

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC ... 7

(MA 152 of 2020 arising in CS 65 of 2016)

In the matter of:

H. SAVY INSURANCE COMPANY LIMITED

(rep by Ms. A. Benoiton)

Applicant

and

MARLETTE ERNESTA & ANOR

(rep by Ms. K. Louise)

Respondent

Neutral Citation: *H. Savy Insurance Company Limited v Ernesta & Anor* (MA 152 of 2020 arising in CS 65 of 2016) [2021] SCSC ... 7... (18 January 2021)

Before: Andre J

Summary: Stay of execution of judgment pending appeal-section 203 of the Seychelles Code of Civil Procedure (Cap 213)

Heard: 4 December 2020

Delivered: 18 January 2021

ORDER

The Court makes the following orders:

- (i) The stay application is granted subject to the compromise solution that the applicant pays into court the whole amount of the judgment award in the sum of Seychelles Rupees Two Million and Five Hundred Thousand (SCR2,500,000/) with interests and costs pending the final determination of the appeal;
 - (ii) The payment into court as ordered is to be effected by the 30 January 2021 and proof the payment be certified by the Registrar to this court by the 3 February 2021 at 9: 30 a.m.
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RULING

ANDRE J

Introduction

[1] This Ruling arises out of a notice of motion of H Savy Insurance Company Limited against Marlette and Germain Ernesta (Respondents) for an order that the execution of the judgment of this court of on Cs No. 65 of 2016 of the 27 March 2020, be stayed pending the outcome of the appeal to the Court of Appeal and disposal of the Applicant's application to set aside the said judgment and this is for the reasons set out in an attached affidavit in support to the motion (gist to be illustrated below).

[2] The Respondents by way of affidavit in response of the 28 October 2020 strenuously object to the application and moves for its dismissal.

Applicant's grounds for stay of execution

[3] In a gist, the grounds for the stay of execution as averred by the applicant are: that the Applicant being dissatisfied with the impugned judgment has filed a Notice of Appeal against the same and that the Applicant verily believes that the merits of the main case are strong in favour of the Applicant, who has a high chance of success; that it would go against the interest of justice to allow the Respondents to seek enforcement of the impugned judgment pending the appeal; finally, that it is urgent and necessary just fair and in the best interest that the judgement be stayed pending the hearing of the application to set aside the impugned judgement and the ensuing appeal.

Respondents' case

[4] The Respondents on their side, through the affidavit in response of the First Respondent Marellet Ernesta set out their grounds for objection to the Applicant in a gist as follows: firstly, that the property subject matter of the impugned judgment was insured under an insurance policy with the Applicant as a commercial property being used as a guest house, from which the Respondents were using the funds to survive as part of monthly

income; that since the fire destroyed the property, the Applicant has been refusing to honour the policy of insurance without valid grounds and the Respondents have been struggling to rebuild the said property and have been unable to use the same to make a gainful living the way they used to until two years ago when they managed to borrow funds to rebuild the same; that based on the above, the balance of convenience is clearly in their favour, the Applicant being a solvent active business whereas the Respondents' business was destroyed by the fire and they remain to date out of pocket on the insured amount of the property.

- [5] It is further averred as objection, that the case for the Respondents in the main suit was substantiated by ample evidence and it is doubtful at this juncture that the Applicant has strong grounds on which to overturn the judgement in the main suit. It is further averred that it is just and fair and necessary in the circumstances for the court to allow the execution of the judgement against the Applicant to continue and allow the respondents to collect the fruits of their judgement as any further delay is only causing hardship to the Respondents.

Applicable law and findings

- [6] Section 230 of the Seychelles Code of Civil procedure applies in these circumstances and provides that an appeal shall not operate as a stay of execution unless the court so orders and subject to such terms as it may impose.
- [7] The authorities in this jurisdiction has confirmed that it is entirely in the discretion of the court to grant a stay (Vide: *Pool v William* (1996) SLR 206), *Chang-Tave v Chang-Tave* (2003) SLRL 74), *Avalon v Berlouis* (2003) SLR 57 and *Faye v Lefevre* (2012) SLR 44).
- [8] The consideration for granting a stay of execution include the weighing of the interests of the parties to establish whether the appeal has some chance of success, the balance of convenience, hardship and irreparable damage that may be suffered by the appellant and the concern that unless a stay is ordered the appeal would be rendered nugatory (Vide: *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685), *Choppy (Pty) Ltd v NJS Construction (Pty) Ltd* (2011) SLR 215).

[9] Albeit the court when hearing the stay of execution application does not examine the merits of intended appeals, it has to examine if the appeal has some prospect of success or if there is a substantial question of law to be adjudicated.

[10] In the Court of Appeal ruling in the matter of ***Dr Ashraf Elmashry & anor v Margaret Hua Sun*** SCA MA 37/2019 (arising in SCA 28 /2019), Learned A. Fernando President set down certain guidelines for a decision on a stay of execution of a money judgment taking into consideration the provisions of section 230 of the Seychelles Code of Civil procedure as follows:

“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 D 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 d satisfied me that he will be ruined, or his appeal otherwise be stifled isf 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 Hasd 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 to Q 4. If no, a stay should not be granted.

Q5 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; 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 losses or lost opportunities in the period till the appeal is heard.”

[11] Now, noting the above guidelines with regards to applications for stay of execution of judgment pending appeal and scrutinizing the objections raised against the application in line with close scrutiny of the grounds for stay as per affidavit of the applicant, I find as follows.

[12] Firstly, I find that the Notice of Appeal as attached to the notice of motion shows substantial questions of law to be adjudicated upon at the hearing of the appeal; let alone the chances of success, which to my mind would entail analysis of the merits of the appeal, which is beyond the jurisdiction of this court at this juncture. Further I find that based on the personal circumstances of the Respondents as rehearsed in their objections as to their inability to make a gainful living the way they used to in view of the destruction of their business, I do find that the appeal could be stifled if the Applicant is forced to pay the Respondents immediately instead of after the appeal.

[13] It is to be noted further, in line with the general rule of straightaway payment of a judgment award, that this court finds that there is no risk that the Respondents will be unable to enforce the judgment if the stay is granted and Applicant's appeal fails. In fact the applicant through Learned Counsel have agreed to place the judgment award on escrow pending the final determination of the appeal (proceedings of the 4 December 2020 refers). Hence, noting that undertaking and in the interest of both parties, I will grant the application for stay of execution as sought subject to the Applicant paying into court the whole amount of the judgment award for the impugned judgment in the sum of SCR2,500,000 with interests and costs as a compromise solution pending the final determination of the appeal.

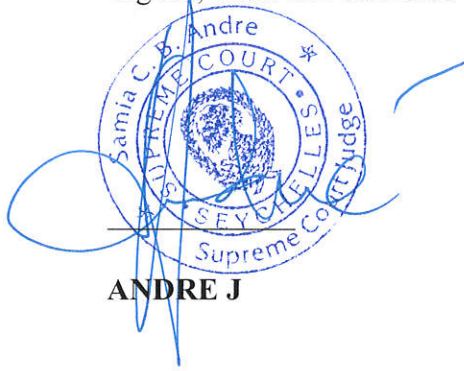
Conclusion and final determination

[14] In line with above analysis and findings based on application of the established principles cited before the Supreme Court and the Court of Appeal (supra) I thus order as follows:

[i] The stay application is granted subject to the compromise solution that the applicant pays into court the whole amount of the judgment award of the impugned judgment in the sum of Seychelles Rupees Two Million Five Hundred Thousand (SCR2,500,000/-) with interests and costs pending the final determination of the appeal.

[ii] The payment into court as ordered is to be effected by the 30th January 2021 and proof the payment be certified by the Registrar to this court on the 3rd February 2021 at 9: 30 a.m.

Signed, dated and delivered at Ile du Port on 18 January 2021.



ANDRE J