

IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal SCA MA 08/2019

Daniella Lablache de Charmoy

Applicant

Versus

Patrick Lablache de Charmoy

Respondent

Heard: 25 June 2019

Counsel: Mr. Frank Elizabeth for the applicant

Mr. Basil Hoareau for the respondent

Delivered: 17 September 2019

ORDER ON APPLICATION

F. Robinson (J.A)

The background

[1] This is an application to the discretion of the Court. The applicant made an application to the Court by way of notice of motion, on the 14 May 2019, to stay the execution of an order of 30 January 2019, Civil Side No. 175 of 2017. The applicant had lodged an appeal to the Court of Appeal, on the 25 February 2019. The notice of motion is supported by the affidavit of the applicant. A copy of the Notice of Appeal is exhibited to the affidavit.

[2] The affidavit sworn in this matter, alleges as follows —

"AFFIDAVIT

I, Daniella Lablache de Charmoy, herein electing my legal domicile in the Chambers of Mr. Frank Elizabeth of Suite 212B,

Premier Building, Albert Street, Victoria, Mahe, Seychelles hereby make oath and say as follow:

- 1) *I am the deponent above-named and I am duly authorised to swear this affidavit being the Applicant in this case and the Appellant in a connecting case currently pending before the Court of Appeal.*
- 2) *I aver that Judge Burhan, dismissed my application for a stay of execution pending appeal on the 12th April 2019. (Copy of order attached herewith and marked A1)*
- 3) *I aver that Judge Burhan erred when he dismissed my application for stay of execution as my appeal has merits and if an order for stay of execution is not granted as a matter of extreme urgency, my appeal would be rendered nugatory.*
- 4) *I aver that Judge Burhan entered the judgment by consent in respect of matrimonial property on the 31st October 2018, before the decree absolute was granted. (Refer to exhibit P1 in the main case)*
- 5) *I aver that on the 13th December 2018, Elvis Chetty, Attorney for the Respondent, made an application for the decree nisi to be made absolute. (refer to exhibit P4 in the main case)*
- 6) *I aver that on the 16th January 2019, the Respondent made yet another application for the decree nisi to be made absolute. (Refer to exhibit P2 in the main case)*
- 7) *I aver that on the 17th January 2019, the Respondent, made another application for the decree nisi to be made absolute. (Refer to exhibit P3 in the main case)*
- 8) *I aver that on the 22nd January 2019 Judge Burhan, in his own handwriting, ordered that the decree nisi be made absolute. ((Refer to exhibit P2 in the main case)*
- 9) *I aver that on the 30th January 2019 the Registrar, made granted a decree absolute and issued a certificate to that effect.*
- 10) *I aver that it is not clear from the record of proceedings on which application for decree absolute was the Registrar relying on.*

- 11) *I aver that there was no original application for decree absolute on file and that Judge Burhan erred when he entered a judgment by consent in respect of matrimonial property before the marriage had been dissolved completely by the issuance of a certificate of decree absolute.*
- 12) *I am advised by my attorney, Mr. Frank Elizabeth, and I verily believe that the orders made on the 22nd January and 30th January 2019 were made as a result of procedural irregularity and is therefore invalid in law and null and void ab initio;*
- 13) *I aver that I have filed an appeal against the said orders before the Seychelles Court of Appeal. (Copy attached and marked A2)*
- 14) *I aver that the appeal has some prospect of success and that it is just and necessary that execution be stayed pending the final determination of my appeal by the Seychelles Court of Appeal.*
- 15) *I aver that there is substantial questions of law and facts to be adjudicated upon at the hearing of the Appeal as disclosed in my notice of appeal attached herewith.*
- 16) *I aver that if the Respondent is allowed to execute the said judgment now and then I am successful in my appeal before the Court of Appeal later; any judgment given by the Court of Appeal in my favour will be rendered nugatory.*
- 17) *[...].*
- 18) *[...].*
- 19) *I aver that I have an arguable case and the Court should grant the orders prayed for in the motion.*
- 20) *I aver that I make this motion in good faith believing that the motion has merit and is not frivolous or vexatious.*
- 21) *I aver that no prejudice will be caused to the Respondent if the Court allows this application...*
- 22) *I aver that it is practical and in the interest of justice for the Court to make the order sought*

23) *That all the statements contained herein are true and correct to the best of my information, knowledge and belief. [...]."* verbatim

[3] The Court notes that the affidavit is suggestive of procedural irregularity in the learned Judge's approach.

[4] The affidavit avers that the Supreme Court entered a consent judgment, between the applicant and the respondent, on the 31 October 2018. Upon reading the affidavit and the exhibits exhibited to and filed with it, the Court notes that the consent judgment, dated the 31 October 2018, was entered by the Supreme Court, on the 30 January 2019.

[5] The respondent filed an "*AFFIDAVIT IN REPLY*" opposing the application. The answering affidavit alleges as follows —

"I, Patrick Lablache de Charmoy, of Machabee, Glacis, Mahe, Seychelles, being a Christian hereby make oath and state as follows:

1. *I am the deponent above-named.*
2. *The facts and matters herein are from my own knowledge unless stated otherwise.*
3. *I am an Advisor in the Ministry of Land Use and Housing.*
4. *I have been informed by Attorney-at-Law Basil Hoareau and verily believe that the order being sought in the Notice of Motion - namely the 2nd order set out in the said Notice of Motion - is one that has no merits whatsoever and this Honourable Court has no power nor jurisdiction to grant the order.*
5. *I have been informed by Attorney-at-Law Basil Hoareau and verily believe that –*
 - (i) *the Learned trial judge – Burhan J – rightfully dismissed the application for stay of execution filed by the Daniella Lablache De Charmoy (hereinafter the Applicant) before the Supreme Court;*

- (ii) *the appeal of the Applicant has no merits whatsoever;*
- (iii) *subject to paragraph 4 of my affidavit, the affidavit of the Applicant fails to disclose all the material averments which is necessary for the Court of Appeal to make a proper determination of the Notice of Motion filed by the Applicant;*
- (iv) *the affidavit of the Applicant is defective or is bad in law and hence this Honourable Court should not rely on the said affidavit; and*
- (v) *there are no grounds for this Honourable Court to grant a stay of execution of the judgement pending the determination of the appeal. [...]"*.

The Issues

[6] Having considered the evidence in this matter and the oral submissions of both Counsel, the issues for the Court to determine are —

- (1) whether or not execution should be stayed;
- (2) whether or not the affidavit is bad in law.

The written law

[7] The application rests on section 229 of the Seychelles Code of Civil Procedure and Rule 20 (1) of the Seychelles Court of Appeal Rules, which provide —

"229 An appeal shall not operate as a stay of execution or of a proceedings under the decision appealed from unless the Court or the Appellate Court so orders and subject to such terms as it may impose. No intermediate act or proceeding shall be invalidated except so far as the Appellate Court may direct."

and

"20 (1) An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from:

Provided that the Supreme Court or the Court may on application supported by affidavits, and served on the respondent, stay execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the payment of any money or the due performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, conviction, or sentence, as the Supreme Court or the Court may deem reasonable.

(2) No intermediate act or proceeding shall be invalidated except in so far as the Supreme Court or the Court may direct".

The submissions of applicant and respondent and analysis

(1) Rule 20 of The Seychelles Court of Appeal Rules: whether or not execution should be stayed

[8] The rule is that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court so orders.

[9] The Court has considered the numerous cases referred to it by both Counsel, which have laid down the proper rules of conduct for the exercise of the judicial discretion. The guiding principles for determining whether or not to stay execution are —

(1) where special circumstances of the case so requires;

(2) there is proof of substantial loss that may otherwise result;

(3) there is a substantial question of law to be adjudicated upon by the appellate court;

(4) where if the stay is not granted, the appeal if successful, would be rendered nugatory.

- see, for example, *MacDonald Pool v Despilly William CS No. 244 of 1993* (11 October 1996), *Falcon Enterprise v Essack & Ors (2001) SLR 137* and *Casino des Iles v Compagnie Seychellois (Pty) Ltd SCA 2/1994*.

[10] Before turning to the question in issue, the Court considers the objection of Counsel for the respondent that the record of proceedings cannot be used in combination with the

affidavit because they had not been exhibited to and filed with it. The submissions of Counsel for the applicant abundantly refer to the record of proceedings of 30 January 2019, 16 January 2019, and 31 October 2018. The affidavit also refers to a decree absolute made and a certificate issued by the Registrar on the 30 January 2019. The aforementioned documents had also not been exhibited to the affidavit.

[11] Rule 25¹(3) of The Seychelles Court of Appeal Rules stipulates that interlocutory matters shall be brought by way of notice of motion, which shall be substantially in the form A as provided in the First Schedule to the Rules, and shall be supported by affidavits. An interlocutory matter means any matter relevant to a pending appeal, the decision of which will not involve the decision of the appeal (Rule 25 (1)). The Seychelles Court of Appeal Rules do not stipulate that the Registrar shall undertake the preparation of any record after an application for stay of execution is lodged. Therefore, Counsel for the applicant cannot be heard to submit that the Registrar should have ensured that the record of proceedings should have been on file. In *Re Hinchliffe, A Person of Unsound Mind, Deceased, [1895] 1 Ch. 117*², the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited to and filed with it. In the same light any document to be used in combination with an affidavit in support of an application to stay execution must be exhibited to and filed with it. Counsel for the applicant should be mindful that the affidavit stands in lieu of the testimony of the applicant.

[12] Turning to the first issue, the affidavit invokes the following two grounds —

¹ "25(1) In this Rule, an interlocutory matter means any matter relevant to a pending appeal the decision of which will not involve the decision of the appeal.

(2) An interlocutory matter, other than an application for special leave to appeal, may be brought before the President or a single Judge designated by the President:

Provided that the President or the Judge before whom the matter is brought may in his discretion hear or refuse to hear or transfer the application to the full Court.

(3) Interlocutory matters shall be brought by way of notice of motion which shall be substantially in the Form A in the First Schedule hereto and shall be supported by affidavit.

(4) The opposing party may deliver answering affidavits within fourteen days of the service of the notice of motion.

(5) The applicant may file replying affidavits within seven days of the service of the answering affidavits."

² *Re Hinchliffe, A Person of Unsound Mind, Deceased, [1895] 1 Ch. 117* was quoted with approval in the cases of *Trevor Zialor v The Republic SCA MA16/2017* (unreported 17 October 2017), and *Marie-Therese Boniface v Maxime Marie SCA MA01/2019* (unreported 28 May 2019).

- (1) that the grounds of appeal raise substantial questions of law to be adjudicated upon by the appellate court;
- (2) that if a stay of execution is not granted, the appeal, if successful, would be rendered nugatory.

[13] Firstly, the Court considers the question of whether or not the affidavit discloses any substantial questions of law to be adjudicated upon by the appellate court. The affidavit exhibits the grounds of appeal, which are —

"Ground 1

The presiding Judge erred when he entered judgment by consent in respect of matrimonial property on the 30th January 2019 as he had vacated the order granting the decree absolute which he made on the 22nd January 2019 and the Registrar had not yet granted the decree absolute at the time he entered the said judgment by consent in respect of matrimonial property.

Ground 2

The applications for decree absolute which were marked as P1 and P2 by the presiding Judge on the 30th January 2019 are out of time and could not have been relied upon either by the presiding Judge or the Registrar to grant the decree absolute.

Ground 3

The Decree Absolute granted by the Registrar on the 30th January 2019 is erroneous as it is not clear on what application the Registrar had acted to grant the Decree Absolute."

[14] The applicant relied heavily on the record of proceedings that had not been exhibited to and filed with the affidavit. Having read thoroughly the affidavit and the Notice of Appeal, the substantial questions of law to be adjudicated upon by the appellate court are unclear. The Court agrees with Counsel for the respondent that it is not enough for Counsel to reproduce or exhibit grounds of appeal. The affidavit should plainly develop the substantial questions of law to be adjudicated upon by the appellate court.

[15] Secondly, Counsel for the respondent has stated the law correctly, in his oral submissions, in relation to the ground raised that, if a stay of execution is not granted, the appeal, if successful, would be rendered nugatory.

[16] He submitted that the Court ought to order a stay of execution of an order, pending the appeal if the appellant would be irretrievably injured by carrying it into execution, in case the appeal succeeds. Counsel referred to the case of **Macdonald Pool** *supra*, which quoted with approval the Sri Lankan case of *Sokkhalal Ram Sait v Kumaravel Nadar and Others* 13 C L W 52, in which Keuneman J. stated —

"[i]t has been stated in England that the usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant: mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of the decree – Walford v Walford LR 1867-83-Ch. App. Cas 812..."

Emphasis supplied

[17] That being the general rule. The next question is whether or not if the subject matter was dealt with, the appeal, if successful, would be nugatory. The Court finds that there is no affidavit or tangible fact upon which, in the Court's opinion, it can rely on for the purpose of arriving at the conclusion that such will be the case. The affidavit clearly fails to adduce any evidence in support of this ground.

[18] The affidavit also avers that the applicant has a good chance of success in her appeal. Counsel for the respondent submitted in his oral submissions that, although the applicant may have a good chance of success in her appeal, for that reason alone, no stay will be granted unless she satisfies the Court that, if the subject matter was dealt with, the appeal, if successful, would be nugatory. He referred to **Macdonald Pool** *supra*. The Court agrees.

[19] In the case of *Chang-Tave v Chang-Tave* (2003) SLR 74, the Supreme Court held that: "*[u]nder the English principle, even if the appellant had some prospects of success in his appeal, for that reason alone no stay will be granted unless the appellant satisfies the Court that he will be ruined without a stay of execution*".

[20] Turning to **Macdonald Pool** *supra*, the Supreme Court held that: *[t]he ground adduced by the appellant in his affidavit, that to the best of his information and belief that he has a good chance of success in his appeal has to be considered inadequate as held in the case*

of *Atkins v. Great Western Railway Co. (1886) 2 T.L.R 400* [...]". The Supreme Court went on to say that: "*it is incumbent on the appellant to disclose in his affidavit the grounds on which he relies upon to support his application for stay of execution. The said requirement finds emphasis in the case of Atkins v. Great Western Railway Co. (1886) 2 T.L.R 400 where court held thus, "As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds".*"

[21] The Court has already found that the applicant has failed to adduce any evidence in support of the ground that, if a stay of execution is not granted, the appeal, if successful, would be rendered nugatory. The Court observes in passing that the affidavit does not even contain any material which can serve as the basis for the assessment of the arguability of the grounds of appeal.

[22] The Court states that those who apply for a stay of execution, must come before the Court prepared with all the necessary materials.

[23] For the reasons stated above, the Court accepts the submissions of Counsel for the respondent that the affidavit of the applicant fails to disclose all the material averments which are necessary for the Court to make a proper determination on the notice of motion filed by the applicant. Accordingly, the Court finds that there are no grounds for the Court to grant a stay of execution of the order pending the determination of the appeal.

(2) Whether or not the affidavit is bad in law

[24] The Court considers the form of the affidavit. Counsel for the respondent relied on the defect in the *jurat*. He stated that the *jurat* must follow immediately on from the text and not be put on a separate page. He submitted that the affidavit is also defective because it does not state the full address of the applicant and her occupation. He added that the affidavit sworn in this matter should have been entitled in this matter.

[25] The Court has considered the submissions of both Counsel. Counsel for the applicant did not offer any acceptable submission in reply.

[26] Counsel for the respondent submitted that the written law of Seychelles is silent on the issues raised. He submitted that the Court of Appeal in *Morin v Pool* (2012) SLR 109 referred with approval to the White Book (Supreme Court Practice 1991 Order 41 rule 8) in relation to an objection raised at the appeal concerning the affidavit. In the present matter Counsel referred the Court to *Order 41 (R.S.C. 1965)* which deals with the form of affidavits, in support of his submission. The Court reproduces Order 41, Rule 1, so far as relevant —

"Form of affidavit (O. 41, r. 1).

1.—(1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

[...].

(3) Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.

[...].

(5) Every affidavit must be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.

[...].

(7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn."

[27] The Court considers the submissions of Counsel to be well founded. Irregularities in the form of the *jurat* cannot be waived by the parties. In *Pilkington v. Himsworth*, 1 Y. & C. Ex. 612), the court held that: "[j]urats and affidavits are considered as open to objection, when contrary to practice, at any stage of the cause. That is an universal principle in all Courts; depending not upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the Court".

[28] Also an affidavit giving no address of the applicant was rejected: see *Hyde v Hyde*, 59 L.T. 523.

[29] For the reasons stated above, the Court accepts the submissions of Counsel for the respondent that the affidavit is bad in law and, consequently, refuses to admit the defective affidavit as evidence.

The decision

[30] The Court dismisses the notice of motion filed by the applicant. The Court makes no order as to costs.

F. Robinson (Justice of Appeal)

Signed, dated and delivered at Palais de Justice, Ile du Port on 17 September 2019