

**International Investment Trading SRL (IIT) v Piazzolla & Ors
(2005) SLR 57**

France BONTE for the Plaintiff
Pesi PARDIWALLA for the Defendant
Phillippe BOULLE for the Intervener

Application for stay of execution delivered 28 March 2005 by:

RENAUD J: This is an application for stay of execution of judgment pending the outcome of an appeal before the Seychelles Court of Appeal.

On 3 March 2004 this Court delivered its judgment in favour of the Plaintiff declaring that 67% of the shares held and registered by Delonix Ltd in Takamaka Development Company Ltd is the property of International Investment Trading SA In pursuance thereof, Delonix Ltd is to transfer back to International Investment Trading Srl, as represented by its liquidator Alfonso Zaccari, 67 % of the shares that Delonix Ltd holds in Takamaka Development Company Ltd.

On 26 April 2004 Mrs Francesca Piazzolla entered a notice of motion moving this Court for an order to grant a stay of execution of the judgment for the reasons set out in an affidavit attached thereto. The affidavit, deponed to by Learned Counsel Ms Dora Zatte of 307 Victoria House, is reproduced hereunder:

1. That I am the Attorney for the Appellant
2. That I am duly authorized to swear the Affidavit on her behalf
3. That Judgment in Civil Side No: 178/1998 was delivered on the 3rd day of March 2004.
4. That the Appellant filed her notice of appeal in the Registry of the Supreme Court on 15th March 2004.
5. That to the best of my knowledge and belief the Appellant has good grounds of appeal.
6. That the Plaintiff's Company is in liquidation.
7. That as a result of the Judgment in Civil Side No. 178/98, the Court made an order that all the shares owned by the Second Defendant in Takamaka Development Company Ltd. be transferred in the name of International Investment Trading, the Plaintiff.
8. That in the event that the Respondents execute the Judgment they may

sell the property and this would be prejudicial to the Appellant in that she will never be able to recover the property should the appeal be successful.

9. That in order to meet the ends of Justice it is urgent and necessary that the Court orders a stay of execution of the Judgment in Civil Side No. 178/98 pending the determination of the appeal.
10. I pray accordingly.

On 14 June 2004, Mr France Bonte Learned Counsel for the First Respondent, in answer to Ms Zatte's Affidavit deposed as follows:

1. In answer to Miss Zatte's affidavit dated 22nd April 2004.
2. That Paragraph 5 of the affidavit is denied. The Appellant is merely an Intervenor who did not even attend Court inspite(sic) of the fact that the Court had ordered her to appear on her personal answers.
3. Of paragraph 7 of the Affidavit. That the judgement(sic) be executed is just and necessary so as not to prejudice the Respondent.
4. Paragraph 8 of the Affidavit is denied. There is no way **that the Appellant** is to obtain any benefit from this appeal. The Appellant should act against the trustee in bankruptcy of her late husband. A stay of execution will only delay the payment of creditors of her bankrupt late husband.
5. Paragraph 9 of the Affidavit and the prayer should be denied." Learned Counsel for the Second Respondent did not file an Affidavit in reply.

Mr Pardiwalla, Learned Counsel for the Second Respondent, did not file any affidavit in reply as he said that he would only be raising a point of law.

There is filed before the Seychelles Court of Appeal a Notice of Appeal dated 15 March 2004 by Learned Counsel Ms Dora Zatte on behalf of the Appellant/Intervenor Mrs Francesca Piazzola of Studio Co. GE.BA Via A. Casardi No. 12, 70051 Barletta (BA), Italy, stating three Respondents, namely: (1) International Investment Trading Sd (IIT) represented by lawyer Alfonso Zaccari as liquidator; (2) Vito Francavilla, Receiver & Trusty in Bankruptcy of Michelle Piazzola; and (3) Delonix Ltd., represented by Suketu Patel & Bernard Pool of La Rosiere House, Victoria, Mahe.

The grounds of appeal advanced by the Appellant/Intervenor are as follows:

- (i) The judgment is ultra petita as the Learned Trial Judge awarded a

remedy to the Plaintiff which was not prayed for in the pleadings.

- (ii) The remedy granted in favour of the Plaintiff was not available in law on the pleadings.

The Appellant/Intervener seeks the following relief:

An order setting aside the judgment of the Supreme Court and substituting therefore a judgment dismissing the Plaintiff's claim, with costs, in the Supreme Court.

Mr Boule, Learned Counsel for the Applicant emphasized that he is seeking a stay of the execution of the judgment particularly where the judgment states:

in the end result I enter judgment in favour of the Plaintiff declaring that 67% of the shares held and registered by Delonix Ltd in Takamaka Development Company Ltd is the property of International Investment Trading Sri. In pursuance thereof, Delonix Ltd is to transfer back to Internation Investment Trading Srl, as represeneted by its liquiditor Alfonso Zaccari, 67 % of the shares that Delonix Ltd hods in Takamaka Development Company Ltd."

He however agreed that time has passed and it is evident that things may have been done in the interim. Therefore, Mr Boule conceded, that in granting a stay of execution, the Court cannot undo what has been done, for example, if the shares have already been transferred, the Court cannot grant a stay that will affect such past transactions. However, Mr Boule argued on the basis that the transfer has not been effected, and therefore he is not pursuing this matter in vain. He said that the matter is on appeal and the other parties ought to be restrained from taking any further action until the appeal is heard, otherwise, as stated in the Affidavit, the Applicant:

in the event that the Respondents execute the judgment they may sell the property and this would be prejudicial to the Applicant in that she will never be able to recover the property should the appeal be successful.

According to Mr Boule, that is the crux of the matter. Mr Boule further argued that there is nothing in the affidavit of the Respondent which avers that the judgment has been executed. The Applicant, as the widow and heir, intervened in this matter upon the passing way of her husband, Mr Michelle Piazolla, who was an original party to the case and the matter between the parties is still alive in Courtin, Italy.

Mr Bonte, Learned Counsel on behalf of the First Respondent reaffirmed his position as stated in his Affidavit in reply and added that the execution of the judgment has already

been completed. He argued that the Court does not act in vain and therefore moved that the application be denied.

Mr Pardiwalla, Learned Counsel for the Second Respondent submitted that the fundamental principle of stay of execution is that the Plaintiff is not deprived of the fruits of his judgment. He agreed that the matter is on appeal and that this Court has a discretion to grant a stay of execution, but, added that as judgment has already been executed the Court does not act in vain. Mr Pardiwalla said that, in the circumstances, he fails to see why the Court should be asked to make an order for stay of execution of a judgment that has been executed. Mr Pardiwalla conceded that the Third Respondent, Delonix Ltd, on instructions, did not transfer the shares to the First Respondent as stated in the judgment, but has transferred these onto other parties. This, Mr Pardiwalla argued, Delonix Ltd has a choice to do. However, he agreed that the fact that the shares have already been transferred is not averred and deponed to in an affidavit. Mr Pardiwalla, further submitted that the Applicant was only an Intervenor in the case and she did not have the property in the first place and this matter cannot affect her in any way and likewise will not change the outcome of the appeal.

There does not seem to be any specific and explicit provision of any statute which directly and expressly grant this Court power to stay execution of judgment pending appeal. It is only by inference from Section 230 of the Seychelles Code of Civil Procedure, that this Court may draw such power. With regard to the question of stay of execution pending an appeal, this is what that Section says:

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 as the appellate Court may direct.

I note that Rule 53 of the Seychelles Court of Appeal Rules 1978 also has an identical provision.

In a similar case, that of *Falcon Enterprise & or v Eagle Autoparts Ltd CS 139/00*, his Lordship Justice Perera also observed that neither of those provisions stipulate any ground or provide guidelines as to the circumstances in which a stay of execution should be granted or refused.

In another similar case of *MacDonald Pool v Despilly William CS 244193* this Court identified five grounds, the existence of any one or more of which, singly or in combination, would entitle an appellant a stay of execution of judgment pending appeal. These are:

1. The Appellant would suffer loss, which could not be compensated in damages.

2. Where special circumstances of the case so requires.
3. There is proof of substantial loss that may otherwise result.
4. There is a substantial question of law to be adjudicated upon at the hearing of the appeal.
5. Where, if the stay is not granted the appeal if successful, would be rendered nugatory.

Going beyond our jurisdiction, I note from the dictum in the case of *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887, Lord Justice Staughton states:

Where an unsuccessful Defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is legitimate ground for granting the application that the Defendant is able to satisfy the Court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

By this, it appears that the principle applicable in the United Kingdom is that, the English Courts would grant a stay only when two basic ingredients co-exist in combination to constitute a single legitimate ground – these are:

- (i) Without a stay the appellant will be ruined and
- (ii) The appeal has some prospect of success.

The above two principles could be combined and considered as a sixth principle, as follows:

6. Without a stay the appellant will be ruined and the appeal has some prospect of success.

I therefore believe that the granting or denying a stay of execution is entirely a matter to be considered within the discretion of the Court, upon facts and circumstances of each case. The Court, however, ought to exercise this discretion judicially and not capriciously or arbitrarily, in its exercise of its equitable jurisdiction in terms of Section 6 of the Courts Act.

In considering whether to grant or refuse a stay of execution, the Court must also balance the interests of the parties by minimizing the risk of possible abuse by an Appellant to delay the Respondent from realizing the fruits of his judgment by obtaining a stay of execution. Careful consideration ought to be given to avoid circumstances wherein such a stay may cause more loss and hardship to the Respondent than the one caused to the Appellant by refusing to grant it. The Court ought to balance the interests

of both parties and minimize the risk of possible abuse by the Appellant.

In the present case, in the Affidavit filed on behalf of the Appellant, it is stated that:

in the event that the Respondents execute the judgment they may sell the property and this would be prejudicial to the Applicant in that she will never be able to recover the property should the appeal be successful.

Agreeably, there is an appeal pending before the Seychelles Court of Appeal which is going to be determined very soon.

On the other hand, in the Affidavit filed on behalf of the First Respondent, it is averred, inter alia, thus: "That the judgment be executed is just and necessary so as not to prejudice the Respondent", and also "A stay of execution will only delay the payment of creditors of her bankrupt late husband".

I carefully and meticulously consider the submissions of Learned Counsel for the parties, as well as the Affidavits filed by them. I allow myself to be guided by the principles enunciated above and apply those principles to the present case. I also endeavour to balance the interests of both parties in the matter.

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I carefully and meticulously consider the submissions of Learned Counsel for the parties, as well as the Affidavits filed by them. I allow myself to be guided by the principles enunciated above and apply those principles to the present case. I also endeavour to balance the interests of both parties in the matter.

I find that, in the circumstances, the Applicant has satisfied this Court that, without a stay of execution, it would suffer more prejudice than the Respondents if the stay pending the determination of the appeal, which has some prospect of success, is denied. Further, I believe that if the stay is not granted, it would render the result of the appeal nugatory if the appeal is successful.

For these reasons, the application for stay of execution is granted effective from 23 February 2005.

For the purpose of clarity, any transaction regarding the shares in issue, that may have taken place prior to the effective date of this ruling, is not subject to this present order.

Record: Civil Side No 178 of 1998