

## SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2019] SCSC ... 933

MA 254/2019

(Arising in DS102/2006)

In the matter between:

**FRANKY HOAREAU**

(rep. by Charles Lucas)

**Applicant**

and

**MARY AZEMIA**

(rep. by S. Rajasundaram)

**Respondent**

**Neutral Citation:** *Hoareau v Azemia* (DS102/2006) [2019] SCSC .... (25 October 2019).

**Before:** Carolus, J.

**Summary:** Stay of Execution of Judgment

**Heard:** 16 October 2019

**Delivered:** 25 October 2019

### ORDER

The application for stay of execution of the judgment in DS102/2006 delivered on 10<sup>th</sup> July 2019 is dismissed.

### ORDER ON MOTION

**CAROLUS, J**

#### Background

- [1] This order arises from an application for the stay of execution of the judgment of Robinson J, delivered on 10<sup>th</sup> July 2019, in DS102/2006 (the “principal suit”) pending appeal of the said judgment. The judgment arose from a claim for a property adjustment order in respect of the matrimonial home of the parties in the principal suit, following dissolution of their marriage. In terms of the judgment the applicant in the proceedings for property adjustment

who is also the applicant in the present proceedings was awarded the sum of SR450,000/- with interest at the legal rate of four per cent from the 10<sup>th</sup> July 2019 until the day of payment of the entire sum of SR450,000/-. The respondent in the principal suit is also the respondent in the present proceedings.

- [2] The application for stay of execution is made by way of Notice of Motion supported by an affidavit sworn to by the applicant. The respondent did not oppose the application.

### **Affidavit evidence of Applicant**

- [3] In his affidavit, the applicant avers the following;

1. *I am the Appellant in this case. I have filed an appeal against the whole decision in the judgment before the Court of Appeal. I verily believe that the grounds of Appeal, attached hereto are bona fide in nature and the appeal has been filed expeditiously after receipt and sight of the judgment.*
2. *The Notice of Appeal contains grounds of appeal which raise serious and substantial questions of law, their interpretation and other matters relating to my entitlement as claimed. I verily believe that the appeal has a very good chance of success.*
3. *It is therefore in the interest of justice, fair and equitable that the stay of execution be granted pending the hearing of this appeal. I further aver that I shall be prejudiced and my claim in the matrimonial property shall be compromised should a stay of execution be refused in the circumstances.*
4. *For these reasons I verily believe that it is just, fair and equitable that the Order for Stay of Execution be granted in the interest of justice pending the determination of the Appeal.*
5. *I verily believe that the Order for a stay of execution shall not interfere with the status quo living and accommodation situation of the Respondent who shall continue to remain in occupation of the matrimonial home and she shall remain undisturbed by the stay in a like manner that we have remained since I vacated the matrimonial home in 2005.*

- [4] I note that the grounds of appeal averred in paragraph 1 of the Affidavit to be attached thereto, is not so attached.

### **The Law**

- [5] The Court derives its power to stay execution of a judgment from Rule 230 of the Code of Civil Procedure. In the case of International Investment Trading SRL (IIT) v Piazzolla & Ors the Court stated as follows:

*“There does not seem to be any specific and explicit provision of any statute which directly and expressly grants 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.”*

- [6] Section 230 provides as follows:

*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.*

- [7] The Seychelles Court of Appeal Rules, 2005, contain a similar provision in its Rule 20 which provides as follows:

*20. (1) An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from:*

*Provided that the Supreme Court or the Court may on application supported by affidavits, and served on the respondent, stay execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the payment of any money or the due performance or non-performance or any act or the suffering of any punishment ordered by or in such judgment, order, conviction, or sentence, as the Supreme Court or the Court may deem reasonable.*

*(2) No intermediate act or proceeding shall be invalidated except in so far as the Supreme Court or the Court may direct.”*

- [8] It was held in the case of International Investment Trading SRL (IIT) v Piazzolla & Ors, whether to grant or deny a stay is entirely within the Court’s discretion.



[9] In addition, the Courts have established principles that a Court may have regard to in considering whether or not to grant a stay of execution. The case of Choppy v NSJ Construction (2011) SLR 215 sets out six such principles as follows:

- 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 not demonstrate an appropriate case or discharge 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 favor of granting a stay.*
- e) *The Court will not speculate on 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.*

### Analysis

[10] The applicant relies substantially on the grounds of appeal to justify the grant of a stay of execution. In that respect he avers in his affidavit that the grounds of appeal raise serious and substantial questions of law, their interpretation and other matters relating to his entitlement as claimed. He further avers that he believes that the appeal has a very good chance of success.

[11] In the absence of the grounds of appeal, it is not possible for the Court to ascertain whether whether they raise serious questions of law as claimed by the applicant.

[12] As to the chances of success of the appeal, in Choppy v NSJ Construction (supra) it was held that "The Court will generally not speculate on the prospects of success on Appeal but may make some preliminary assessment of whether the applicant has an arguable case in order to exclude appeals lodged without real prospect of success simply to gain time." In order for the Court to determine whether the grounds of appeal of the applicant/appellant

disclose an arguable case, it must be in the presence of those grounds of appeal. In the absence of such grounds the Court cannot make such determination.

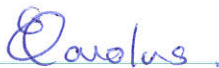
[13] The appellant further avers that he will be prejudiced and his claim in the matrimonial property will be compromised should a stay of execution be refused in the circumstances. He also expresses his belief that an order for a stay of execution shall not interfere with the status quo living and accommodation situation of the respondent who shall continue to remain in occupation of the matrimonial home and remain undisturbed in the same manner as she has been since the applicant vacated the matrimonial home in 2005.

[14] In terms of the impugned judgment the respondent is to pay to the applicant the sum of SR450,000/- with interest. I fail to see therefore how a stay of execution which will have the effect of preventing the payment of that sum to the appellant himself will cause him prejudice. If the sum awarded to him is increased on appeal, the respondent will simply have to pay him the balance and if it is increased, the appellant will return the sum paid in excess to the respondent.

#### **Decision**

[15] For the reasons stated above, I refuse to grant a stay of execution of the Judgment of Robinson J, dated 10<sup>th</sup> July 2019. This application stands dismissed.

Signed, dated and delivered at Ile du Port on 25 October 2019



E. Carolus J