

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2019] SCSC

MA 29/2020

Arising in CC 49/2015)

In the matter between:

MASSIMO LONGOBARDI (*rep. by Rene Dur up*)

and

FELICITA PIROZZOLO

(*rep by Rene Durup*)

v/s

ROBERTO ROCCHI

(*rep. by Joel Camille*)

1st Applicant

2nd Applicant

Respondent

Neutral Citation: *Longobardi and Anor v Rocchi* (MA 129/2020 arising from CS 49/2015) [2020] SCSC.....(25th November 2020).

Before: Pillay J

Summary: Stay of Execution

Heard: By way of affidavit and submissions

Delivered: 25th November 2020

ORDER

Motion for stay of execution is dismissed.

RULING

PILLAY J

- [1] By way of a motion filed on 6th August 2020, with supporting affidavit, the Applicants in the case seek an order of the Court staying the execution of the Judgment in the main case pending the hearing of the Applicant’s appeal before the Court of Appeal.
- [2] **The first Applicant** averred that on 10th February 2020, the Supreme Court gave a judgment ordering the Applicants, then Defendants, jointly and severally, to pay the Respondent, then Plaintiff, as follows: Euros 85, 976 plus 4% interest as well as moral damages on SCR 100, 000.00.
- [3] **The first Applicant** averred that he has filed an appeal against the said judgment before the Seychelles Court of Appeal.
- [4] He further averred that there are points of law and facts to be adjudicated upon on the hearing of the appeal. The appeal is a meritorious case and has some prospect of success.
- [5] He averred that should the Respondent be allowed to execute the judgement, any judgment given in

his favour by the Court of Appeal would be rendered nugatory.

[6] The second Applicant rehearsed the same averments in her own affidavit.

[7] Indeed with the second Applicant's affidavit was attached a Notice of Appeal dated 16th March 2020.

There is no formal seal or receipt confirming that the appeal has indeed been filed in the Court of Appeal.

[8] By way of submissions counsel for the Applicants rely on section 43 (3) of the Courts Act and section 230 of the Seychelles Code of Civil Procedure as well as Rule 20 (1) of the Seychelles Court of Appeal rules.

[9] Counsel referred to the case of **International Investment Trading v Piazzola (2005) SLR 57** and **Choppy v NS J Construction (2011) SLR 215**.

[10] Counsel further expanded on the grounds of appeal and the Applicants chances of success on the appeal.

[11] The Respondent objected to the motion, averring that the sums he invested with the Applicants were from his personal savings, hence any order for stay of execution would affect him adversely.

[12] In terms of the law applicable to applications for stay of execution 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. ”

[13] It was held in the case of **International Investment Trading SRL (IIT) v Piazzola & Ors (2005) SLR 57** that the power of the Court to grant or deny a stay is a discretionary one.

[14] In the same case the Court stated as follows;

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

[15] The case of **Choppy v NSJ Construction (2011) SLR 215** sets out the following such principles, which was approved in the **International Investment Trading** case above:

- 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. *ÄAe 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.

[16] In the case of **Elmasry & Anor v Hua Sun (MA 195/2019 (Arising in CC13/2014))**

[2019] SCSC 962 (08 November 2019) Twomey CJ, summarized the law as follows:

[11] 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 J A 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 than 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, when 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)?

[17] In effect the Applicant has to show that should the appeal be successful the Applicant will have no way to recover any funds paid to the Respondent, as clearly explained in the case of **Lablache de Charmoy v**

Lablache de Charmoy (Civil Appeal SCA MA 08/2019) [2019] SCCA 35 (17 September 2019)

[18] The Court of Appeal in the **Elmasry and Anor v Hua Sun (SCA 28/2019) [2020] SCCA 2 (23 June 2020)**,

held that:

...the most important element that needs to be satisfied in seeking a Stay is to aver in the application and satisfy the Court prima facie that there are substantial questions of law and facts to be adjudicated upon at the hearing of the appeal. Merely stating that the applicants have an arguable case and the appeal filed has some prospect of success, is not sufficient. The affidavit filed in this case does not state why the Applicants believe that they have an arguable case or has some prospect of success.

[19] The Court went on to simplify the consideration by setting down the following guidelines for a decision on a stay of execution of a money judgment;

C has obtained a money judgment against D who appeals and applies for a stay of execution. C objects. The Court must ask the following questions:

Q1 Has 1) satisfied me that there is a substantial question of law to be adjudicated upon at the hearing of the appeal and that his appeal has a good prospect of success?-

If yes, proceed to Q2. - If no, a stay should not be granted.

Q2 Has I) satisfied me that he will be ruined, or his appeal otherwise be stifled if forced to pay C immediately instead of after the (unsuccessful) appeal?

If yes, a stay can be granted subject to considering the answers to Q4. - If no, a stay should not be granted unless a positive answer is given to Q3.

Q3 Has D satisfied me that there is no reasonable probability that C will be able to repay the monies paid to C by D?

If yes, a stay should be granted, subject to considering the answers to Q4. - If no, a stay should not be granted.

Q4 What are the risks that C will be unable to enforce the judgment if the stay is granted and D's appeal fails? Depending on the extent of that risk and other relevant circumstances can there be a compromise solution: payment of all or part of the relevant sum into court to await determination of the appeal: a stay only of part of the judgment sum: provision of security for part of C's payment to D? A compromise solution should be a last resort, the basic rule being that a money judgment must be complied with, so that a claimant is entitled to recover the money straightaway and not to suffer further losses or lost opportunities in the period till the appeal is heard.

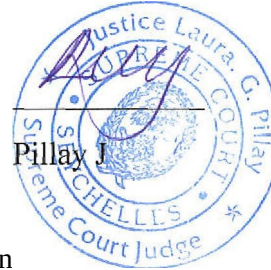
[20] With regard to the case at hand, there is no additional evidence to the affidavit that the first Applicant is indeed paying the tuition fees for his daughter. Furthermore there is no evidence of the cost of those fees in relation to his salary. As for the Respondent's ability or inability to repay any monies received in execution there is no evidence to that effect.

[21] In as much as the Applicants have shown that there is a substantial question of law to be adjudicated upon at the hearing of the appeal and that their appeal has a good prospect of success, their failure to

show that they will be ruined or their appeal stifled if forced to pay the Respondent as well as their failure to show that the Respondent will be unable to repay the monies paid to him results in their application failing.

[22] On that basis the motion is dismissed. Each side shall bear their own costs.

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Signed, dated and delivered at He du Port on