (*a*) all parties to the proceedings agree that the information may be published; or
>
> (*b*) the court is satisfied that the information, if published in accordance with any directions that it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the

> proceedings **reasonably wishes to remain confidential**.
>
> (4) Despite subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court is to direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings **reasonably wishes to conceal** any matter, including the fact that the party was such a party, the court is to –
>
> (*a*) give directions as to the action that is to be taken to conceal that matter in those reports; and
>
> (*b*) if it considers that a report published in accordance with directions given under paragraph (*a*) would be likely to reveal that matter, direct that no report may be published until after the end of any period, not exceeding 10 years, that it considers appropriate.
>
> [emphasis added]

14 Pursuant to s 56(1), CA 22 would be heard in private by default; there was no application for the appeal to be heard in open court. SUM 28 was an application made pursuant to s 57. As sections 56 and 57 of the AA are *in pari materia* with sections 22 and 23 of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"), it is apposite to refer to this court's decision in *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 ("*Deutsche Telekom*") for the principles relating to the protection of the privacy of arbitration enforcement proceedings. In *Deutsche Telekom*, this court noted the following salient principles which can be summarised as follows:

> (a) As a starting point, a sealing order may be granted pursuant to its inherent powers to regulate its own processes and make appropriate orders to achieve the ends of justice (*Deutsche Telekom* at [14] citing *Re Tay Quan Li Leon* [2022] 5 SLR 896 ("*Leon Tay*") at [22]–[23] and *BBW v BBX and others* [2016] 5 SLR 755 at [25]–[30]). However, the making of such privacy orders should be the exception rather than the norm

because it is a departure from the principles of open justice. Open justice is "fundamental to ensuring public confidence in and the integrity of the judicial system" (*Deutsche Telekom* at [14] citing *Leon Tay* at [17]).

(b) Sections 22 and 23 of the IAA provide a statutory basis for the court to depart from the emphasis on open justice with the object of protecting the confidentiality of arbitral proceedings: *Deutsche Telekom* at [15] and [22].

15 To avail oneself of the statutory exception to open justice provided for in the AA, an applicant for confidentiality protection in arbitration-related proceedings in court must show that the confidentiality of the arbitration is still intact. This threshold requirement exists because the courts would not "go through an empty exercise to protect confidentiality when there is nothing left to protect" (*Deutsche Telekom* at [26]–[28]). In *Deutsche Telekom*, no sealing order was granted as confidentiality had been substantially lost, owing to multiple disclosures of considerable information relating to the arbitration, the identity of the parties and enforcement proceedings in Singapore and overseas, which had entered the public domain (*Deutsche Telekom* at [30]).

16 Returning to SUM 28, the appellant was unable to establish that the confidentiality of the Arbitration was still intact in the present case (see [18]–[22] below). It is clear from *Deutsche Telekom* (at [22]) that in situations where even if the cloak of privacy is retained, the right of a party to insist on the confidentiality of an arbitration is not an absolute one. The court may still order the publication of certain information and in doing so the court would bear in mind the interest of preserving the confidentiality of information that a party "reasonably wishes to remain confidential" or that a party "reasonably wishes to conceal". At [29] of *Deutsche Telekom*, the court explained that this phrase

in s 23(3)(*b*) of IAA which speaks of protecting information that a party wishes to "remain" confidential suggests that the court is not required to protect information that is already in the public domain. Likewise, the interest of preserving confidentiality is less of an issue, or even a non-issue, whenever a party to the arbitration has by his actions or conduct deviated from his obligation of confidence as a party to the arbitration and in so doing has disclosed confidential information in a way that undermined the purpose of preserving and protecting the confidentiality of the arbitration. In the result, as the information has been leaked, so to speak, there is nothing left to justify protecting the confidentiality of the arbitration. It follows that a successful application for any sealing or redaction order would have to properly bear out, on the facts and circumstances, the need of the party in the arbitration (*ie*, the reasonableness of the party's wishes) to maintain and preserve the confidentiality of the information in question. In *Deutsche Telekom,* the threshold question was not satisfied (see [15] above).

17 For the reasons which follow (see [18]–[22] below), the court will not lend aid to protect the confidentiality of the arbitration where an erstwhile confidential document has already become part of the record in non-arbitration-related proceedings in court and been made accessible to a third party under the ROC 2021. It is pertinent to note at this juncture that the document which was exhibited in the Statutory Demand Proceedings was the *Final Award*, which represented the sum total of the Arbitration (including the salient facts, evidence, findings and ultimately, the outcome of the Arbitration).

18 We begin with the question of whether the confidentiality of the Arbitration was intact at the time SUM 28 was filed. In our judgment, the confidentiality of the Arbitration had been compromised and was even as good as lost in the way the Final Award was disclosed in the Statutory Demand

Proceedings, which were open court proceedings without the protection of sealing order(s). We already mentioned that the appellant did not preserve the confidentiality of the Final Award by taking out the necessary applications or measures to preserve its confidentiality (see [5]–[7] above). This remained the present state of affairs. By this disclosure, the appellant had unilaterally altered the nature of the Final Award, which was a *private* document between the parties to the arbitration, into a *publicly accessible* document because it had been exhibited in an affidavit that was filed and used in the open court proceedings (*ie*, the Statutory Demand Proceedings).

19 Once the Final Award became part of the court record and remained there, its character could only be that of a publicly accessible document. As such, the appellant could no longer claim that the confidentiality of the Arbitration was intact. It must be noted that it is trite that the Statutory Demand Proceedings, being open court proceedings, were squarely within the public domain. As noted in *Jethanand Harkishindas Bhojwani v Lakshmi Prataprai Bhojwani (alias Mrs Lakshmi Jethanand Bhojwani) and others* [2022] 3 SLR 1211 at [95], when "a document has become a part of the record in any court proceedings, the information in the document enters into the public domain". The fact that the Final Award was a *publicly accessible* document was, in our judgment, not a mere taxonomical recharacterisation. Rather, significant practical implications ensued, chief of which was that as part of the court record, the Final Award could be accessible to a third party upon a request for the inspection of the Statutory Demand Proceedings. More to the point, the appellant would have no say at all to resist any such request. In this sense, the appellant's autonomy over the confidentiality of the Final Award was gone; lost or compromised.

20 We had regard to the instructive observations of Lee Seiu Kin J (as he then was) in *Tan Chi Min v The Royal Bank of Scotland plc* [2013] 4 SLR 529 ("*Tan Chi Min*") that the principle of open justice operates such that the threshold for a request for inspection of a case file is a low one. This principle operates *a fortiori* in cases which have been concluded, so that "decisions by judges (and Registrars) in court proceedings [may] be accessible to scrutiny by members of the public through inspection of documents filed in court that were considered in the decision-making process", thereby enhancing "public confidence in the administration of justice" (*Tan Chi Min* at [14]).

21 It was also relevant that under O 26 rr 3(8) and 3(10) of the ROC 2021, any party may cause a cause book search to be done against the appellant without permission of the Registrar. Cause book searches are commonly procured as part of the customary background checks for commercial transactions (*eg,* loans and transactions involving real property) and would immediately reveal the existence of the Statutory Demand Proceedings against the appellant. Given the nature of the Statutory Demand Proceedings as bankruptcy proceedings, it would not be unexpected that a request for inspection would likely follow the cause book search.

22 For these reasons (in particular at [19]), the irreversible conversion of the nature of the Final Award from a private document to a matter of court record that is accessible under the ROC 2021 meant that the confidentiality of the arbitration was no longer intact.

23 There is yet another reason for which SUM 28 was dismissed. Unlike in the Statutory Demand Proceedings, the appellant was represented at all material times in CA 22 and yet, as the respondents have rightly noted, SUM 28 was only filed on 12 July 2024, slightly more than three months after the notice of

appeal was filed on 1 April 2024. The appellant did not explain the lateness in filing SUM 28.

24 There was also no mention in the affidavit in support of SUM 28 that the Final Award was disclosed in the Statutory Demand Proceedings. Neither was there any explanation as to why such disclosures in those proceedings were not protected by a sealing order or why those proceedings need not have been protected.

25 In the light of the learned Assistant Registrar's guidance at the hearing of OSB 54 that a formal application was required for the sealing, the appellant's inaction could not be said to have been due to mere inadvertence, but rather, a conscious decision which had plainly jeopardised the confidentiality of the Arbitration for the reasons articulated above.

26 Importantly, the appellant in SUM 28 was inviting this court to protect the confidentiality of the Arbitration which had already been compromised. Above all, a sealing order to protect CA 22 would be meaningless when the Final Award was accessible to a third party in the Statutory Demand Proceedings. Consequently, the present situation favours the principle of open justice over the cloak of privacy that has been provided for by the AA or under the inherent powers of the court.

27 On the inherent powers of the court, while the court may have inherent powers to make orders to protect a party's confidentiality despite information about the arbitration and the identities of the parties having entered the court record, the appellant did not identify any basis to exercise such powers except for the confidentiality of the arbitration itself, which as we have explained above, was no longer intact at the material time of this application.

Conclusion

28 For the foregoing reasons, we dismissed SUM 28. No order was made on the Amendment Application that fell away consequently. We would not have been persuaded to rule otherwise even if the prayers before us were amended as per the Amendment Application. Costs of SUM 28 were fixed at $6,000 inclusive of disbursements to be paid by the appellant to the respondents.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Ho Pei Shien Melanie, Chang Man Phing Jenny and Goh Sher Hwyn Rebecca (WongPartnership LLP) for the applicant;
Devathas Satianathan, Thawdar Soe Moe @ The Sandi Tun and Louis Lau Yi Hang (Rajah & Tann Singapore LLP) for the respondents.