



ADGM COURTS

محكمة سوق أبوظبي العالمي

22 November 2022 08:40 AM



In the name of  
**His Highness Sheikh Mohamed bin Zayed Al Nahyan**  
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

**COURT OF FIRST INSTANCE  
EMPLOYMENT  
BETWEEN**

**MOUSTAFA ASHRAF ABDELGHANI MOHAMMED SHAABAN**  
Claimant

and

**AUMET LTD**  
Defendant

**JUDGMENT OF JUSTICE SIR MICHAEL BURTON GBE**



<b>Neutral Citation:</b>	[2022] ADGMCFI 0010
<b>Before:</b>	Justice Sir Michael Burton GBE
<b>Decision Date:</b>	8 November 2022
<b>Hearing Date:</b>	8 November 2022
<b>Decision:</b>	<ol style="list-style-type: none"> <li>1. Judgments against the Defendant not set aside.</li> <li>2. Application by the Defendant to file a counterclaim stayed.</li> <li>3. Payment to the Claimant of \$36,900 by way of assessment of the value of the Shares Claim judgment.</li> </ol>
<b>Date of Order:</b>	8 November 2022
<b>Catchwords:</b>	Second application to set aside judgment – Non-compliance with Orders – Effect of Article 28 of Federal Law
<b>Legislation Cited:</b>	Article 28 of Federal Law No 35 of 1992 as amended
<b>Cases cited:</b>	None
<b>Case Number:</b>	ADGMCFI-2022-017
<b>Parties and representation:</b>	<p><b>Claimant</b> Mr. Moustafa Shaaban</p> <p><b>Claimant’s Legal Representatives</b> Mr. Mohamed ElHouseiny, Partner, Steering Legal</p> <p><b>Defendant</b> Mr. Yahya Aqel (director of AUMET LTD)</p> <p><b>Defendant’s Legal Representative</b> Ms. Zeina Azzi, Senior Associate, Obeid &amp; Medawar Law Firm</p>



## JUDGMENT

1. This has been the hearing of the assessment of damages in respect of judgments in favour of the Claimant on 18 May 2022 and 14 July 2022, and of applications by the Defendant to set aside the order and judgment of 9 February 2022 and to be permitted to bring a counterclaim. I have had the great advantage of hearing submissions from Ms Azzi and Mr Aqel himself on behalf of the Defendant and from Mr Elhouseiny and the Claimant himself on behalf of the Claimant.
2. The Claimant's claim was in respect of his dismissal by the Defendant by letter dated 7 December 2021, terminating his employment on 31 December 2021. The history of the applications before me begins and is based upon the orders made in these proceedings, of which the most material of many such orders are as follows:
  - (i) 9 February 2022, a default judgment. This was in respect of the substantial part of the Claimant's claim arising out of his dismissal by the Defendant. By paragraphs 1, 2 and 3 of the order, judgment was entered in the Claimant's favour in default in the sum of US\$76,631.97 plus costs assessed as US\$2,987.33 ("the US\$76,000"). So far as the balance of the Claimant's claims was concerned, the so-called arbitrary dismissal claim was dealt with by paragraph 4 of the order and was subsequently dismissed by a later order of 25 February 2022, and his claim in respect of shares in AUMET Inc ("the Shares Claim") was dealt with by paragraph 5 of the order, and later amended.
  - (ii) The next material order was that of 5 April 2022, when I gave a detailed judgment. This related to the application made by the Defendant to set aside the default judgment/ order of 9 February 2022 together with the hearing of the Claimant's application to amend the Shares Claim, which were to be heard together as a result of orders of 7 and 11 March 2022, and were so heard. The explanation given for the delay by the Defendant in applying to set aside the judgment was, as I set out in paragraph 2 of my judgment:

*"Their employees in charge of emails didn't notice it and they only discovered the existence of the proceedings after notification by this court that the default judgment had been entered."*

Evidence was put in on behalf of the Defendant as to what the defence would be. I set aside the judgment only if \$76,631.97 was paid into court by 26 April 2022. I said as follows in my judgment, starting in paragraph 10:

*"Very belatedly, the Defendant has put forward a defence. Notwithstanding apparently amicable termination emails and notwithstanding the fact that at the time of or just before the termination, the Claimant invested substantial sums in AUMET Inc, the Defendant now says that it has discovered that there was a fraud by the Claimant on the basis of, very, very broadly stated, fabrication of orders for other business which would have justified his remaining in employment.*

*11. It seems that they have made a complaint to the onshore authorities in Abu Dhabi, although none of that has been produced before me and the fraud is very lightly and minimally explained by the Defendant. If they are right that there is a fraud then that would amount to a defence in relation to some, but not all, of the claims by the Defendant."*

*12. It would certainly amount to a defence of justified Termination, which would rule out, looking at the seven heads of claim in the Claimant's claim form, number 2 of compensation in lieu of notice, number 5 for end-of-service benefit and number 6, repatriation flight ticket. Those would be ruled out if the*



*Defendant establishes, the onus being on the Defendant, that the dismissal was justified, albeit only very belatedly discovered.*

*13. Clearly, the English law authorities would allow a defendant to produce a case that, even though they did not know about the matters at the time of termination, they now seek to justify the termination on the basis of subsequently discovered matters, and that is a defence which would be open to them, but they would clearly need to establish it and, of course, if it is established, why it was so belated.*

*14. The Defendant has further produced, very belatedly, an email which the Claimant denies receiving and asserts is in some way fabricated. If the fraud defence were established then it would justify a dismissal, but it would still leave the claimant entitled to three of its heads of claim totalling US\$36,000 plus interest.*

*15. I am satisfied that there is just about enough merit to set aside this judgment so that the Defendant should have the opportunity of defending, on the basis of both the two defences, which it has put forward. But I consider that the merits, at least as they appear to be now, are very slim, the wrong company defence is very slim indeed and the fraud claim is at the moment wholly unparticularised and very belated.*

*16. But I conclude that the Defendant should have the opportunity to set aside the judgment, but, as I put it in the course of argument, only on the basis that they put their money where their mouth is. If they are to be entitled to set aside this judgment, it must be on the basis that the defences are only pursued if the judgment sum is brought into court. That is on the basis that the defences are - certainly the company defence is on the face of it - not strong, but secondly on the basis as I have indicated that the fraud defence would only be an answer to something under half of the claim made.*

*17. And so I direct that the judgment be set aside on terms that the Defendant bring into court, within 21 days, the amount of the judgment .. and that they pay the costs thrown away by the judgment having been entered."*

There was no appeal against that judgment. The Defendant did not make any payment into court pursuant to the order. The amendment to the Shares Claim was allowed by paragraphs 1, 3 and 5 of the 5 April 2022 order, and by 18 May 2022 there had also been default in compliance by the Defendant with those orders. So the judgment was entered for damages to be assessed in paragraphs 1 and 2 of the 18 May 2022 order.

- (iii) The next material order was that of 10 June 2022, when I directed, for the purposes of assessment of the damages in respect to the Shares Claim, that the Defendant file a witness statement by 23 June 2022. No such statement was filed by the Defendant, and by an order dated 29 June 2022 I made an unless order and a debaring order in respect of the Defendant's filing any evidence if there was non-compliance.
- (iv) On 14 July 2022, there having been no evidence filed by the Defendant, the assessment was ordered to be determined on the Claimant's evidence only.
- (v) On 28 July 2022 the Defendant emailed the Court with a proposed witness statement, and I ordered, by paragraph 2 of the order of 29 July 2022, as follows:

*"If the Defendant wishes the Court or the Claimant to have regard to the witness statement, it must file and serve, by no later than 4.30 pm on 4 August 2022, an application giving full reasons to set aside out of time paragraph 1(c) of the order dated 29 June 2022 and paragraph 3 of the order dated 14 July 2022."*



3. What then followed was on 3 August 2022, just within time, an application, supported by a witness statement, to set aside the order of 9 February 2022; not to set aside the orders of 5 April, 18 May, 10 June, 29 June or 14 July 2022. The case that is put forward is that there was a fraud by the Claimant justifying dismissal, and that it was discovered on 23 December 2021, contrary to the at least implication at the 5 April 2022 hearing that it had been subsequently and only recently discovered.
4. As to this:
  - (i) There has already been an application to set aside the default judgment of 9 February 2022 on exactly that basis, which resulted in my order of 5 April 2022. That order was unappealed. It is, save in exceptional circumstances, unchallengeable.
  - (ii) The case of fraud is again put forward but such is no longer said or implied to have been undiscovered or undiscoverable, which makes explanation by the Defendant all the more difficult, at least as to why the case was not properly put forward before me on 5 April 2022.
  - (iii) It was discovered and known about on 23 December 2021. There is nothing new in it, except that the Defendant has now brought proceedings in the Abu Dhabi Court filed on 22 August 2022, number 2022/871.
  - (iv) I ordered payment into court as a condition of setting aside, which was unappealed, and no payment was made. It seems that some payment has been required to be made by the Defendant in the Abu Dhabi Court on 19 July 2022, but not to this Court.
5. The parties have, in recent weeks, been locked into putting forward in evidence before me rival contentions as to the nature and strength of the evidence put before the onshore courts in relation to the strength or otherwise of the fraud claim there being processed. But the respective cases will no doubt be fully contested in those courts, if it proceeds.
6. However, I see no basis whatever for setting aside the judgment of 9 February 2022 in the light of the history of continued default in this Court by the Defendant, which I have described. The only reason that is put forward for non-compliance is that the Defendant was advised by his then lawyers that the fraud should be pursued in the Abu Dhabi onshore courts. That was perfectly good advice, but it did not and could not involve ignoring the order of this Court by way of failing to pay into court, failing to put in a defence and taking no notice of any of the subsequent orders.
7. I have indicated that there has already been an application to set aside the default judgment which, after full argument and a detailed judgment, I dealt with by an order which was not complied with by the Defendant. There is no basis for reopening that order. I can see no basis whatever for setting aside the judgment of 9 February 2022 nor, particularly as there is no application to set aside, nor any explanation for the Defendant's continuous defaults, the judgments or orders of 18 May or 14 July 2022. The Defendant's renewed application to set aside the judgment of 9 February 2022 is dismissed.
8. Given that the judgment on the claim was by default, there is nothing, so far as res judicata is concerned, to prevent the Defendant bringing a counterclaim. The Defendant wishes to bring a counterclaim in these proceedings for the same alleged fraud as is now being adjudicated in the Abu Dhabi Courts, such a counterclaim including a claim for recovery of the US\$76,000. I refer, however, to Article 28 of Federal Law number 35 of 1992, as amended by Federal Law number 29 of 2005, which reads as follows in material part:

*"Where the civil case is brought before the civil court, it must be stayed until a decisive judgment is rendered in the criminal action filed prior or during the examination of the civil case."*



In this case, the judgments were entered on 9 February 2022 so far as concerns the US\$76,000 and 18 May 2022 so far as concerns the Shares Claim. Neither of those judgments is affected by Article 28 because 2022/871 was filed on 22 August 2022, which both sides agree is the date when the criminal action was filed, and thus it was not "prior to or during the examination" of the civil case, which had been concluded by judgment before the criminal case was filed.

9. It is plain that the proposed counterclaim must be stayed pursuant to Article 28, and I so order. There has been a suggestion by Ms Azzi that the Defendant may decide to take the course of withdrawing the criminal proceedings onshore and applying to transfer the moneys in the Abu Dhabi Court to the ADGM and pursuing the counterclaim in the ADGM. If they did decide to do that, to take that course, that will require an application to the Court and the involvement of the Claimant, in respect of which Mr Elhouseiny has indicated that he did not rule it out.
10. If that course were taken, and the proceedings onshore were indeed withdrawn, the stay on the counterclaim could be lifted on the basis of the moneys so transferred to the ADGM being retained pending the outcome. But so long as the criminal proceedings continue Article 28 dictates that the proposed counterclaim by the Defendant must be stayed.
11. Since Article 28 has no effect on the 18 May 2022 and 14 July 2022 judgments, both of which antedated the filing of the criminal case, I shall therefore proceed to assess the damages in respect of the Shares Claim judgments. Given the absence of any liability issues, in the light of my earlier orders, this involves simply my assessing the value of the shares in AUMET Inc, namely the 4,800 shares, the subject of paragraph 2(b)(i) of the contract of employment and the job offer email dated 23 December 2020, which vested on 28 December 2021, and the first of the four years of shares, the subject of the emails of 29 April 2021 and 24 August 2021, namely 7,500, added to the 4,800, a total of 12,300 shares.
12. The original 4,800 shares in AUMET Inc were valued in the job offer email at \$2 per share. The Claimant relies on various documents and literature produced by and about AUMET Inc to assert that the shares are worth considerably more, namely as much as US\$11.2 by reference to Forbes. This was put in issue by the Defendant and, in any event, cannot amount to a real basis for valuation. But most persuasive is the value put on the shares in the evidence given by Mr Yahya Aqel to the Abu Dhabi authorities in August of this year, namely, that the value of the shares in the market is \$7 per share.
13. This is a claim for damages in respect of the Claimant not receiving the shares, and the value of the shares may well not be the same in his hands, particularly as they may not be easily transferable, but I feel entirely comfortable in valuing them at \$3 per share, hence 12,300 x 3 equals \$36,900.
14. As I am valuing the shares as of today, there is no call for any interest. I order the payment of \$36,900 by way of assessment of the value of the Shares Claim judgment.



Issued by:

**Linda Fitz-Alan**  
**Registrar, ADGM Courts**  
**22 November 2022**