In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Ruler of Dubai

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE
ARBITRATION DIVISION

BETWEEN

NASIB

Claimant/Respondent

and

(1) NAVIDAD
(2) NABEEL

Defendants/Appellants

ORDER WITH REASONS OF H.E. JUSTICE SHAMLAN AL SAWALEHI

UPON the Order of H.E. Justice Shamlan Al Sawalehi dated 12 April 2023 recognizing and enforcing a final arbitral award in favour of the Claimant/Respondent, Nasib (the "Respondent") (the "Recognition and Enforcement Order")

AND UPON the Appellants' Application No. ARB-0058-2023/1 dated 28 April 2023 to set aside the Recognition and Enforcement Order (the "Set Aside Application")

AND UPON the Amended Order of H.E. Justice Shamlan Al Sawalehi dated 25 April 2024 dismissing the Set Aside Application

AND UPON the Appellants' Application No. ARB-008-2023/2 dated 8 May 2024 for permission to appeal and stay on the operation of the Recognition and Enforcement Order (the "PTA Application" and "Stay Application")

AND UPON the Appellants' Application No. ARB-008-2023/3 dated 12 July 2024 for retrospective extension of time for the service of the PTA Application and associated documents on the Respondent; and payment of the filing fees for the PTA and Stay Applications (the "Extension of Time Application")

AND UPON reviewing all the materials submitted by the parties including the witness statement of Dr. Nash dated 25 April 2024, the first and second witness statements of Mr. Noah of 12 July 2024 and 2 August 2024 respectively, and the witness statement of Mr. Nakul dated 29 July 2024

IT IS HEREBY ORDERED THAT:

1. The Extension of Time Application is granted.

2. The PTA Application is granted.

3. The Stay Application is dismissed.

4. Costs of the PTA Application is reserved to the Court of Appeal determining the appeal.

5. The Appellants shall pay the Respondent's costs of the Stay Application, to be assessed by the Registrar, if not agreed.

6. No costs ordered for the Extension of Time Application.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 13 August 2024
Time: 11am

SCHEDULE OF REASONS

1. These reasons address three applications filed by the Defendants/Appellants, Navidad, Nabeel (the "Appellants") arising from the dismissal on 4 April 2024 of the Appellants' application to set aside an Order recognizing and enforcing a final arbitral award (the "Set Aside Application"). The three applications are: (i) application for permission to appeal the Set Aside Order (the "PTA Application"); (ii) application to stay (the "Stay Application") the execution of the Recognition and Enforcement Order in favour of the Claimant/Respondent, Nasib (the "Respondent") (the "Recognition and Enforcement Order"); and (iii) application for retrospective extension of time for the payment of filing fees towards the PTA and Stay Applications (the "Extension of Time Application"). I have addressed below each of these applications and the reasons for allowing and/or dismissing it.

Application for Retrospective Extension of Time

2. The Appellants seek retrospective extension of time (a) for the service of the PTA Application and associated documents on the Respondent; and (b) to pay the filing fees for the PTA Application and Stay Application.

3. The Respondent submits the Extension of Time Application is unmeritorious and should be dismissed.

4. Rule 44.13 of the Rules of the DIFC Courts (the "RDC") states that where the time for appeal has expired, the appellant must file the appellant's notice and include therein - (1) an application for an extension of time; and (2) a statement of the reason for the delay and the steps taken prior to the application being made.

5. The RDC, both generally, and more specifically as it pertains to applications for PTA, impose strict, clear and deliberate timeline which parties should undoubtedly adhere to. As the Respondent correctly points out the rules are intended to ensure fairness, and in the context of the PTA also finality of litigation. At the same time fairness also requires due consideration be given to the reasons for an Appellant's delay, which is contemplated by Rule 44.13(2), and the potential prejudice that could result to either party resulting from the failure to comply with the RDC.

6. In this instance, the Appellants "filed" the Notice of Appeal by 25 April 2024, although the Respondent's point out, correctly, in my view, that an application cannot be considered "filed" until the filing fees is paid, which the Appellant delayed to do in this case, with the PTA Application and Stay Application being eventually issued on 8 May 2024.

7. Further, although no particulars were provided in the first witness statement of Mr. Noah regarding when the Appellants' new Solicitors received instructions or why they waited to act until a day prior to the expiry of the filing deadline which was 25 April 2024, I am satisfied with the explanation Mr. Noah subsequently provided in his second witness statement including the chronology of steps taken towards perfecting the appeal. I accept that it was not until 23 April 2024 that he was formally engaged as the Appellants' counsel. In this regard, I do not foresee, as the Respondent suggests, that granting relief from sanctions in this case would be tantamount to making it an open season for parties to flout RDC 44.13.

8. Regarding the Appellants' delay in serving the Respondent with the PTA Application, it is not disputed that service was not effected until 14 June 2024. The Appellants' position is that at the time of filing on the DIFC Court's e-filing portal, it selected the option of service to be made through DIFC Court and therefore had assumed that the service would be effected by the Registry. Apparently, it was not until the Registry's communication on 11 June 2024 that the Appellants' counsel became aware that service had not been effected. Regardless of the foregoing circumstances described by the Appellants' counsel, it strikes me as rather unusual that the Appellants would not have taken steps to monitor the file and ensure that the relevant documents had indeed been served. Mr. Noah's second witness statement is silent on this issue.

9. Be that as it may, and having carefully considered the parties submissions, evidence and the overall circumstances, including the Respondent's position that had service been effected in compliance with the RDC, the PTA Application might have been dealt with more expeditiously and the litigation may even have finally been resolved, I am not persuaded that is a sufficient basis to deny granting the Extension of Time Application. Consequently, I am granting the Extension of Time Application.

Application for Permission to Appeal

10. The PTA Application arises from my dismissal of the Set Aside Application.

11. The PTA Application is based on five grounds. They are that the Judge was wrong in: (1) finding that the grounds for refusing the recognition and enforcement based on lack of arbitrability and public policy are distinct and separate; (2) finding that the parties' submissions and evidence relating to the non-arbitrability of the dispute under UAE law were "peripheral and inapplicable"; (3) failing to give sufficient weight to the uncontested evidence of the Appellants' expert; (4) holding that the high threshold necessary to refuse recognition or enforcement on public policy grounds was not met in this case; and (5) the appeal raises an issue of general public importance which is important for the DIFC Court of Appeal to consider.

12. Pursuant to RDC 44.19, permission to appeal may be given only where the Court considers that: (1) the appeal would have a real prospect of success; or (2) there is some other compelling reason why the appeal should be heard.

13. The Respondent submits that none of the grounds identified by the Appellants have a realistic prospect of success or give rise to any compelling reasons to be heard on appeal. Additionally, the Respondent objects to the inclusion of grounds 4 and 5 in the Appellants' submissions on the basis that they are not included in the PTA Application.

14. I agree with the Respondent that none of the Appellants' arguments advanced in grounds 1 to 4 have a realistic prospect of success. Nonetheless, unlike the Respondent, in my view, there are compelling reasons for the appeal to be heard, namely, to enable the Court of Appeal to provide guidance on certain questions of law that underpin some of the grounds the Appellants identified.

15. Based on the foregoing reasons, I am granting the PTA Application.

Stay Application

16. The Appellants' third application is for an order staying the execution of the Recognition and Enforcement Order. The Appellant asserts in the absence of a stay, there will be irreparable harm and if there is execution of the Recognition and Enforcement Award, it will impact the implementation of an ongoing project and its reputation, none of which according to the Appellants can be adequately compensated monetarily. Further, the Appellants assert that the Recognition and Enforcement Order purports to alter the property rights of the parties, and that third parties will seek to rely (and will be entitled to rely) upon the entries in the Company's register.

17. The Respondent objects to the Stay Application and correctly, in my view, points to the inadequacy of the Appellants' evidence, including on

the issues of irreparable harm and prejudice, that would warrant departing from the ordinary rule that an appeal *"shall not operate as a stay of any decision of the lower Court'*. The Appellants' reliance on liabilities arising in separate arbitral proceedings and the possibility of personal guarantees given by the Appellants being called upon, to the extent that it is even related to the current arbitration between the parties, are in my view, speculative.

18. Based on the totality of the evidence before me, I am not persuaded that the relative risk of injustice, if any, to the Appellants in not being granted a stay outweighs the risk of injustice to the Respondent if the stay is granted.

19. I concur with the fundamental principle articulated by Justice Sir David Steel in *Taleem that the successful party at trial has a decision in its favour and is entitled to the fruits of that decision* - unless the grounds for a stay have been established, which in my view, has not been established.

20. Based on the foregoing reasons, the Stay Application is dismissed.

Costs

21. Costs of the PTA Application are reserved for the Court of Appeal determining the appeal.

22. The Appellants shall pay the Respondent's costs of the Stay Application, to be assessed by the Registrar, if not agreed.

23. No costs ordered for the Extension of Time Application.