

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC
MA 229/2021

In the matter between:

North Island Company Limited

Applicant

(Rep. by Mr. Basil Hoareau and Mr. Guy Ferley)

versus

Ayyoub Salameh

Respondent

(Represented by Mr. Clifford Andre)

Neutral Citation: North Island Company Limited v Ayyoub Salameh [2021] SCSC MA 229/21 arising in CA 23, 2021

Before: Judge Esparon

Summary: **Application for stay of execution of Judgment- Section 230 of the Seychelles Code of Civil Procedure- Order granted by the court to stay execution of Judgment pending appeal with conditions**

Heard: 18th October 2021

Delivered: 28th October 2021

RULING

ESPARON J

[1] This is an Application seeking an order from this Court to stay execution of a Judgment delivered on the 24th August 2021 by the Employment Tribunal pending Appeal. The Application is Supported by the Affidavit of the deponent namely Mr. Vincent Meriton which Affidavit has been sworn in his Capacity as a Director of the Appellant /Applicant in the matter namely North Island Company Limited.

[2] The grounds on which he is relying upon in support of Application for a stay of execution is contained in Paragraphs 5 to 10 of the affidavit of the above deponent.

[3] In Paragraph 5 of his affidavit, the deponent avers that I am advised by my Attorney to the Application and I verily believe same to be true that the Applicant has a strong case for success for the Following reasons inter alia;

- i) The ruling dated 20th July 2021 was made in contravention of schedule 6 (Section 73(A) of the Employment Act because the Tribunal had no Quorum.
- ii) The Tribunal had not sought the consent of the Parties to proceed with only the Chairperson and one member.
- iii) The tribunal erred in law in finding that the Respondent had committed no offence minor or otherwise to warrant his immediate termination when evidence shows that he repeatedly ignored specific provision and explicit orders from his employer to cause his subordinates to comply with reasonable orders issued by his employer.
- iv) The Employment Tribunal failed to consider that repeated failures to obey a reasonable order is a serious disciplinary offence and warrants instant dismissal pursuant to part III (i) of the Employment act.

[4] The deponent has averred at paragraph 6 of his Affidavit that the Respondent is a foreign national who left the Jurisdiction and has no reason to return to the Jurisdiction and at paragraph 7 the Deponent further avers that because the Respondent is a foreigner and has no assets in the Seychelles, if the Applicant succeeds with its Appeal, which has a strong likelihood of success, without a stay the Judgment would be rendered nugatory.

[5] The Deponent further avers in paragraph 6 and 7 of his Affidavit that there are substantial questions of law to be adjudicated upon namely the interpretation of Part III (i) of the employment Act and that the balance of convenience lies with the Applicant in that the Respondent is beyond Jurisdiction of the Court and it will be very impractical to recover any money from him under the Judgment.

- [6] The Respondent, Mr. Ayyoub Salameh on the other hand has filed an Affidavit in reply objecting to the Application of the Applicant for the stay of execution of the said Judgment pending the Appeal.
- [7] The grounds for his objection is found in Paragraph 3 of his Affidavit where the deponent avers that Mr. Vincent Meriton was not a director when the case was filed and when he was GM of North Island and that he has no knowledge of what had happened in court as he was not present and had not followed the case and that he is averring what he doesn't have knowledge.
- [8] The Respondent avers in paragraph 7 of his Affidavit that in the first place the Applicant was the one who requested from the tribunal for an adjournment and never at any point informed the tribunal that it was not properly constituted and in paragraph 7 the Respondent avers in his Affidavit that in view of the fact that the Applicant was the one who requested for an adjournment and this is taken that the Applicant has consented to the chairman sitting with any other member as there was no objection as such on record.
- [9] At Paragraph 7 of the Affidavit the Respondent avers that that there is no chance of success in any Appeal by the Applicant as it was the Applicant that made the Application for adjournment without raising any issue before the tribunal regarding to any illegality and therefore no chance of success in the Appeal.
- [10] The Respondent further avers in Paragraph 11 of his Affidavit that the Respondent can and in fact will return to Seychelles anytime when required even on vacation as he has not been declared a PI.
- [11] The Respondent averred in paragraph 9 of his Affidavit that the Judgment of the employment tribunal has been delivered and therefore no prejudice will or has been made to the Applicant. The execution of the ruling has commenced and the fact that the Appellant had not Appealed at that time and that the court have always stated that a stay should not be granted as it prevents the Respondent from bearing the fruits of the Judgment.

- [12] In his submission before the court counsel for the Applicant relied on the case of DR *Ashraf Elsmay and Ors V/s Margarete Hua Sun* SCA MA 37/2019 (arising in SCA 28/2019). He submitted to the Court in relying on the authority of the case referred to above that the grounds which should be present in order for the court to grant a stay of execution of the Judgment is that the court should prima facie be satisfied that there is a substantial question of law and facts to be adjudicated upon at the hearing of the Appeal and the Applicant has an arguable case and the Appeal filed has some prospect of success. Counsel for the Applicant also submitted that once the above pre- conditions have been satisfied prima facie only then can the court look at the principle that if the stay is not granted and the Appeal is successful, whether the Applicant will suffer loss, which will render the Appeal nugatory.
- [13] Counsel for the Applicant referred to the Affidavit of Mr Vincent Meriton in support of the Applicant' s Application for a stay of execution of Judgment and submitted that the Applicant have established that there is a substantial question of law to be adjudicated upon as averred in the said deponent' s Affidavit namely that the ruling was made in contravention of schedule 6 (section 78(3) (a)) of the Employment Act because the Tribunal had no quorum and did not seek the consent of the parties before proceeding with only the Chairman and only one member which raises the question as to whether the Tribunal was properly constituted which goes to matters of interpretation of schedule 6 of section 78 (3) (a) of the Employment Act.
- [14] Secondly counsel submitted there is also a substantial question of fact to be adjudicated upon as to whether the Respondent had committed a disciplinary offence which warrant his termination.
- [15] Counsel for the Applicant also submitted that as to the issue of if the stay is not granted and the appeal is successful as to whether the Applicant will suffer loss which will render the Appeal nugatory is that in the present case the Respondent is a non-Seychellois with no assets in Seychelles and if he is paid the money, the chances of the Applicant recovering that money in the event the Appeal is successful is almost non- existent and hence it will render the Appeal nugatory if the Appeal is successful.

- [16] Counsel for the Applicant also raised a point of law that the Affidavit sworn by the Respondent is defective and bad in law since the Affidavit in reply to the Application has been sworn in Dubai purportedly before a Senior Legal Consultant, managing director in Dubai legal Affairs. Counsel for the Applicant relied on the authority of the case of *Nasim Onezime v/s Attorney General and the Government of Seychelles* (CP01/2021, (2021 SCSC 4) and submitted to this Court that Affidavits sworn out of the Jurisdiction of Seychelles has to be authenticated only in accordance with section 28 of the evidence act and this not being done in accordance with the said section and as such the Affidavit sworn by the Respondent is defective and bad in law and that the Court should simply take it that there is no proper Affidavit before the court. Hence the effect of this is that there is no objection on file against the stay of execution of Judgment and that there is no Affidavit upon which he can base his submissions on.
- [17] Counsel for the Applicant also submitted that on the issue raised by the Respondent in paragraph 3 of his Affidavit that Mr. Vincent Meriton swore an Affidavit and made averments on matters not within his personal Knowledge that section 170 of the Seychelles Code of Civil Procedure provides that in interlocutory matters an Affidavit can contain matters as to the belief and knowledge of the deponent. Counsel for the Applicant further submitted that since he was a director at the time the Judgment was delivered he would have read the judgment and hence it would have been within his personal Knowledge.
- [18] Counsel for the Applicant also submitted that since execution of the said judgment is not yet completed the court does have the power to stay execution of the Judgment pending Appeal.
- [19] On the other hand, Counsel for the Respondent raised a point of law that the Affidavit of Mr. Vincent Meriton sworn in support of the Application is against Order 41 rule 1(1) of the white book which provides that every Affidavit sworn in a cause or matter must be entitled in that cause or matter and since it does not state in which cause or matter it is, it is hence in breach of order 41 rule 1 (1).

- [20] Learned Counsel for the Respondent submitted that in order to satisfy the conditions for granting a stay prima-facie the grounds of Appeal must be substantial and that the application for an adjournment was made for an interlocutory matter and the Judgment was delivered in the presence of a full bench. He further submitted at the time counsel for the Applicant moved the application for an adjournment, the Applicant would have seen that the Tribunal was not properly constituted but went ahead to move the motion showing that he consented to hear the matter with two members only and hence the Appeal has no prospect of success and that there is no arguable case He further submitted that such an Application made cannot deprive the successful party the fruits of the Judgment. He further submitted that even if it was a Judgment for a sum of money the Court of Appeal did not grant a stay of execution.
- [21] Learned counsel for Respondent further submitted that the Affidavit sworn by the Respondent was sworn before a competent authority in the UAE and submits to the Court to consider the Affidavit of the Respondent and rather to consider the Affidavit of Mr. Vincent Meriton to be defective in terms of order 41 rule 1 (1) of the white book and as such there is no Affidavit before the Court in support of the Application. Hence Counsel for the Respondent submitted to the Court that the court should not make an order granting the stay of execution of Judgment.
- [22] This court have meticulously considered the submissions of Counsel for the Applicant and Counsel for the Respondent in the matter and will deal with the submissions as to the points of law raised as to the Affidavits being defective before going into the merits of the Application.
- [23] As regards to the issue raised by the Respondent in his Affidavit that Mr. Vincent Meriton has averred in his Affidavit matters which are not within his personally knowledge, I take note from the attachment attached to his Affidavit showing the particulars of Directors of the Applicant namely North Island company limited that Mr. Vincent Meriton became a Director of the Applicant which documents was registered at the Registrar General on the 16th of July 2021 and the Said impugned ruling was delivered on the 20th July 2021. Section 170 of the Seychelles Code of Civil Procedure

requires that an Affidavit shall be confined to such facts as a witness is able of his or his own personal knowledge to prove, except in interlocutory application for which a statement as to his belief with the grounds there of are admitted.

[24] This Court takes note that an Application for stay of execution of a judgment is an interlocutory application of which a statement as to the deponent's belief with grounds thereof is admissible. Further at paragraph 5 of Mr Meriton's Affidavit, he avers the following;'' I am advised by my Attorney to the Application and verily believe same to be true that the applicant has a strong chance of success in it's Appeal for the following reasons and states the reasons. Hence I find that the Affidavit of Mr. Meriton is not defective as it contains averments as to his belief with grounds thereof in accordance with section 170 of the Seychelles Code of Civil Procedure and can be relied upon.

[25] As regards to the point of law raised by Counsel for the Respondent in his submission as to the fact that the Affidavit of Mr. Vincent Meriton is defective since it is in breach of order 41 Rule 1 (1) of the white book since it does not say in which cause or matter it is. The case of *Elmasry and ors v/s Margarette Hua Sun* SCA MA 37/2019 whereby a similar issue arose since it was argued that the Affidavit was in breach of Order 41 Rule 1 (1) as there was no title to the Affidavit and it does not state in respect of which cause or matter it has been sworn. Justice Fernando, President of the Court of Appeal held that '' I am of the view that although it would have been preferable if the Affidavit itself was entitled but in view of the statement in the Notice of Motion referred to earlier and the averments in paragraphs 2 and 3 of the said Affidavit there is no breach of Order 41 rule 1 (1) of the white book.

[26] This court in the present case have examined both the Notice of motion and the Affidavit filed in the present case and takes note that the Notice of Motion contains the Appeal case number CA 23 /2021 and mentions that it is seeking an order staying the execution of a Judgment delivered on the 24th August 2021 in the above case and this for the reasons set forth in the attached Affidavit. In Paragraph 2 of the said Affidavit there is an averment as to the case number before the employment Tribunal namely case number ET 02/21 and in paragraph 4 there is an averment that the Judgment was

delivered on the 24th August 2021 and the Applicant has Appealed against the said judgment and that a copy of the Judgment is attached herewith and marked as exhibit.

[27] This Court finds that in view of the statements contained in the Notice of motion and the averments contained in paragraphs 2 and 4 of the said Affidavit in the present case, that there is no breach of Order 41 rule 1 (1) of the white book.

[28] I will now turn on the point of law raised by Counsel for the Applicant in the present case namely that the Affidavit sworn by the Respondent is defective and bad in law since it has not been authenticated in accordance with section 28 of the evidence act in view that it is an Affidavit sworn outside the Jurisdiction of Seychelles.

[29] Section 28 (1) of the Evidence act provides that "When any document executed in a foreign country or place, not being a public document executed in the territory of a convention state is produced before any Court in Seychelles purporting to have affixed impressed or subscribe thereon the seal and signature of any British Ambassador, envoy Minister, Charge d'affaires, Secretary of Embassy or Legation, British Consul General, Consul, or vice Consul, Acting Consul, Pro Consul, Consular Agent, Acting Consul General, Acting Vice Consul or Acting Consular Agent, duly authorized by Section 6 subsection (1) of the Commissioner of Oaths Act, of the Imperial Parliament as amended by section 2 of the Commissioner of Oaths Act, 1891, of the Imperial Parliament to administer an Oath in testimony of any Oath, affidavit or act being administered taken or done by or before any such officer, such document shall be admitted in evidence without proof of the seal or signature being the seal or signature of any such officer and without proof of the official character of any such officer, and the Court shall presume that such seal or signature is genuine and that the officer signing any such document held at the time when he signed the official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the United Kingdom of Great Britain and Northern Ireland in accordance with English Law of Evidence for the time being:

Provided always that anything in this section contained shall not be deemed or taken to render inadmissible as evidence in the Courts in Seychelles any deed, writing, act or

thing which before the passing of this Act would have been admissible or would by law have been taken Judicial notice of.

[30] Section 28 (1) of the Evidence Act deals with judicial recognition of any document from any foreign country sworn before diplomatic or consular officers in foreign countries other than public documents from a Convention State whilst section 28 (2) Of the Evidence Act deals with Judicial recognition of public documents executed in the territories of a Convention state. Since the State where the purported Affidavit was allegedly sworn is the UAE which is not a Convention state, I find no need to reproduce section 28 (2) of the Evidence Act in the present Judgment.

[31] The case of *Onezime V/S AG and Ors* (CP 01/2021) (2021) SCSC 4 (7 September 2021) of which the Constitutional Court relied on the case of *Joy kawira Kanga v/s Ministry of Employment, Immigration and Civil Status and Anor* (2020) SCSC 657 (2020) Where Govinden J had this to say;

“If a state is not a party to the Convention the documents must be authenticated. Authentication stands for verification of the genuineness of a document or signature, to make it effective or valid. For countries which are not party to the Apostille Convention, documents are required to go through the authentication process certifying the authenticity of the document before being presented in the Country of use.”

“A state that has not signed the Convention must specify how foreign legal documents can be certified for its use. Two countries may have a special Convention on the recognition of each other’s public documents, but in practice, this is infrequent and authentication would be the norm. The documents must be certified by the foreign Ministry of the state in which the document originates and then by the foreign Ministry of the Government of the State in which the document will be used; one of the certification will often be performed at an Embassy or Consulate. In practice this means that the document must be certified twice before it can have legal effect in the receiving country”.

- [32] In *Nasim Onezime* (Supra) the Constitutional court held that “Both parties to this case have admitted that Kenya is not a party to the Apostille Convention, accordingly, the Affidavit by Mrs. Onezime, signed by a commissioner of Oaths and Public Notary, does not suffice. This accordingly renders the Petitioners Affidavit inadmissible”.
- [33] In the present case, I note that the purported Affidavit has been sworn in Dubai purportedly before a Senior Legal Consultant, managing director in Dubai legal Affairs.
- [34] This court further takes judicial notice that the UAE is not a party to the Apostille Convention and hence it is clear from the above that the purported Affidavit has not been authenticated in accordance with section 28 (1) of the evidence act which renders the Respondent Affidavit inadmissible. However in view that counsel for the Applicant raised this point of law at a very late stage during the hearing of the Application itself of which I find that it is somewhat catching the Respondent by surprise by way of ambushing the Respondent, this Court being a court of law which shall uphold the right to fair hearing in the present civil proceedings in accordance with our Constitution and the fact that the submission of Counsel for the Respondent is mainly based on submission on the law which need not necessarily be pleaded. As a result this Court shall proceed to consider the Submissions of the Respondent in the matter.
- [35] The law as regards to the stay of execution Judgment is as provided for in section 230 of the Seychelles Code of Civil Procedure which provides that:
- “An Appeal shall not operate as a stay of execution or of a 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.”
- [36] It follows from the reading of section 230 of the Seychelles Code of Civil procedure that “a stay of execution of judgment is a discretionary remedy and that such a discretion should be exercised judiciously and as such the general rule is to decline a stay, unless solid grounds are shown. A stay is therefore an exception rather than the

rule'' (vide: *Elmasry and Ors v/s Margarett Hua Sun*, Civil Appeal SCA MA 37 /2019 (arising in SCA 28/2019).

[37] In the case of *Elmasry and Ors V/s Magarett Hua Sun*, Civil Appeal SCA MA 37/2019 (arising in SCA 28/2019) , Justice Fernando listed down the circumstances which the Court would consider in granting a stay which have been stated as follows in earlier Seychelles Authorities:

- i) Where there is a substantial question of law to be adjudicated upon at the hearing of the Appeal,
- ii) Where special circumstances so require,
- iii) Where there is proof of substantial loss that may otherwise result,
- iv) Where if the stay is not granted the appeal is successful, would be rendered nugatory,
- v) If a stay is granted, and the Appeal fails, what are risk that the Respondent will be unable to enforce the Judgment,
- vi) If the stay is refused, and the Appeal succeeds, and the Judgment is enforced in the meantime, what are the risk of the appellant being unable to recover the subject matter of the execution (in money Judgment which have been paid to the Respondent).

[38] The Court further held in the case referred to above that "The sine qua non or 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 question of law and fact 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 Court went further in stating that an Appeal shall succeed before an Appellate Court, where the trial Court had erred in law or facts in rendering its judgment and not on the issue of prejudice that will be caused to the other party. Issues such as prejudice to parties and the balance of convenience come in for consideration only where the Court hearing a stay of execution Application is prima-facie satisfied

that there are substantial question of law and facts to be adjudicated upon at the hearing of the Appeal, that the Applicant has an arguable case and the appeal filed has some prospect of success. This necessitates that the Notice of Appeal filed should in stating the grounds of Appeal, at the bare minimum disclose the question of law and facts upon which the Judge erred and thus to be adjudicated upon at the hearing of the Appeal. This does not mean that there needs to be an elaborate discussion of the law and facts.

[39] In the case of *D.L de Chamoy Lablache and P.L. DE Charmoy Lablache* (2019) SCSC 962 (MA/195/2019) the court stated: ' moreover, in applications for stays, the Applicant must make full, Frank and clear statements of irremediable harm to him/her if no stay is granted. This is primarily to ensure that a successful party is not denied the fruits of a judgment.

[40] This court has taken cognizance of the grounds of Appeal filed as regards to this matter and the averments made in paragraph 5 of the Affidavit of the Applicant without going into the merits of Appeal and notes that ground (i) and Ground (ii) of the Appeal as mentioned in paragraph 5 of the Affidavit of the Applicant that it relates to matters of interpretation of schedule 6 (section 73 (A)) of the employment Act. Hence this Court finds that the Applicant has satisfied this Court prima-facie that there is a substantial question of law to be adjudicated upon at the hearing of the Appeal. This Court is equally satisfied after a cursory look at ground (iii) and ground (iv) of the Appeal as averred in paragraphs 5 of the Affidavit of the Applicant which relates to whether the Employment Tribunal erred in its finding that the Respondent had committed no offence to warrant the immediate termination and hence I find that the Applicant has satisfied the Court prima - facie that there is a substantial question of facts to be adjudicated upon at the hearing of the Appeal.

[41] From a cursory look of ground (i) and (ii) of Appeal as averred in paragraph 5 of the Affidavit of the Applicant namely in ground (ii) of Appeal where the Appellant avers that the tribunal had not sought the consent of the parties to proceed with only the chairperson and one member sitting and a perusal of the record of the proceedings of the matter before the Employment Tribunal without going into the merits of the case,

this court notes that it appears that there is no express consent given by the Appellant to proceed with the matter with only 2 members of the Employment Tribunal. Hence this court finds without making any pronouncement as to the merits of the case that the Applicant has satisfied this Court prima-facie that the Applicant has an arguable case and that the Appeal filed has some prospect of success.

[42] After finding that the Applicant has satisfied the Court prima-facie that there is a substantial question of law and facts for the court to adjudicate on it at the hearing of the Appeal and that the Appellant has an arguable case and that the Appeal has some prospect of success as highlighted in the case of *Elmasry and ors vs Margarete Hua Sun* SCA MA 37 /2019 arising in (SCA 28 /2019) this court shall now deal with issues of prejudice to the parties in the event the stay is granted.

[43] The Applicant has averred in paragraph 7 of his Affidavit that the Respondent is a foreigner and has no assets in the Seychelles and if the Applicant succeeds with its Appeal, which it has a strong likelihood of success, without a stay, the Judgment would be rendered nugatory. The Applicant further avers in paragraph 10 of his Affidavit that the balance of convenience lies with the Applicant in that the Respondent is beyond the Jurisdiction of the Court and it will be very impracticable to recover any money paid to him under the judgment.

[44] Hence this Court finds that the Applicant has established on a prima-facie basis that in the event the Applicant succeeds with its Appeal without a stay, the Judgment would be rendered nugatory in view of the fact that the Respondent is a foreigner with no assets in Seychelles and that the balance of convenience lies with the Applicant since the Respondent is beyond the jurisdiction of the Court and it will be impracticable to recover any money paid to him under the Judgment.

[45] The Court makes the above findings bearing in mind that such Application may at times be made in order to deny the successful party to a Judgment the fruits of the Judgment. However since the Applicant has satisfied the Court prima-facie that the sine qua non conditions as highlighted in the case of *Elmasry* (supra), the court finds that no prejudice would be caused to the Respondent in granting a stay of execution of

Judgment in the present case in the event that the Court imposes certain reasonable conditions in order to minimize any risk which may be present for the Respondent to be denied the fruits of the Judgment in the event the appeal in the present matter is unsuccessful.

[46] As a result of the above, the court makes the following orders;

- i) that the Court grants an order to stay execution of the Judgment of the Employment Tribunal in case number ET 02/21 delivered on the 24th August 2021 on the following terms and condition;
 - a) That the Respondent deposits one third of the Judgment sum awarded to the Respondent in ET 02/21 of which the total amount awarded to the Respondent in the said Judgment was 286,531.61 Euro's in the Registry of the Supreme Court in order to satisfy the Judgment in the event the Appeal is unsuccessful either in the form of its equivalent in Seychelles Rupees at the current bank rate at the time of deposit or in Euro currency within 2 weeks of the delivery of this ruling namely by the 10th of November 2021 in default of which this stay of execution of the Judgment would be rendered obsolete and will be no longer in effect.
 - b) That the Registrar of the Supreme Court through the Court usher who seized the assets of the company will retain into its custody the vessel "North Spray" and the vehicle belonging to the Applicant seized as a result of the commencement of execution in ET 02/21 as security to satisfy the Judgment in the event the Appeal is unsuccessful.
- ii) that in view of the hardship caused to the Applicant and its business operations as a result of the seizure of both vessel since I have already ruled that the balance of convenience lies in favour of the Applicant, I accordingly Order that once the one third of the Judgment sum awarded

to the Respondent in ET 02/21 has been deposited in the Registry of the supreme Court, the Registrar of the Supreme Court shall release the vessel ‘ ‘ North Rev’ ’ forthwith in the custody of the Representative of the Applicant, North island Company Limited.

Signed, dated and delivered at Palais de Justice on the 28th October, 2021.

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D. Esparon, Judge