

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC 111

MC 370/2019

Arising in MC 63 and 78 /2019

In the matter between

STEVE CHANG TAVE

NATASHA CHANG TAVE

NORTHERN STAR PTY LTD

(rep. by William Herminie)

Applicants

and

THE GOVERNMENT OF SEYCHELLES

(rep .by David Esparon)

Respondents

Neutral Citation: *Chang Tave & Ors v Government of Seychelles* (MC 63/2019) [2019] SCSC 111(18 November 2019).

Before: Twomey CJ

Summary: Application for a stay of execution of a section 4 interlocutory order under the Proceeds of Crime (Civil Confiscation) Act

Heard: 5 February 2020

Delivered: 12 February 2020

ORDER

The application for a stay of execution of the court's order of 18 November 2019 is dismissed with costs

RULING

TWOMEY CJ

1. This is an application for the stay of execution of this Court's order made pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act (hereinafter POCA) on 18

November 2019 in which, inter alia, the Applicants and any other person were prohibited from disposing or otherwise dealing with properties listed by the Court and Superintendent Hein Prinsloo was appointed as Receiver of the properties.

2. The Applicants have supported this application with affidavits of the first two Applicants and another of Mr. Jean-Marc Lablache, Attorney-at-Law.
3. The present application is to the effect that the Applicants were deprived of their constitutional right to a fair hearing. They claim that unbeknown to them, they were granted legal aid but that Counsel Mr. Derjacques appointed for the First Applicant was only informed only fifteen minutes before the case was called and Mr. Lablache appointed for the Second Applicant was informed of his appointment after the case was called and that neither Applicant were in a position to file their defences. Mr. Lablache has supported this averment by stating in an affidavit that he received notification of his appointment only at around 11 am on the 23 October 2019 after the case had already been called.
4. From the proceedings on file, I make the following observations in respect of the averments of the affidavits:
 1. On 9 October 2019, Mr. Joel Camille appeared for all respondents (now the Applicants in this suit) and the Court then observed that all pleadings according to the return of summons had been served. Mr. Camille was in court given a fresh copy of the affidavit in support of the section 4 application by the present Respondent. His clients were given time outside the notice period to file affidavits in answer to that of the Respondent (See Rule 5 of the Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016). The Court indicated on that occasion that if the notices and other proceedings were not on file in breach of the Rules, it would proceed in default on the next occasion.
 2. On 9 October 2019, subsequent to the court sitting, the two Applicants and one Jean Mellie swore affidavits countering that of the Respondent with regard to the section 4 application. These affidavits were not placed on the court file until after the 16 October 2019.

3. On 16 October 2019, Mr. Camille withdrew his appearance from the matter, the reasons for which became obvious in the course of the proceedings and is referred to in the court's ultimate order of 18 November 2019. The court informed the Applicants of the time line in terms of filing responses under the Rules of POCA and again indicated that unless their response was on file by then, the court would act in default.
 4. On 23 October 2019, the affidavits of the first two Applicants and Mr. Mellie were on file when the case was again called at 9.30 am and this was noted by the Court. It was also indicated to the court by Mr. Derjacques that he had been appointed under the Legal Aid Act to represent the Applicants.
 5. As the affidavits were on file, the Rules complied with, and the matter ripe for the court's decision, the legal aid certificate in respect of Mr. Derjacques who was present in court was therefore set aside without objection. There was no indication on the court file that Mr. Lablache had been appointed as the representative of the Second Respondent nor did the Second Applicant inform the court of this fact. In any case, the Applicants having complied with the Rules by having filed their counter affidavits, there was no further necessity for legal representation or any further pleadings or proceedings as the matter only awaited the decision of the Court
 6. The Court indicated that it would consider the affidavits of the parties to the suit and give its decision, which it did on the 18 November 2019.
5. Under the provisions of section 24 of POCA and Proceeds of Crime (Civil Confiscation) (Procedure) Rules, 2016 strict rules are imposed for all matters commenced under POCA. In this regard, the following provisions are relevant to the present matter:

Rule 3 (8) Where a party materially fails to comply with any provision of these Rules, the Court shall -

(a) dismiss the matter;

(b) disregard any non-compliant document or part thereof; or

(c) proceed by default,

unless the Court for good cause otherwise directs.

...

Rule 5(3) Where notice of an application has not been given in accordance with this rule within 21 Court days after filing the application, the Court may -

(a) direct that notice is given within a further period not exceeding 21 Court days;

...

(d) dismiss the application...

8. (1) A respondent other than the FIU who has received notice of an inter partes application under the Act shall enter an appearance in Form 2 within seven Court days.

(2) Where a respondent fails to comply with subrule (1), the Court shall proceed by default against that respondent unless the non-compliance has been sufficiently explained in Court.

(3) A respondent shall file a reply affidavit within 14 Court days after entering an appearance or, where the respondent is the FIU, within 21 Court days after receiving notice of the application.

(4) Extension of time for filing reply affidavits may be granted only for good cause, on a request made in advance by notice of motion filed in accordance with rule 3(6).

(5) Where a respondent fails to file a reply affidavit within time, the Court shall proceed by default unless an extension of time is granted in accordance with subrule (4).

6. It is clear from the provisions above that the applicants were not denied any rights, if anything they were given more than the specified statutory time to comply with the provisions and they were at that time legally represented.

7. With regard to hearing inter partes applications, where there are no points of law to argue, the matter is decided on the affidavit evidence filed, although the cross-examination of the deponents as to the veracity of their averments is permitted (See Rule 9 (5)). The procedures for interlocutory applications under POCA are different to other civil suits and follow specific rules as laid out. In this case Counsel for the Applicant

(Mr. Esparon) did not seek to cross-examine the Deponents. The Court in the present case therefore proceeded to consider the affidavit evidence as is normal in such proceedings and delivered its decision on 18 November 2019.

8. It is therefore patently incorrect to aver that the Applicants did not have an opportunity to present a defence or were denied a fair hearing. The proceedings have progressed exactly according to the Rules of POCA.
9. With respect to the application for the stay of the order, the Respondent has averred that in any case the Applicants have not complied with the Court's order in its entirety: the Applicants' relatives still occupy the dwelling house; several items of jewellery specified in the order have not been handed over. In this respect, it must be observed that a stay of execution is a discretionary and equitable measure. He who comes to equity must do to equity. From the affidavit evidence, it is clear to me that the Applicants have not come to this court with clean hands. The affidavit evidence before this Courts show that the Applicants are currently in contempt of the court order. Proceedings may yet issue on this matter.
10. The Respondent also aver that there are no grounds or sufficient grounds for a stay of execution of the Court's order to be granted.
11. It is trite that a stay of execution is granted only where the following principles are followed:
 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 (See in this respect *Elmasry & Anor v Hua Sun* (MA 195/2019 (Arising in CC13/2014)) [2019] SCSC 962 (08 November 2019)).*

12. It is further noted that any interest the Applicants have in the properties that have been forfeited are preserved and remain in the hands of the Receiver and will remain so until the conclusion of this case even if the appeal were to proceed beyond the twelve months' validity of the interlocutory order. The Applicants can at any time apply to set the order aside.
13. Given the above facts, circumstances and law, I do not see how the application meets the principles on which a stay of execution is granted and it is accordingly dismissed with costs.

Signed, dated and delivered at Ile du Port on 12 January 2020.

M. Twomey
Chief Justice