**Delcy v Camille**
**(2005) SLR 87**

Francis CHANG SAM for the Judgment Creditor
Philippe BOULLE for the Judgment Debtor

**Ruling delivered on 26 October 2005 by:**

**PERERA J*:*** By a judgment dated 27 October 2003, the Defendant was ordered to pay FF 469,667, R20,000 and costs of action in a sum of R8975, the equivalent in Seychelles rupees being approximately R511,536. No appeal was filed against that final judgment. On 13 January 2004, upon an application for summons to show cause being filed by the Plaintiff (Judgment Creditor) under Section 251 of the Code of Civil Procedure as the judgment debt had not been paid, this Court by order dated 7 February 2005 ordered that the judgment debtor be civilly imprisoned for a period of six months unless the judgment was satisfied within three months. However exercising its discretion under Section 253, this Court made a further order granting the judgment debtor a last opportunity to avoid imprisonment by paying R200,000 of the judgment debt within three months, and the balance in installments of R5000.

The Judgment Creditor filed a motion dated 12 May 2005, averring that the Judgment debt had not been paid in terms of the order of 7 February 2005, and moving that the order for Civil Imprisonment be "reviewed". The judgment debtor filed a motion dated 12th July 2005 in this Court seeking a stay of execution of the order dated 7 February 2005. It was averred that a Notice of Appeal had been filed on 22 February 2005. A further answer to the motion of 12 May 2005 was filed by the judgment debtor before the Court of Appeal averring that a similar motion was filed before the Supreme Court. In paragraph 3 of the affidavit to that answer, the judgment debtor averred that:

> I believe it is just and reasonable that the notice of motion before the Supreme Court to review the order dated 7th February 2005 be stayed pending the decision of the Court of Appeal on the motion to stay the order pending the hearing of the Appeal.

Hence the judgment debtor had sought an order of this Court to stay execution of the order dated 7 February 2005 pending the hearing of the Appeal before the Court of Appeal, and at the same time sought an order from the Court of Appeal to stay the motion filed by judgment creditor to "review" the order of 7 February 2005. However, before the present matter was considered, Counsel for the Judgment debtor amended the caption of the latter "answer to motion dated 12 May 2005" to read as "Supreme Court" instead of "Court of Appeal". Accordingly there is now no motion before the Court of Appeal. There is only the notice of Appeal filed on 22 February 2005. The judgment creditor has, in an affidavit dated 4 August 2005, inter alia objected to a stay until the hearing of the Appeal, as the judgment debtor had not filed an Appeal against the original judgment dated 27 October 2003.

Before the merits of the motions before this Court were considered, I called upon Learned Counsel for the Judgment debtor, Mr Boulle to satisfy Court whether there was a proper Appeal before the Court of Appeal, as it appeared that the order dated 7 February 2005 was an "Interlocutory order" and hence needed leave to appeal. Pending a ruling on that issue, the hearing on the merits of the motion to review the order of 7 February 2005 was stayed.

The present Ruling is therefore limited to a consideration of whether the order dated 7 February 2005 is "interlocutory or final'. If "final", there is a valid "appeal" before the Court of Appeal, but if "interlocutory", there is no such 'Appeal' at all as leave to Appeal has not been obtained, and further the time limit for doing so has also lapsed. In the latter situation, a stay order will not arise. The distinction is relevant for all purposes connected with Appeals to the Court of Appeal.

Section 12 (2) (a) (i) of the Courts Act provides that in Civil matters, no Appeal shall lie as of right to the Court of Appeal. Sub Section (b) provides that:

> in any such cases as aforesaid, the Supreme Court may, in its discretion, grant leave to appeal if, in its opinion, the question involved in the Appeal is one which ought to be the subject matter of an Appeal.

The Seychelles Court of Appeal Rules 2005 came into operation under SI 13 of 2005 on 14 February 2005. Rule 35 thereof provides that the former Rules of 1978 have been repealed and superceded by the present Rules, subject to the proviso that:

> any proceedings already commenced under the repealed Rules may continue thereunder, save in so far as the Rules herein contained maybe applicable thereto without injustice or increased costs to the parties.

In the present matter, proceedings to appeal commenced with the Notice of Appeal filed on 22 February 2005. Hence the Rules of 2005 would apply. Rule 18 thereof sets out the procedure to be followed in Court. Rule 25(i) states that, "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". Subsection (2) provides that "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".

Clearly therefore, for Rule 25 to apply there should already be filed an appeal from a final judgment of the Supreme Court. “Interlocutory matters" would then be matters relevant to that Appeal, such as matters concerning the furnishing of security for costs, delays in filing heads of arguments, and such other incidental matters. Rule 20 (i) provides that the Supreme Court or the Court of Appeal may on application stay execution on any judgment or order pending appeal. This Court has therefore the jurisdiction to consider an application for stay of execution of its own judgment pending the determination of an Appeal to the Court of Appeal. But where leave to Appeal is

required before an Appeal is filed in the Court of Appeal, the consideration of an application to stay execution would arise only upon such leave being granted, subject to the provision in Rule 20(i) that "an Appeal shall not operate as a stay of execution or of proceedings under the decision appealed from". It is in this context that it becomes necessary to consider whether the Order of this Court dated 7 February 2005 was "interlocutory" or "final".

The following tests illustrate the differences in terminology.

In *Collins v Paddington* 5 QBD 370 it was stated:

> Where any step is necessary to perfect an order or judgment, it is not final but interlocutory.

*In Bozson v Altrincham* [1903] 1 KB 547, Alverstone CJ giving a more clear definition stated:

> If a judgment or order finally determines the rights of the parties, it ought to be treated as final: if, on the other hand, further proceedings are necessary in order to determine those rights, it ought to be treated as Interlocutory.

In that case Alverstone CJ further said that "the test was whether the Judgment or Order as made finally disposed of the rights of parties". However in a previous case *Salaman v Warner* [1891] 1 QB 734*,* Lord Esther MR had said that the test was the nature of the application to the Court, and not the nature of the order which the Court eventually made. Lord Denning MR in the case of *Salter Rex & Co* v *Ghosh* [1971] 2 QB 597, preferred the test adopted by Lord Esther MR and stated "Lord Alverstone was right in logic, but Lord Esther was right in experience." He then proceeded to state:

> This question of "final" or "Interlocutory" is so uncertain that the only thing for Practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can do with it. There is no other way.

In this respect, the test laid down in the case of *White v Brunton* [1984] QB 570 is of special significance to the instant matter which involves enforcement of a judgment. That test was that *"*an order was not final unless it would have finally determined the whole case whichever way the application in the Court below had been decided".

In the present matter, the judgment dated 27 October 2003 finally disposed of the rights of the parties. But to the successful party, finality is reached only when he obtains the fruits of that judgment. To that end he would pursue the avenues provided in the Code of Civil Procedure for execution of judgment. Any application made in the process of execution of Judgment, would, on the basis of Salaman v Warner (supra), and approved by Salter Rex & Co v Ghosh (supra), be interlocutory. In Re Page [1910] Ch D 489

Buckley LJ stated thus:

> It is plain that many orders which prima facie are final, are not final but are Interlocutory for the purposes of Appeal, such for instance as orders made in favour of Creditors or Claimants in an administration action finally determining their rights. The reason, as I understand it, is that although their rights are finally determined, it remains to work out the administration of the fund in order to give effect to those rights.

This Court, by order dated 7 February 2005 suspended an order of civil imprisonment for six months imposed on the Judgment debtor. Section 254 of the Code of Civil Procedure provides inter alia that Section 10 to 15 of the Imprisonment for Debt Act shall apply to and be read with Sections 251, 252 and 253 of the said Code. Section 15 of the said Act, provides that:

> The imprisonment of a debtor under the provisions of this Act shall in no way interfere with or prejudicially affect the right of his creditors to obtain the payment of their claims by the seizure or sale of the property of such debtor or by all other legal means whatsoever.

Civil imprisonment therefore does not extinguish the judgment debt. Hence there was no finality to the order of 7 February 2005.

In this context, it is of interest that Order 59 of the Rules of the Supreme Court of UK, was amended by inserting a new Rule 1A with effect from 1 October 1988 under the heading "Final and Interlocutory orders". Rule (3) embodied the test propounded in the case of White v Brunton (supra) and states:

> A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible Appeal) have been finally determined whichever way the Court below had decided the issues before it.

That Rule also followed Lord Denning's advice in the case of Salter Rex & Co (supra), to the Practitioners "to look up the Practice Books" for guidance, by setting out lists of specific types of orders which are to be treated as "final" and specific types of orders to be treated as interlocutory. Ord 59/1A/4 lists "enforcement of judgment" under Ord 59/1A/21, as an "Interlocutory order" under Ord 59/1A/ (6) (cc).

On a consideration of the jurisprudence, and Order 59/1A of the R.S.C. Rules (U.K.), the order dated 7th February 2005 of this Court was, for purposes of an Appeal to the Court of Appeal, Interlocutory in nature. Hence leave to appeal was necessary. Rule 17(8) of the Seychelles Court of Appeal Rules 2005 provides that "where an application for special leave to appeal in a civil matter is required by law, provisions of Sub Rules (1) to (7) inclusively shall mutatis mutandis apply". The "law" referred to therein is undoubtedly Section 12 of the Courts Act, which provides that leave to appeal should be obtained from the Supreme Court, and if such leave is refused, "the Court of Appeal

may grant special leave to appeal".

There is no application for leave to appeal against the order of 7 February 2005 before this Court. Consequently the motion dated 12 July 2005 to stay execution of that order does not arise for consideration. Hence in view of these circumstances, Learned Counsel for the judgment creditor may now support the motion dated 12 May 2005 to review the order of 7 February 2005. Learned Counsel for the judgment debtor will have the right to reply on the merits of that motion.

There will be no order for costs.

**Record: Civil Side No 55 of 2001**