

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 61
MA 307/2019
(Arising in CA 32/2017)

BEAU VALLON PROPERTIES LIMITED
(rep. by *Elvis Chetty*)

Applicant

versus

PHILIPPE COINTY
(rep. by *Frank Elizabeth*)

Respondent

Neutral Citation: *Beau Vallon Properties Limited v Philippe Cointy* (MA 307/2019) [2020] SCSC 61 .(22 January 2020).

Before: Dodin J.

Summary: Stay of Execution pending Appeal. Chances of success on appeal. Bank Guarantee.

Heard: 29 November 2019

Delivered: 22 January 2020

ORDER

Application for stay of execution is dismissed with cost to the Respondent.

RULING

DODIN J.

[1] The Applicant is appealing the judgment of this Court delivered on 16th July 2018 which dismissed the Applicant's appeal from a judgment of the Employment Tribunal delivered on 24th October, 2017. The grounds of appeal before the Court of Appeal are :

- i. *“The learned judge erred in law on the evidence in awarding compensation to the Respondent;*
- ii. *The learned judge erred in law in failing to consider the reasonable excuse given by the Appellant for non-appearance of lawyer;*
- iii. *The learned judge erred in law in holding that the Respondent had adduce evidence to prove the damages, awarded by the trial judge; and*
- iv. *The learned judge erred in law in failing to rescheduling [sic] the case back for hearing.”*

[2] It must be noted that the material issues of contention of the appeal from the Employment Tribunal to this Court were legal representation and procedures adopted by the Employment Tribunal. The grounds of appeal were:

2. Grounds of Appeal.

2.1 The learned Tribunal erred in allowing this case to be heard ex-parte and refusing time for the Appellant to seek the assistance of legal counsel and thus denying the Appellants a fair hearing.

2.2 The learned Tribunal erred when it did not give due consideration to the Notice of Motion filed by the Appellant’s former counsel.

2.3 The learned Tribunal erred when it did not allow the newly appointed counsel time to appear.

2.4 The learned Tribunal erred when it failed to allow the Appellant time to find an alternative counsel when it decided to proceed with the hearing.

2.5 The learned Tribunal erred in order the Appellant pays to the Respondent unpaid salaries up to the day the fixed-term contract was to expire on the 26th January 2012.

2.6 *The learned Tribunal Judge erred in order the Appellant pays to the Respondent leave earned from the period of his employment from the 27th January, 2011 up to the 24th October 2011 totalling 15.75 days.*

3. Relief sought

3.1 *That the whole of the Tribunal decision be dismissed.*

3.2 *That the case shall be remitted to the Employment Tribunal for determination on the merits.*

[3] In his address to the Court during final submissions, learned counsel for the Applicant/Appellant stated thus:

“...My Lord, this afternoon’s appeal is very simple; the appeal is solely based on the fact that the Appellant did not have representation. The Appellant is stating that a miscarriage of justice occurred when the tribunal allowed for the case to be heard ex-parte”...

” ...My Lord, as I stated the case was heard ex-parte. The Appellant was deprived the right to representation. This afternoon my Lord, my appeal is based on that fact. I am asking the Court to overturn the judgment of the Tribunal as I believe the Appellant should be afforded the right to appear with counsel before its forum.”...

“...My Lord, I wish to also address the fact that I have not made reference to the actual finding of the Employment Tribunal. I have not done so my Lord because the facts that I have stated in the proceedings were never tried and tested by any counsel. They were not put under cross-examination, so we do not know what conclusion would have actually arisen had these matters been properly conducted.”

[4] Clearly although the Appellant/Applicant raised the issue of award of compensation and damages in its memorandum of appeal, it did not pursue the same at the hearing of the appeal. The Appellant/Applicant dropped the issue of award or its calculation as grounds

of appeal except in so far as they would be reconvassed at a rehearing of the case by the Employment Tribunal. This position was adopted by both parties although learned counsel for the Respondent ventured to a small extent to the awards to show that the Tribunal did not award to the Respondent all that was being claimed.

[5] It is therefore somewhat misleading for the Appellant to state as its 1st and 3rd grounds of Appeal to the Court of Appeal that the Judge was asked to determine and erred in its determination on the issues of compensation or award of damages.

[6] Grounds 2 and 4 were issues considered by this Court on appeal from the Employment Tribunal which may support the appeal to the Court of Appeal. Nevertheless the matter at hand now is whether there is sufficient reason for this Court to grant the Applicant a stay of execution of the Employment Tribunal awards pending appeal to the Court of Appeal.

[7] Learned counsel for the Applicant submitted that the notice of appeal filed by the Applicant to the Court of Appeal shows that the Applicant has reasonable grounds of appeal and that the grounds are not frivolous or vexatious. Learned counsel further submitted that the Applicant will suffer irreparable hardship in the event that the stay is not granted and that the injury, loss, hardship and inconvenience the Appellant would suffer would be greater than that what the Respondent would suffer in the event a stay of execution is not granted. The Applicant however did not venture further into the details of the hardship, injury, loss, inconvenience that the Applicant stands to suffer should the Application for stay not be successful. Learned counsel further provided the Court with a letter of Guarantee dated 01 October, 2019 issued by the Seychelles International Mercantile Banking Corporation Limited (SIMBC) aka Nouvobanq for the amount of EURO 75,407.41 payable to the Respondent in the event of the Respondent securing judgment on appeal unless sooner revoked by the bank.

[8] Learned counsel for the Respondent objected to the application for stay of execution maintaining that this is a long standing matter whereby the Respondent is being denied the fruit of his judgment. Learned counsel submitted that the issues raised on appeal before this Court were matters of law only and the Applicant does not have any chance of

success in respect of the appeal. Learned counsel moved the Court to dismiss this application for stay.

[9] Section 251 of the Seychelles Code of Civil provides that:

“A judgment creditor may at any time, whether any other form of execution has been issued or not, apply to the court by petition, supported by an affidavit of the facts, for the arrest and imprisonment of his judgment debtor and the judge shall thereupon order a summons to be issued by the Registrar, calling upon the judgment debtor to appear in court and show cause why he should not be committed to civil imprisonment in default or satisfaction of the judgment or order.”

[10] Section 230 of the Seychelles Code of Civil Procedure further states:

“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 the case of Pool v William Civil Side 244/1993 (judgment delivered on 11 October 1996) the Court determined that in considering whether to grant a stay of execution the Court must take into consideration the following:

- a. Whether an appellant would suffer loss which could not be compensated in damages;
- b. Where special circumstances of the case so require;
- c. If there is proof of substantial loss that may otherwise result;
- d. If there is substantial question of law to be adjudicated upon at the hearing of the appeal; or
- e. If the appeal would otherwise be rendered nugatory.

- [12] Further in the case of *Chang-Tave v Chang-Tave [2003]SLR 74 (Civil Side 153/2002 judgment delivered on 6 March 2003)*, the Court added two further requirements as necessary if a stay of execution is to be granted. These are if:
- a. Without a stay the appellant would be ruined; and
 - b. The appeal has some prospect of success.
- [13] In *Avalon (Pty) Ltd & others v Berlouis [2003] SLR 59 (Civil Side 150/2001, judgment delivered on 8th September 2003)*, the Court stated that the Court will exercise its discretion to grant a stay of execution sparingly. It will not without good reason delay a successful plaintiff from enforcing the judgment obtained although as a Court of Equity it will not deny an unsuccessful defendant the possible benefit from the appeal process. Equally, the Court must consider the balance of convenience, hardship and loss the parties may suffer. The judgment debtor/appellant must show that the likely injury suffered by them is greater than any suffering by the Respondent if the stay is not granted.
- [14] In the actual case I can find no evidence to support the assertion that the Applicant would suffer substantial loss or would be ruined or that the Appellant would suffer loss that could not be compensated in damages by the Respondent. It is also clear that a successful appeal would not render the Appellant's judgment on appeal nugatory. No special circumstances has been raised by the Applicant either. The bank guarantee does not in my view assist the Respondent judgment creditor because it can be revoked at any time even before the determination of the Court of Appeal.
- [15] The only grounds for a stay are whether there is a substantial question of law to be adjudicated upon at the hearing of the appeal and whether the Appellant has a reasonable chance of success.
- [16] As stated at the beginning of this ruling, this court made no awards of damages as stated in grounds 1 and 3 of appeal. The decision of the Court is contained in paragraphs 14, 15, 16 and 17 of the judgment:

“[14] The Employment Tribunal was therefore correct to consider the balance of convenience and choose one of the options available to it under its inherent discretionary powers. Paragraph 6(5) of Schedule 6 of the Employment Act states that “A party before the Tribunal may be represented by a lawyer or by a representative of a trade union or an employers’ organization or any other person as the case may be”. It falls short of making it obligatory for party to be represented by a lawyer. I also note further that throughout the taking of evidence, the representative of the Appellant was asked whether she had any question in cross-examination. It shows there was representation by the Appellant although it is another matter whether it was adequate.

[15] In my opinion, the decision of the Employment Tribunal to proceed with the hearing the way it did was not the best of the available options but it was not unlawful either. It is not the function of an appellate Court to substitute its finding for that of the lower Court unless it is clear that the finding of the lower Court was wrong in law or was so perverse that no reasonable Court or Tribunal could have reached.

[16] This appeal therefore cannot succeed and is dismissed accordingly.

[17] Each party to bear its own costs.”

[17] Not only are grounds 1 and 3 either poorly drafted or are erroneous but they do not indicate any chance of success as they were not issues determined by this Court on appeal from the Employment Tribunal.

[18] With respect to grounds 2 and 4 it is understandable that the Appellant would attempt to persuade the Court of Appeal that the failure of the Applicant/Appellant to have the lawyer of its choice who was not available on the date of the hearing would constitute a successful ground of appeal. Unfortunately, this is not view or finding of this Court. If the Court is compelled to wait for litigants to have the services of a counsel of its choosing

when that counsel eventually becomes available the whole litigation process would be held hostage by litigants and would break down.

[19] Consequently I find no sustainable ground to support stay of execution of the award made by the Employment Tribunal pending appeal to the Court of Appeal. This application is therefore dismissed in its entirety with cost to the Respondent.

Signed, dated and delivered at Ile du Port on 22nd January, 2020.

Dodin J.