

**Avalon (Pty) Ltd & Ors v Berlouis
(2003) SLR 59**

Philippe BOULLE for the Applicants
Francis CHANG-SAM for the Respondent

Appeal by the Defendant was allowed on 5 December 2003 in CA 25 of 2002.

Ruling on Application for a stay of execution delivered on 8 September, 2003 by:

KARUNAKARAN J: This is an application for a stay of execution of the judgment, delivered by the Supreme Court on 7 November 2002 in the suit - Civil Side No: 150 of 2001- whereby the Court ordered the Applicants to pay R1,000,000 in damages to the Respondent. By the way, the Applicants and the Respondent herein were respectively the Defendants and the Plaintiff in the original suit. The application is resisted by the Respondent on a number of grounds and hence this ruling.

It is not in dispute that the Applicants being aggrieved by the said judgment have lodged an appeal against it to the Seychelles Court of Appeal. The appeal had already been set for hearing during the last session of the Court of Appeal. However, at the instance of an application made by the Applicants the case was adjourned, which now stands posted for hearing in the forthcoming session of the Court of Appeal. In the meantime, the Respondent is attempting to execute the judgment ignoring the fact that the matter is still pending before the Court of Appeal for final determination. Faced with a clear threat of execution of the judgment, the Applicants have now come before this Court with the present application, seeking a stay of execution pending the outcome of the appeal in this matter.

In essence, the Applicants contend that they have valid grounds of appeal and stand a good chance of success in the appeal. According to the Applicants, if the Respondent is allowed to execute the judgment before the determination of the appeal, the Applicants would suffer irreparable loss and hardship in that, they wouldn't be able to realize the fruits, in the event of their success in the pending appeal. Moreover, the First Applicant in this matter is a company, which has sufficient means and assets to satisfy the said judgment. Admittedly, this company owns an immovable property worth of R5million as its fixed assets. The Respondent is on the verge of forcing the judgment against this property in order to recover the said judgment debt of 5 million. According to the Applicants, if this property is sold in execution of the judgment, the company will suffer irreparable loss, inconvenience and hardship. Moreover, the company has no intention of selling this property pending appeal in this matter. In any event, this asset according to the Applicants would be more than sufficient to satisfy the judgment debt. Further, it is the contention of the Applicants that since no interest has been awarded in the judgment to accrue on the debt the Respondent would not suffer any pecuniary loss if the stay is granted for the interim period. For these reasons, Boule, the learned counsel for the Applicants submitted that it is just, reasonable and necessary that a stay

of execution should be granted in this matter. In the same breath indicated that the Court may even grant a stay subject to a condition that the Applicant should not dispose of the said immovable property pending the appeal.

the learned counsel submitted that the Applicant should not be granted a stay pending the appeal.

On the other hand, the Respondent vehemently opposed to this matter. According to the Respondent, the Applicants do not seek a stay of execution. It is the contention of the Respondent only to deprive him of the fruits of the judgment, which he has obtained. In his submissions, the learned counsel for the Respondent Mr. J. Sam invited the Court to apply the principles, which were reiterated in the cases of *Despillay William* Civil Side No: 244 of 1993 and *Laserinisima* Civil Side No: 274 of 1999, setting out the grounds on which the Court may grant a stay of execution. According to the counsel, the instant case does not satisfy any of the five grounds spelt out in those cases in order for the Court to grant a stay of execution. Therefore, the learned counsel urged the Court to refuse the application. I carefully perused the entire record of the proceedings and the grounds of appeal as well as the affidavits filed by the parties.

nothing of the stay in the instant case. There are no valid grounds to grant such a stay would be granted in his favour. In *J. Sam* invited this Court to apply the principles, which were reiterated in the cases of *Despillay William* Civil Side No: 244 of 1993 and *Laserinisima* Civil Side No: 274 of 1999, setting out the grounds on which the Court may grant a stay of execution. According to the counsel, the instant case does not satisfy any of the five grounds spelt out in those cases in order for the Court to grant a stay of execution. Therefore, the learned counsel urged the Court to refuse the application. I carefully perused the entire record of the proceedings and the grounds of appeal as well as the affidavits filed by the parties.

I meticulously went through the authorities cited supra. I gave diligent thought to the submissions made by the counsel for and against this application. First of all, I note that Section 230 of the Seychelles Code of Civil Procedure reads thus:

An appeal shall not operate as a stay of execution or of a proceeding 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 the appellate Court may direct.

From the above section of law, although one may logically presume the Courts in Seychelles to have the power to stay execution of judgments, there is no specific statutory provision in our laws, which expressly empowers the Courts to grant a stay as a legal remedy to protect the interest of an appellant/judgment debtor pending appeal. However, in the United Kingdom the position is different since there are specific statutory provisions under different statutes, which expressly empower the Court to grant a legal remedy of this nature. For instance, apart from a general power to stay proceedings under the Supreme Court Act, Section 19, and the power to make instalment orders under the Debtors Act 1869, the Courts in the UK have wide powers under the Rules of the Supreme Court to grant a stay of execution. In fact, under Order 47, r. 1, if a judgment is given or an order made for the payment of money the debtor may apply then or later for a stay. The judge or master, if satisfied that there are special circumstances which render it inexpedient to enforce the judgment, may stay execution either absolutely or for such period and subject to such conditions as he thinks fit. Besides, under the Execution Act 1844, Section 62, a judge also has discretion to suspend or stay any judgment, order or execution if he is satisfied by evidence that a debtor is unable to pay due to sickness or unavoidable accident. Moreover, it is pertinent to note under Order 59, r. (1) of the Supreme Court Rules the Court of Appeal and the Court below may stay execution pending appeal. The statutory power to grant

a stay of execution, thus conferred on the English Courts by those English legislations is not applicable in Seychelles. They are indeed, legal remedies as opposed to equitable ones. They are provided by statutes. They cannot be imported into our jurisdiction for obvious reasons. This Court therefore, cannot grant a stay of execution as a legal remedy pending appeal as no such power has been conferred on it, by any statute. However, the lack of such statutory power in my view cannot prevent the Court from exercising its equitable powers conferred by section 6 of the Courts Act in order to grant a stay of execution as an equitable remedy. This can be done only, if justice so requires in a particular case, when no sufficient legal remedy is provided by any statute for the judgment-debtor/appellant to obtain this protection of a stay pending appeal. Section 6 of the Courts Act reads thus:

The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority, and jurisdiction to administer justice and to do all acts for the due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.

It is truism that the Court will not without good reason delay a successful Plaintiff in realizing the fruits of his judgment obtained from the trial Court. At the same time as a Court of Equity it cannot also deny an unsuccessful Defendant the fruits of his judgment from the Court of appeal in the event of his success if any, in the appeal. In the circumstances, it is the duty of the Court to take into account all relevant facts and circumstances peculiar to each case on hand and weigh the conflicting interest of both parties so as to determine what justice requires in that particular case whether to grant or refuse a stay. Therefore, I hold that the principles governing the stay of execution and the exercise of the Court's power to grant a stay in this respect cannot be restricted to or pigeonholed within the five grounds as canvassed by the learned counsel for the Respondent quoting the authorities cited supra. In the circumstances, the question as to the granting of a stay is to be determined not on the basis whether the case satisfies any or none of the five grounds or of the chances of success in the appeal but primarily on the basis whether granting of such a stay is necessary for the ends of justice in the given set of facts and circumstances. I decline, therefore to ask myself: What are the grounds or special circumstance required for the Court to grant a stay of execution? I prefer to ask: What does justice require, whether to grant or refuse a stay in the given case on hand? Hence, in my considered view, the principle that ought to be applied in matters of this nature may be formulated as follows:

The stay of execution is a discretionary remedy as it falls within the equitable jurisdiction of this Court in terms of section 6 of the Courts Act. It is a prerogative power that may be exercised by this Court though sparingly, as no other legal remedy is available to an appellant/judgment debtor in order to prevent an irreversible or irreparable injury, -which is substantial and could not be adequately remedied or atoned for by damages, if the judgment is reversed by the appellate Court once it has been executed. In matters of such a stay, first the Court should be satisfied ex facie the pleadings that the appellant has valid or substantial grounds of appeal. It should not venture to

examine the merits and speculate on the chances of success. In addition, the Court for granting or refusing a stay it must also consider the balance of convenience, hardship and loss to the parties. Where the appellant/judgment debtor claims that there are substantial grounds of appeal, the burden is on him to show that he will suffer due to inconvenience, loss and hardship by a refusal of stay greater than that which the Respondent will suffer by the grant of the stay. Thus after taking into account all relevant facts and circumstances, the Court ought to determine what justice and equity require and then should grant or refuse the stay accordingly.

In the light of the above principle, I approach the case on hand. I have perused the pleadings I find that the appellants have valid grounds of appeal. Secondly, I weigh the conflicting interest of both parties. I take into account all relevant facts and circumstances of the case. I consider the balance of convenience, hardship and loss the parties may suffer in granting or refusing the stay. In so doing I find that the injury the Applicants will suffer due to a refusal of stay is greater than that which the Respondent will suffer by the grant of the stay. I quite agree with the submission of Mr. [Name]. Whatever be the arguments advanced by the counsel for and against the stay, it remains that if the stay is granted, in the worst possible scenario it would simply delay him the fruits of his Judgment under appeal. If the stay is refused, in a similar scenario for the Applicants, it would delay them the fruits of the judgment obtained from the appellate Court. In the circumstances, judgment may be delayed but should never be denied to anyone. After careful thought to all relevant facts and circumstances of this case, in light of the principle formulated supra, I find that a stay of execution is necessary in the interest of justice in this matter. For the reasons given above, I order a stay of execution of the judgment in question pending the outcome of the appeal. This stay is granted on a condition that the Applicants should not dispose of or encumber any property comprised of Title PR423 and PR422 until the final decision is rendered in this matter. The application is granted accordingly.

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