

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC
MA 35/2020
(Arising in CC08/2015)

In the matter between:

DAVID ESSACK
(rep. by Anthony Derjacques)

Applicant

and

EDGAR MOREL
(rep. by France Bonte)

Respondent

Neutral Citation: *Essack v Morel* (MA35/2020) [2020] SCSC (17th November 2020).
Before: Burhan J
Summary Conditional stay of execution of judgment pending appeal granted.
Heard: 24th July 2020 and 15th October 2020
Delivered: 17th November 2020

ORDER

Stay of execution of judgment pending appeal granted on condition that the whole judgment debt due at the time the judgment was delivered i.e. on 29th October 2018, be deposited in Court. In the alternative a bank guarantee in respect of the payment of the said sum, be produced to Court by the next date.

RULING

BURHAN J

[1] This is an application by the aforementioned applicant for stay of execution of judgment pending appeal.

- [2] The salient facts to the case are that judgment was given in favour of the respondent (plaintiff) on the 29th of October 2018. Thereafter, the respondent moved Court as judgment creditor for the recovery of the said debt owed to him by the judgment debtor the defendant in the main case and applicant in this application. The applicant in this application argued that he was protected by the corporate veil and moved Court that the respondent's application for recovery of the said debt be dismissed. However by ruling dated 30th January 2020 this Court held that the applicant was personally liable. It is against this order that the applicant has now filed an appeal and seeks a stay of execution of proceedings pending determination of the appeal.
- [3] It is the contention of learned Counsel for the applicant Mr. Derjacques that as he has reasonable chances of success in his appeal the application for stay should be granted. It is the contention of the applicant that a special application for lifting the corporate veil should have been filed and an opportunity given to the applicant of being heard on the said issue. He further states that the applicant is 75 years old a pensioner and if he were to pay this debt and he is successful in his current appeal, then he would have to recover his money back which would take him at least another five years.
- [4] Learned Counsel for the respondent Mr. France Bonte opposes the application on the basis that the applicant did not prefer an appeal from the final judgment and that if a stay is to be given that the applicant (judgment debtor) deposit the money in Court and if he does so, he has no objection to a stay of execution being given pending appeal.
- [5] It would be pertinent at this stage to mention that another issue arose in respect of whether learned Counsel for the applicant should have sought leave to appeal under section 12 (2) of the Courts Act, prior to filing his appeal relevant to this application. Having considered the submissions on this issue made on the 15th of October 2020 by both learned Counsel, this Court is of the view that as the final judgment has been delivered in this application, the appeal filed at this stage of proceedings, does not attract the provisions of section 12 (2) of the Courts Act, as it is not an appeal from an interlocutory order given in the hearing of the main case. Therefore the need to seek leave

to appeal in an appeal preferred at this stage of proceedings does not arise, as the final judgment has already been given in this case.

[6] The general rule in an application for stay of proceedings pending appeal, is to decline a stay unless there are significant and substantially valid or strong grounds on which the applicant relies. Therefore, a stay of execution is the exception rather than the rule.

[7] In the case of **Mary Geers v Noel De Lafontaine SCSC 903, MA200/2018 (arising in CS78/20115)**, wherein referring to **Alexander v Cambridge Credit Corp Ltd [1985] 2 NSWLR 685, Choppy v NSJ SC23/2011** and **Chow v Bossy SC 53/2011**, it was held that the considerations to be applied on an application for stay are that;

“(a) the onus is upon the applicant to demonstrate a proper basis for a stay which is fair to all the 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 the balance of convenience and competing rights of the 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 favour of a stay;

(e) the Court will not generally speculate upon the appellant’s prospect of success, but may make 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 gain time,

(f) As a condition for stay the Court may require payment of whole or part of the judgment sum or the provisions of security.

[8] Firstly, it cannot be said that the applicant was not given an opportunity to be heard on this issue as on the first opportunity provided to the applicant (judgment debtor) to show

cause as to why he should not pay the debt to the respondent (judgment creditor), he took up the defence that he was protected by the corporate veil and after hearing both parties on that particular issue, this Court made a ruling dated 30th January 2020 that this is a fit case for the corporate veil to be set aside. It is from this ruling that the applicant now seeks to appeal. Further it is to be noted that no appeal was preferred from the final judgment of this Court dated 29th October 2018, clearing indicating that that the applicant either agreed with the judgment or slept on the rights available to him. He cannot now suddenly awake and ask for a stay of proceedings, based on the fact that he has a reasonable chance of succeeding in appeal. His delayed appeal at this stage of proceedings, indicates that he is stalling for time, in order to prevent the respondent from enjoying the fruits of the judgment given in his favour.

- [9] I have considered the balance of convenience and competing rights of the parties and conclude that the applicant has failed to satisfy Court of any good reasons why an order for stay should be made. I feel that the applicant is merely buying time and denying the respondent the possibility of enjoying the fruits of his judgment.
- [10] For the aforementioned reasons, I am inclined to refuse the order for stay. However, as learned Counsel for the respondent has stated that he has no objections to the stay being given, if the applicant were to deposit the said sum in Court, this Court holds that a stay of proceedings pending appeal be granted, on condition that the whole judgment debt due at the time the judgment was delivered i.e. on 29th October 2018, be deposited in Court. In the alternative a bank guarantee in respect of the payment of the said sum, be produced to Court by the next date.
- [11] If the aforementioned conditions are not adhered to, no stay of execution pending appeal is permitted and the applicant is to show cause on the next date as to why he should not be committed to civil imprisonment in default of satisfaction of the judgment debt.

Signed, dated and delivered at Ile du Port on 17th November 2020.

M Burhan J