**SUPREME COURT OF SEYCHELLES**

---

**Reportable**
[2019] SCSC 962
MA 195/2019
(Arising in CC13/2014)

In the matter between

**ASHRAF ELMASRY**

**ELENA KOZLOVA** **Applicants**
*(rep. by Frank Elizabeth)*

and

**MARGARET HUA SUN** **Respondent**
*(rep. by Basil Hoareau)*

---

| | |
|---|---|
| **Neutral citation:** | *Elmasry and anor v Hua Sun* (MA 195/2010 (Arising in CC13/2014 [2019] SCSC (8 November 2019). |
| **Before:** | Twomey CJ |
| **Heard:** | 2 October 2019 |
| **Summary:** | stay of execution- when granted-defective affidavit - jurat overleaf |
| **Delivered:** | 8 November 2019 |

---

**RULING**

---

**TWOMEY CJ**

[1] This is an application for a stay of execution of a decision delivered on 29 May 2019 in which the Applicants were ordered by Robinson J to jointly pay the Respondent the sum of US$ 660,428 with interest and moral damage of SR 100,000 with interest and the costs of the suit for a breach of contract.

[2] The Applicants appealed the decision on 7 June 2019 on two grounds, namely that the learned judge erred when she dismissed the Appellants' counter-claim and that she further erred when she awarded moral damages to the Respondent.

[3] In the application for a stay of execution the Applicants swore a joint affidavit in which they deponed that the appeal had ‘some prospect of success” and that there were “substantial questions of law and facts to be adjudicated upon” and that if successful the appeal judgment would be rendered nugatory unless a stay of execution of the decision of the Supreme Court was granted.

[4] In support of this application, learned counsel for the Applicants, Mr. Elizabeth has submitted that the guiding principles for determining whether or not to stay an execution were set down in the recent case of *Lablache de Charmoy v Lablache de Charmoy* SCA 9/2019 [2019] SCCA 35 (17 September 2019) in which the cases of *Pool v William* (CS 244/1993) [1996] SCSC 1 (11 October 1996), *Falcon Enterprise v Essack and Ors* (citation unknown) and *Casino des Iles v Compagnie Seychelloise* SCA 2/1994.

[5] Learned Counsel for the Respondent endorsed these principles but added that in such applications the grounds of appeal filed ought also to be taken into consideration by the Court. Where these grounds state that there are substantial questions of law to be argued or that the appeal decision might be rendered nugatory if the stay was not granted, the material facts for these grounds need to be set out in the affidavit. He relied for this submission on the case of *Pool v Williams* (supra) and the English case of *Atkins v G.W. Ry* (1886) 2 T.LR 400 on which the court held that:

> *"As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable possibility of getting them back if the appeal succeeds."*

[6] Mr Hoareau, further submitted that the balancing exercise by the courts to consider whether the stay should be granted or not is only carried out after satisfying itself that there are indeed grounds on which to grant a stay. He also submitted that there are three stages in the assessment of the grounds for a stay of execution: 1. the consideration of whether there were substantial grounds disclosed on which an appeal might be granted, 2. the consideration of whether there were grounds on which a stay might be granted and 3. the balancing exercise as to whether to grant or refuse the stay.

[7] Lastly, Mr. Hoareau submitted that in the assessment of these matters, the Applicants fall at every hurdle. First, he submits the grounds of appeal in the present case are neither valid or substantial as they are vague and inconsequential so as to be meaningless.

[8] As for the application for stay, the affidavit in support is invalid since the *jurat* of the affidavit does not follow immediately on from the averments in the deposition and is on a separate page. He relied for this submission on rule 40 91) of the White Book, Supreme Court Practice Rules.

[9] In *Pillay v Pillay* (MA 141/2018) [2018] SCSC 791 (03 September 2018) I observed that 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 that

> *"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] In this regard, as I pointed out in *Pillay* (supra), 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 is repetitive and *Pool* (supra) is the only useful authority. 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, four of which are reproduced by Robinson JA in *Lablache de Charmoy* (supra). I set out the *Pool* principles in full below regarding circumstances in which a stay should be granted by the court:

> *1. Where the appellant would suffer loss which could not be compensated in damages.*
> *2. Where special circumstances of the case so require.*
> *3. Where there is proof of substantial loss that may otherwise result.*

*4. Where there is 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.*

[12] 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.

[13] As there are no other guiding principles and essentially a stay of execution is a discretionary remedy, pursuant to section 17 of the Courts Act, I turn to English authorities as I did in *Pillay* (supra). 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 that the rule. Moreover, 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 a judgment.

[14] In this regard, again as I did in *Pillay,* 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)?*

[15] The present matter concerns payment of money. It has not been shown that the Respondent is impecunious and will not be able to return the money if the Court of Appeal were to reverse the Supreme Court decision. In the circumstances I do not find

that the Applicant runs the risk of a decision in its favour on appeal being rendered nugatory.

[16] On another point having examined the grounds of appeal, and while I am reluctant to consider the appeal at this stage, even a cursory examination of the decision against the grounds of appeal does not reveal any earth shattering or important facts or law to be decided on appeal. The two grounds are extremely vague and are not helpful in aiding the court to arrive at a decision. I therefore reject the Applicants' submission on this point.

[17] Finally, with regard to the validity of the Affidavit, I find it important to set out Order 41, Rule 1) of the Supreme Court Rules of England 91965) which in relevant form provides in mandatory terms:

> *"(1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.*
> …
> *(5) Every affidavit must be in book form, following continuously for page to page, both sides being used.*
> …
> *(8). Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn. "*

[18] Rule 41 (1) (6) then provides as follows:

> *"Jurat – The jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavits should never end on one page with the jurat following overleaf. The jurat should follow immediately after the end of the test. The signature of the Commissioner for Oaths should be written immediately below the words "Before me"*

[19] The obvious reason for this rule is that an extra averment may be inserted after the jurat has been sworn to amount to a tampering of evidence. The Court of Appeal in *Lablache de Charmoy* (supra) held that irregular affidavits cannot be waived by the parties and is bad in law. I agree with this positon. Affidavits are sworn evidence and evidential rules for their admission cannot be waived.

[20] In all the above circumstances, the application for the stay of execution is therefore dismissed with costs.

Signed, dated and delivered at Ile du Port on 8 November 2019

_____

M Twomey CJ