

IN THE SUPREME COURT OF SEYCHELLES

**Civil Side: MA 141/18)
(arising in CS 78/2015)**

[2018] SCSC 791

Gracy Sybil Pillay

Applicant

Versus

Anthony Herbert Dave Pillay

Respondent

Heard: 10 July 2018, submissions 11 July 2018

Counsel: Mr N. Gabriel standing in for
Mrs. Alexia Amesbury for applicant
Mr. Serge Rouillon for respondent

Delivered: 3 September 2018

ORDER

M. Twomey, CJ

- [1] This is an application for a stay of execution by the Applicant made by notice of motion dated 28 May 2018 and supported by affidavit in which she deposes that she had filed an appeal against orders and judgments of this Court delivered in relation to applications for ancillary relief under the Matrimonial Causes Act.
- [2] In a gist, her averments are to the effect that if the orders were executed she would suffer loss and extreme hardship and that she ‘and her daughter’ would not be adequately compensated in damages.
- [3] She further avers that the appeal involves a substantial question of law and that it had good prospects of success and if the stay was not granted, the appeal, if successful, would be rendered nugatory.

- [4] In an affidavit in reply, the Respondent has averred that he opposes the stay mainly because of the fact that the application is an attempt to frustrate his business ventures and close them down; businesses in which the Applicant was purely a nominee shareholder.
- [5] He further avers that Sterling Investment Ltd had bank obligations and if they were not met both the company and he would be prejudiced.
- [6] In answer to the Applicant's averment of imminent homelessness which he denies, he depones that the Applicant is living in a two-bedroom house at Machabée with her concubine whilst her family occupies the matrimonial home on V10596.
- [7] Several other allegations are made by both parties in their affidavits, but given the clearly obvious acrimonious relationship between them, this Court will only take into consideration the averments that are pertinent to this application and which will help inform a judicious decision in this matter.
- [8] Although several orders are sought to be stayed, the Court notes that only the final order issued by the Court on 30 April 2018 is in operation, that is, that the Applicant vacate the house on Parcel V10596 at Le Niol by 20 October 2018, that the Respondent pay the Applicant the sum of SR1.2 million for her share in Parcel J1606 and SR 829,243.30 for her combined shares in Sterling Investment and Impact Logistics. If the Applicant were to fail to make the payment in relation to the Respondent's shares in Sterling Investment and Impact Logistics, the companies are to be wound up.
- [9] An application for a stay of execution of a judgment or an order of the Supreme Court is necessary because an application may be made immediately after the delivery of the judgment by a judgment creditor for execution or forty eight hours after the judgment if the judgment debtor defaults in complying with the court order or fails to satisfy judgment (see section 225 of the Seychelles Code of Civil Procedure).
- [10] Section 230 of the Seychelles Code of Civil Procedure provides:

“An appeal shall not operate as a stay of execution or of proceedings 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.”

[11] Section 230 makes it clear that this court has limited powers in respect of stays, in any case much less power than the appellate court. Jurisprudence on this issue has been provided in the submissions of both Counsel for the parties in this case.

[12] Both Mrs. Amesbury for the Applicant and Mr. Rouillon for the Respondent have cited the authority of *Pool v William* CS 224/1993, which in effect is the only useful authority in relation to this application. In that case, the Supreme Court set out five grounds which may be considered in granting a stay of execution of a judgment pending appeal:

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

2. Where special circumstances of the case so require.

3. There is proof of substantial loss that may otherwise result.

4. There was a substantial question of law to be adjudicated upon the hearing of the appeal.

5. Where if the stay is not granted the appeal if successful, would be rendered nugatory.

[13] Subsequently, various authorities have reformulated or recast these considerations with little substantive addition or clarity to them. What is obvious is that the judge’s discretion must be based on whether it is just and convenient to make such an order so as to prevent undue prejudice to the parties. When the prejudice is finely balanced, as is the case here, there is little other guidance from Seychellois jurisprudence.

[14] Apart from the provisions of section 230 of the Seychelles Code of Civil Procedure (supra), there is also no guiding and specific statutory provision in relation to stays of execution in our jurisdiction (see *Falcon Enterprise & or v Eagle Autoparts Ltd* CS 139/00, *International Investment Trading SRL (IIT) v Piazzola & Ors* (2005) SLR 57).

[15] Where there is a lacuna in our laws on a specific issue, section 17 of the Courts Act provides:

“In civil matters whenever the laws and rules of procedure applicable to the Supreme Court are silent, the procedure, rules, and practice of the High Court of Justice in England shall be followed as far as practicable.”

[16] The above provision is of course subject to the qualification in *Kimkoon & Co. Ltd. v R* (1969) SCAR 60, namely, that subsequent legislation or amendments in England to the referential law do not apply. In respect of our civil procedure, rules and laws passed in England after Seychelles’ independence in 1976 would not apply. Hence our laws, frozen in time as it were in this respect, cannot take into account subsequent orders and rules of the White Book containing the Civil Procedure Rules of the High Court for the handling of civil litigation after that date. It may only take into account orders and rules and jurisprudence on those rules that have survived amendments.

[17] Insofar as the applicable rules of the High Court of England are concerned, the general rule is to decline a stay, unless solid grounds are shown. A stay is therefore an exception rather than the rule. In any case what is clear is that in applications for stays, the Applicant must make full, frank and clear statements of the irremediable harm to her/him if no stay is granted. This is primarily to ensure that a successful party is not denied the fruits of judgment

[18] Moreover, in applications for stays of execution, the judge seized with the application is loath to consider the chances of success of the appeal as he/she seized with the perennial problem of having to assess the application for a stay of execution having in most cases ruled on the case in the first place. That exercise demands both a subjective consideration and an element of self-criticism, and is a problematic undertaking.

[19] It is especially true in the present matter, as I do not see any winners or losers in this case. Both parties have ‘taken a hit’ with the division of the matrimonial property. Moreover, a substantive portion of the matrimonial property was held by companies, one of which (Impact Logistics Ltd), despite having ownership of immovable property is with negative shareholder equity. In those circumstances I find that both parties would be denied the fruits of the judgment where a stay granted.

[20] In this regard, I find the following suggestion in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ. 1915, when considering stays of execution to be helpful and I adopt it to decide the present application: for the court to decide whether to grant a stay or not, two questions must be asked:

1. If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?
2. If a stay is refused, and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover the subject matter of execution (in a money judgment that has been paid to the respondent)?

[21] I have considered the competing rights of the parties in this case and find it necessary to address each order and the respective matrimonial property separately for the exercise to be carried out to decide whether a stay of execution should be granted.

[22] I have taken on board the fact that both parties need a roof over their heads and I am not insensitive to the fact that the minor child resides with the Applicant. The evidence of her homelessness is equivocal given the diametrically opposed statements to that effect in the affidavit and cross affidavit of the parties. Without the affidavits being tested by cross-examination of the deponents, I am unable to conclude if indeed it is the Applicant's family rather than her and the child of the parties who are occupying Parcel V10596. I am prepared in the circumstances to give her the benefit of the doubt on this issue.

[23] With respect to the order concerning Parcel V10596 and Impact Logistics Ltd, if the stay is refused and the appeal were successful, the Applicant would be more inconvenienced than the Respondent because of her eviction. I therefore will stay execution in respect of that property.

[24] In the circumstances I grant a stay of execution in respect of the order concerning Impact Logistics as it owns Parcel V10596 at Le Niol.

[25] In respect of the other orders concerning the other properties and Sterling Investment Ltd, I am of the view that if a stay is refused, and the appeal succeeds, the risks to the

Appellant are such that she would not be inordinately inconvenienced as any adjustment will only be in respect of monetary shares in either Sterling Investments Company Ltd or Parcel J1606.

[26] I therefore further exercise my discretion to refuse to grant a stay of execution in respect of the orders relating to Sterling Investments Ltd and Parcel J1606.

[27] I make no order as to costs.

Signed, dated and delivered at Ile du Port on 3 September 2018.

M. Twomey

Chief Justice