IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 76/2017

(arising in CS CC04/2012)

[2017] SCSC 382

HEDGEINTRO INTERNATIONAL LTD
Applicant

versus

HEDGE FUNDS INVESTMENT MANAGEMENT LTD

Respondent

Heard: 21 March 2017

Counsel: Mr. John Renaud for applicant

Mr. Serge Rouillon for respondent

Delivered: 8 May 2017

ORDER **ON MOTION**

M. TWOMEY, CJ

[1] The Applicant filed an application on 9 March 2017 for a stay of execution of a decision delivered by the Supreme Court on 6 February 2017. The application is supported by an Affidavit jointly sworn by Mr. Anthony Derjacques and John Renaud both Attorneys in the matter.

[2] They depone that grounds of appeal in the matter are set out in the Notice of Appeal which they have filed dated 7 March 2017 and attached to the Application.

[3] They aver that the Applicant has an overwhelming chance in succeeding in the appeal and that it is just and necessary that the execution of the judgment be stayed pending the final determination of the appeal by the Court of Appeal.

[4] They further aver that unless the stay is granted the Applicant stands to suffer from great injustice, inconvenience and financial prejudice.

[5] They also state that it would be in the interests of justice for the judgment to be stayed and that the statements in the Affidavit are true and correct to the best of their knowledge, belief and information.

[6] The Respondent filed a response to the application. It states that the application is not proper before the Court for the following reasons inter alia :

1. The application was filed without any attachments on 9 March 2017 although it purports to.

2. The appeal was not filed until the 13 March 2017.

3. The application and the affidavit are improper as they contain the falsity that the application was filed after an appeal had been filed when in fact the application predates the appeal.

4. No stamp or proof of filing is shown on the face of the documents.

5. It is not shown on whose instructions the Attorneys have filed the application and the Affidavit.

6. There is scant evidence of the appeal having an overwhelming chance of success.

7. No security for the appeal has been filed.

8. The deponents of the Affidavit, namely the two attorneys, have no personal knowledge of the facts to which they swear in the Affidavit.

9. In a previous affidavit dated 27 February 2017 and heard on 6 March 2017 in the related case of *Panesar v French* CC157/2011 the Deponent confirmed that the directors of the Applicant and the Applicant had insufficient funds for paying the costs of the appeal in the present suit and wanted the *Panesar v French* case adjourned on that basis.

10. The Respondent will suffer greater financial hardship than the Applicant if the stay is granted since the interest on the judgement award accrues at approximately USD 34,000 per month.

[7] Let me say from the outset that I am as singularly unimpressed with the attempts of the Applicant at the last minute to stay the execution of judgment as I am with the Applicant's attorneys swearing an Affidavit on behalf of their client.

[8] At the hearing of this Application I took up the first ground of appeal that is ground 2.1 with Counsel for the Applicant. It states that the case was derailed by my assuming the continuation of the case.

[9] Mr. Renaud for the Applicant admitted that the grounds of appeal were drafted by Mr. Panesar, a director of the Applicant company and that the grounds filed in the appeal would have to be reassessed since all the parties in the case had unanimously agreed to my taking over the case in the absence of the original trial judge.

[10] This allegation in the ground of appeal is therefore questionable.

[11] Further, as submitted by Counsel for the Respondent, the averments in the affidavit are not proper.

[12] I am, because of contentious issues raised in the Respondent's answer to the application, unable to ascertain the truth of the matters alleged as such an exercise would entail my calling both counsel who swore the affidavit into the witness box for the veracity of the averments in the affidavit to be tested. This is clearly untenable in this case.

[13] Counsel has not raised any issue about the Applicant's directors' inability or non-availability to swear the affidavit themselves. In fact Mr. Panesar was in court on numerous occasions and also as stated by Counsel for the Applicant at the hearing of this Application, drafted the grounds of appeal.

[14] Moreover, it is clear that the contents of the Affidavit especially those relating to the fact that the Applicant would suffer great injustice, inconvenience and financial prejudice are not matters that are personally known to the deponents. It was this same set of facts which led Sauzier J to find in *Union Estate Management (Proprietary) Limited v Herbert Mittermeyer* (1979) SLR 140 that:

> *"...an affidavit which is based on information and belief must disclose the source of the information and the grounds of belief. It is therefore necessary for the validity of an affidavit that the affidavit should distinguish what part of the statement is based on information and belief.*

[15] Recently, in *Erne v Braine (unreported)* MA290/2015 and 230/2016 arising out of CS 127 /2011, I stated:

> *"[16] The Court has on countless occasions laboured the point that affidavits are evidence and are therefore subject to the same rules of admissibility as other evidence. In the present affidavit it may well be that the Deponent may have been told by the Plaintiff what her wishes are but that is hearsay evidence and is inadmissible. The Deponent may however have personal knowledge of some of the facts but that it is not stated in his affidavit. That distinction is essential and will validate or invalidate an affidavit. In this case it is the latter that applies."*

[16] In a recent case in the UK, namely *POT v Child and Family Agency [2016]* IEHC 101, Humphreys J, noted:

> "*The applicant in this case did not swear the grounding affidavit himself. He did not set out on oath his own full version of events... More fundamentally, he did not personally verify the statement of grounds…*

Leaving aside the special cases where a party is a corporate entity including a corporation sole, or an office-holder where it is not possible or appropriate for this requirement to be literally enforced, a court faced with an application for leave grounded on an affidavit sworn by the applicant's solicitor, rather than by the applicant personally, would, where a personal affidavit is in fact necessary, be entitled to refuse relief, or to adjourn the application pending the swearing of the necessary affidavit, or to grant leave premised on or subject to the filing of that affidavit in due course…"

[17] I am of the view therefore that the affidavit in this case is invalid and cannot support the application which also falls and is therefore dismissed.

[18] In *Mapletoft v. Christopher J. Service, 2008* CanLII 6935 (ON SC) Judge Myers dismissed a case in which the affidavit was sworn by the clients' attorney and made the following observations which are equally applicable to our jurisdiction:

15. For the guidance of counsel in future, I propose the following guidelines:

a) A partner or associate lawyer or a member of the clerical staff may swear an affidavit identifying productions, answers to undertakings or answers given on discovery. These are simple matters of record, part of the discovery and admissible on a motion pursuant to Rule 39.04. Strictly speaking an affidavit may not be necessary but it may be convenient for the purpose of organizing and identifying the key portions of the evidence. Used in this way, the affidavit would be non-contentious.

b) If it is necessary to rely on the information or belief of counsel with carriage of the file, it is preferable for counsel to swear the affidavit and have other counsel argue the motion. This approach will not be appropriate for highly contentious issues that may form part of the evidence at trial. If the evidence of counsel becomes necessary for trial on a contentious issue, it may be necessary for the client to retain another law firm.

c) Unless the evidence of a lawyer is being tendered as expert testimony on the motion, it is not appropriate for an affidavit to contain legal opinions or argument. Those should be reserved for the factum.

[19] It is also my view that a litigant must be prepared to give evidence directly on his own behalf and where a company is concerned, a director acting on its behalf must fill that place and be prepared to be tested on the evidence it tenders by affidavit or otherwise.

[20] I have decided to consider another matter purely in the event that my decision may be appealed. In applications for stays of execution, the judge seized with the application is loath to consider the grounds of appeal as he/she seized with the perennial problem of having to assess the application for a stay of execution when the main plank of that application is that the appeal has an overwhelming chance of success.

[21] In *Avalon v Berlouis* (2003) SLR 59 the court stated that although it is unnecessary to examine the merits or likely chances of success of the appeal, the court has nevertheless to assess whether the Appellant has valid or substantial grounds of appeal. Having examined the grounds of appeal filed I am not persuaded that these are substantial grounds or that the appellant has any prospect of success.

[22] I am also unable to accept that this stay of execution filed tardively with procedural irregularities is entirely of good faith and not a means to deny the Defendant the benefit of the judgment.

[23] In the event I dismiss this application with costs.

Signed, dated and delivered at Ile du Port on 8 May 2017.

M. TWOMEY
Chief Justice