

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MA 79/2018
(arising in CS8/2018)

[2018] SCSC

SYLVAIN MORTIER

Petitioner

versus

MARQUISE DAVID

Respondent

Heard: 24 April 2018

Counsel: Mr Bernard Georges for petitioner

Mr Anthony Juliette for respondent

Delivered: 24 April 2018

RULING

R. Govinden, J

[1] The Applicant herein is in occupation of title H1880, upon which he operates a Scuba Diving business, hereinafter referred to as the “premises” at Beauvallon, Mahe, It is indisputed that the Respondent herein is the owner of the said premises. In February

2018, the Respondent petitioned this court for a writ habere facias possessionem to issue against the Applicant on the ground that the Applicant was in illegal occupation of the premises. The court as presided by the Honourable Chief Justice, after considering the said Writ Petition on its merits delivered her Order on the 8th of January 2018, wherein she found that the occupation was illegal and ordered the Applicant to quit, leave and vacate the premises. The Applicant has not complied with this court order and has instead applied for a stay of execution of the Supreme Court order and has appealed against the said order. The Notice of Appeal containing the grounds of Appeal is attached to the Application.

[2] The Application seek a stay of execution on the following grounds ;

- (1) That he has appealed against the order of the Supreme Court in this matter and that he is informed that he has an overwhelming chance of succeeding in so far as the judgment of the court misrepresents the law on statutory tenancies.
- (2) If he is ejected from the premises he would suffer immeasurable loss and will be unable to start elsewhere in similar locations.
- (3) He believe that the Rent Board would have been the tribunal best suited to weigh the factors in issue
- (4) That if he is forced to leave the premises and he succeeds on appeal the appeal will be rendered otiose.
- (5) That the balance of hardship weigh heavily in his favour as he has occupied the premises for several years and he has nowhere else to relocate the business.

[3] In a nutshell, the learned counsel for the Applicant, Mr Bernard Georges, submitted that the Application has an overwhelming chances of success in his appeal and the balance of convenience weighs in his favour in this application. According to Mr Georges the learned Chief Justice in her Ruling has made a fundamental error of law in assuming that the Supreme Court was the proper forum to adjudicate on this matter and in issuing the writ given that the Applicant was a statutory tenant under that the Control of Rent and Tenancy Act and that the Rent Board should have been the only tribunal competent to sort out the differences between the parties.

- [4] Counsel for the Applicant submitted that it is not in dispute that a landlord can have a right to have his or her rented tenancy back. However, he submitted that the conditions which governs occupancy of rented premises and the method that a landlord can reposes the rented premises.
- [5] According to him the sole issue before the court was whether the tenant was in legal possession of the premises. If he was a writ cannot be issued. A writ of habere facias possessionem can only be issued if the occupier has no reason to be on the premises at all and where the latter has no legal defences.
- [6] Mr Georges submitted that Section 9 of the Act provides that no other court or tribunals other than the Rent Board is competent to evict a statutory tenant .He submitted that s 10 further gives an exhaustive list of grounds upon which a tenant can be evicted. Admittedly the ground sought for eviction the writ habere facias possessionem application was one of those statutory grounds, being that the premises was required for the personal use of the landlord and had to be repaired. However he goes on to submit that s 12 of the Act provides that a lessee or tenant who retains possession of a rented premises , so long as he or she retains possession, even at the end of tenancy or lease, enjoys all the rights of a tenant as a statutory tenant.
- [7] In that regards Mr Georges contest the submissions of counsel for the respondent that a state of statutory tenancy exist only when both parties agree.
- [8] Counsel grounded his objections in that regards on citations found paragraph 590 of the Halsbury laws of England 4th edition and the following authorities decided by the Mauritian Supreme Court ; Ramphul ltd vs Ramdeen 9162 MR 14; Bissesur vs Tyack 1963 Mr 175; Gangar vs Samtally and Ramghoohundan vs Baldeo 1973.
- [9] As a result of all the above learned counsel submitted that if the writ is not stayed before the appeal is stayed and the tenant is evicted the appeal would be rendered otiose.

- [10] On the other side Ms Marquise David for the Respondent has sworn to an affidavit dated 9th of April 2018 contesting the application for stay of execution.
- [11] She first take a preliminary objection to the deponent of the affidavit in support of the Stay Application. She avers that the deponent, being Mr Jonathan Boquillon cannot swear to the affidavit as there is no evidence that Mr Boquillon is the employee of the Applicant and that at any rate Mr Boquillon has no direct or indirect property right in the matter.
- [12] The Respondent also aver that the claim of undue hardship on the part of the Claimant if he is evicted before the appeal is heard is misplaced as the Respondent has already found alternative accommodation elsewhere at Eden Island marina north.
- [13] The Respondent further put the Applicant to proof of undue hardship.
- [14] The respondent avers that the application of the applicant is but a delaying tactic that would unduly prolong this matter and hence deny her the fruit of the judgment of the Supreme Court.
- [15] The Respondent also filed a written closing submission, with the leave of the court and there being no objection from the Applicant. This submission repeats most of the averments filed in her affidavit.
- [16] With regards to the position of the learned counsel of the Applicant regarding the fact that the Applicant is still tenant in law and that this is the case by operation of law in view of the Section 10 ; 12 and 13 of the Act . The Respondent submits that that proposition holds provided that there is a lessee (which the Applicant was not as the result of the termination of the lease Agreement) and provided that there lessor allows the lessee to occupy the said premises (which the Applicant was not, having terminated the lease by extending the required 6 months notice and having been informed that he was in illegal occupation and having his rent payment refused by the land lord during the period of illegal occupation.

- [17] I have given careful consideration to the Pleadings file by the parties in this case together with their attached documents. I have also carefully listen to the different submissions on the facts and the law made in this case. Having done so I have come to the following determination.
- [18] The law on stay of execution is well established in this jurisdiction. Although it is trite that this court will not without justification denies a successful litigant in obtaining the fruits of her judgment, it has the power to stay execution of a judgment in the interest of justice.
- [19] Section 229 of the Code of Civil Procedure provides “An appeal shall not operate as a stay of execution or proceedings under the decision of execution appealed from, unless the court or the Court of Appeal so orders and subject to such terms as it may impose. No intermediate act or proceedings shall be invalidated except so far as the Appellate Court may direct.”
- [20] Rule 53 of the Seychelles Court of Appeal Rules has an identical provision.
- [21] In the case of *Chow vs Bossy* MA 53/2011 and *Choppy vs NSJ Construction* 011 , the Supreme Court held that “in considering whether or not to grant a stay of execution the court may have regards to the following principles,
- (a) The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties.
 - (b) The mere filing of an appeal does demonstrate an appropriate case or discharge the the onus
 - (c) The court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of parties.
 - (d) Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted courts will normally exercise their discretion in favour of granting a stay.

- (e) The court will generally speculate upon the appellant's prospect of success but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to grant time
- (f) As a condition of a stay the court may require payment of the whole or part of the judgment sum or the provision of security.

[22] The crux of the Applicant contention before this court is that the Supreme Court was not the proper forum to decide upon the disputes between the parties. According to him he was a statutory tenant in pursuant to the provisions of the Act. As a statutory tenant his security of tenure of the premises is safeguarded under the provisions of the Act.

[23] He can only be evicted from the premises for reasons provided for in law and that this can be done only by the Rent Board Tribunal. To the extent that the learned Chief Justice ruled against him on this point of law applicant submit he has an overwhelming chance of success on appeal, hence the need for a stay of execution of the Supreme Court Ruling. This therefore calls for this court to scrutinize the provisions of the Act in the light of the facts of this case established legal authorities.

[24] Before proceedings on this point which deals with the merits of the application we need to address the issue raised regarding the competency of Mr Jonathan Boquilon to attest to the affidavit in support of the application for stay of execution.

[25] Mr Jonathan Boquillon was not a party to the proceedings and did not appear as a witness in the Habere facias possessionem actions. This suit was entered by Mrs Sylvaine Mortier against the Applicant.

[26] In this Application Mr Jonathan Boquillon swear to the affidavit in support. He avers that he is the manager of the Blue Sea Divers, which is the business occupying the premises. He swear the affidavit on his behalf and on behalf of the Applicant.

- [27] Having scrutinized this affidavit I am satisfied that the deponent has sufficient connections between Mr Boquillon and the Applicant and the rented premises and the facts relating to this case. His involvement as the manager of the business of Mrs Mortier makes his averments relevant and admissible. This deponent does not attest to hearsay evidence and at any rate as the affidavit is one in support of an interlocutory application he can properly attest to his knowledge; information and belief.
- [28] I therefore reject all of the Respondent's objection regarding the competency and admissibility of the affidavit of the deponent of the affidavit of the Applicant.
- [29] I now proceed to consider the bone of contention in this matter.
- [30] Part ii of the Act in s13 provides that the Act applies to any premises used for business ; trade or professional purpose as it applies to a dwelling house. S 13(1) extend the ground for eviction by the landlord when it comes to business premises (which is additional to those of a dwelling house). This additional ground that applies to business premises is that "The premises are reasonably required by the lessor for business, trade or professional purposes or for the public service. Accordingly "dwelling house" wherever the term appears in the Act is also a reference to a business premises, such as that owned by the Respondent.
- [31] Part ii of the , s 9 provides that no lessor shall eject or apply to the Supreme Court or the Magistrates Court for the ejection of or take step towards the ejection of his lessee , provided that nothing in the section shall prevent a lessor from giving his notice to quit .
- [32] Section 10 (1) "Every lessor wishing to eject his lessee shall apply to the Boar for an order of ejection.
- [33] S10 (2) On the other hand gives specific grounds upon which a lessor can apply for the ejection of a lessee.
- [34] S 12 (1) of the Act further provides that a lessee who under the provisions of the Act retains possession of any dwelling house shall so long as he retains possession observe

and be entitled to the benefit of all the terms expressed or implied in the original contract of letting so as the same are consistent with the provisions of the Act.

[35] In this case it is not contested that the Applicant has retained the possession of the business premises belonging to the Defendant. She has done so whilst obeying to the expressed and implied terms and conditions of the lease agreement, both upon the expiry of the lease and upon the expiry of the 6 months notice to quit given to him by the Respondent. He kept and maintained the premises as a “bon pere de famille”; he accepted and acknowledged the service of the notice to quit; he paid or attempted to pay the rent.

[36] Accordingly, in line with S12 9; 10 and 12 of the Act he was a statutory tenant both after the expiry of the lease and the expiry of the notice to quit. As long as he retained possession of the premises he had security of tenure. The only recourse was for the Respondent to apply to the Rent Board under s12 of the Act and pray for his eviction.

[37] A writ habere facias possessionem was not the most appropriate action to bring before the Supreme Court as this eventually encountered the bona fide defence of statutory tenancy under the Act.

[38] To this extent I am satisfied that the Applicant has an overwhelming chance of success on appeal and as a result if the execution in this case is

Signed, dated and delivered at Ile du Port on 24 April 2018

R. Govinden, J
Chief Justice