

IN THE SUPREME COURT OF SEYCHELLES

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**Reportable**

[2021] SCSC 139

MA 219/2020

Arising from CS02/2019

**DYNAMICS (PTY) LIMITED**

**1<sup>st</sup> APPLICANT**

*(rep. by Guy Ferley)*

**GREGORY ALBERT**

**2<sup>nd</sup> APPLICANT**

*(rep. by Guy Ferley)*

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and

**DANIEL VADIVELLO**

**1<sup>st</sup> RESPONDENT**

*(rep. by Serge Rouillon)*

**LIDIANNE AGATHINE**

**2<sup>nd</sup> RESPONDENT**

*(rep. by Serge Rouillon)*

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**Neutral Citation:** *Daniel Vadivello & Another v Dynamics (Pty) Ltd* (MA 219/2020) Arising from CS 02/2019 [2021] SCSC 139. (13<sup>th</sup> April 2021).

**Before:** Vidot J

**Summary:** Application for Stay of Execution

**Heard:** Parties filed written submission

**Delivered:** 13<sup>th</sup> April 2021

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**ORDER**

Application denied

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**ORDER**

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## VIDOT J

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- [1] This is an application filed by means of a Notice of Motion supported with affidavit sworn by the second Applicant for a stay of execution of a judgment delivered by Honourable Chief Justice Twomey on the 18<sup>th</sup> February 2020 in Supreme Court case CS 02 of 2019 (SCSC 122 of 2020). The Applicants has filed an appeal to the Court of Appeal against that judgment.
- [2] The grounds on which this Application is based are;
- i. That the Applicants has filed an appeal against the entire decision;
  - ii. That the appeal has a great chance of success and that the Applicants have a right of appeal;
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- iii. That if the Supreme Court judgment is to be executed in respect of the damages awarded which is SR108,300.00, that the second Applicant will be affected. The first Applicant is not operational and bankrupt and that the first Applicant has insufficient savings; and
  - iv. That it is in the interest of justice that a stay of execution be ordered.
- [3] The grant of a stay of execution is a discretionary and equitable remedy. There isn't any specific statutory provision which gives power to a court to grant a stay of execution as a legal remedy to protect the interest of an appellant or judgment debtor pending an appeal as held in **Avalon (Pty) Ltd & Others v Berlouis [2003] SLR 59** and **Chang-Tave v Chang-Tave [2003] SLR 74**. In any case an application for a stay of execution should not be utilized as a means to prevent a judgment creditor from enjoying the fruits of his judgment. It is a remedy that should be exercised sparingly and judiciously when an applicant satisfies one or more of the considerations or grounds as laid down in paragraph 5 below.

- [4] Since it is an equitable remedy, the court has to bear in mind section 6 of the Courts Act which provides as follows;

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*“The Supreme Court shall continue to be a Court of Equity and is hereby invested with powers, authority and jurisdiction to administer and to do all acts for due execution of such equitable jurisdiction in all cases where no sufficient legal remedy is provided by the law of Seychelles.”*

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That implies that the remedy is available in special circumstances where after considering all the facts the court deems that grant of such stay will only serve the cause of justice.

- [5] The law in regards to applications for stay are clearly laid down by the Court through case law. Both Counsels have identified the case of **Pool v Williams [1996] SLR 192** as one such case. The same grounds laid down in the latter case were followed in **Laserinisima v Boldrini [1999] SLR CS No. 274 of 1998**. These grounds are;
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- i. The applicant could suffer loss, which could not be compensated in damages;
- ii. Where special circumstances of the case so require;
- iii. There are proof of substantial loss that may otherwise result;
- iv. There is a substantial question of law to be adjudicated upon at the hearing of the appeal; and
- v. Where, if the stay is not granted the appeal if successful, would be rendered nugatory.

Counsel for the Respondent noted that these rules were followed in **Ramkalawan v Electoral Commission & Ors MA 164 of 2016 (Arising from CP01 of 2016)** (on an application for stay of execution) wherein the Constitutional Court stated that *“The provision is however not instructive as to when such an order should be granted. The authorities in this jurisdiction have confirmed that it is entirely in the discretion of the Court to grant a stay.”*

- [5] The decision whether to grant a stay of execution necessarily includes weighing the interest of the parties to establish whether an appeal has a chance of success, the balance of convenience, hardship and irreparable damage that may be suffered by the applicant and the concern that unless a stay is ordered, the appeal will be rendered nugatory; see **Alexander v Cambridge Credit Corp. Ltd [1985] 2 NSWLR 685**.
- [6] The above is very much aligned with what was held in **Avalon (Pty) Ltd. v Berlouis [2003] SLR 59** (a case also quoted by Counsel for the Applicant) that “... *the principles governing a stay of execution and the exercise of the Court's power to grant a stay in respect cannot be restricted to or pigeonholed within the five grounds as canvassed by the authorities cited supra. In the circumstances, the question as to the granting of a stay is to be determined not on the basis whether the case satisfies any or none of the five grounds or of the chances of success in the appeal but primarily on the basis whether granting such a stay is necessary for the ends of justice in the given set of facts and circumstances.*”
- [7] I note that apart from the affidavit attached to the Notice of Motion, no other documents that would substantiate and allow the Court to better appreciate the Applicants' grounds for this application were submitted. I do not find attached to the Notice of Motion any Memorandum of Appeal. As was correctly argued by Counsel for Respondents in his submission, any document to be used in combination with an affidavit in support of an application to stay execution must be exhibited to and filed with it; see **Re Hinchliffe, A person of Unsound Mind, Deceased [1895] 1Ch. 177**. It appears that the Applicants' affidavit was hastily drafted with much thought of the legal requirements needed in respect of this application.
- [8] Section 230 of the Civil Procedure Code (“the CPC”) states 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.”*

Rule 20(1) of the Seychelles Court of Appeal Rules (“the Rules”) provides

*“An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from.*

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*Provided that the Supreme Court or the Court may on application supported by affidavits, and served on the respondent, stay execution on any judgment, order, conviction, or sentence pending appeal on such terms, including such security for the payment of any money or the due performance or the non-performance of any or the suffering of any punishment ordered by or in such judgment, order, conviction or sentence, as the Supreme Court or the Court may deem reasonable.”*

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- [9] Therefore, the fact that the Applicants have filed an appeal is not sufficient reason to grant the stay. The Applicants have averred in the affidavit that they have a right to appeal against the judgement of the 18<sup>th</sup> February 2020. That right is undeniable. That in itself is not reasonable grounds enough to grant a stay of execution. As stated above an appeal will not act as a stay of execution. This is in agreement with section 230 of CPC and Rule 20(1) of the Rules.
- [10] However, as was stated in **Chang-Tave v Chang-Tave** [supra] “... *under the English principle, even if the appellant had some prospects of success in the appeal, for that reason alone no stay will be granted unless the appellant satisfies that he will be ruined without a stay of execution.*”
- [11] The 2<sup>nd</sup> Applicant did allege without more in the affidavit that he will be affected save to add that he has insufficient savings and that the 1<sup>st</sup> Applicant is bankrupt. The Applicants did not provide any documents to show its financial state of affairs was such that the 1<sup>st</sup> Applicant was bankrupt. They could have provided the last business returns which in any case as a business it is obligated to file every year. The Respondents attached to their submission a sale order/ delivery note issued on 9<sup>th</sup> November 2020. Payment for that transaction was made in cash. That was issued nine months following the judgment of the Supreme Court.
- [12] The claim of the 2<sup>nd</sup> Applicant that he does not have sufficient savings is exceedingly dishonest. When one comes to court seeking an equitable remedy that applicant must come

with clean hands. This unfortunately is not the case here. The 2<sup>nd</sup> Applicant is well known in Seychelles as being a person of considerable means. He manages a big company. His family is known to own several businesses.

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- [13] The Court needs better substantiated grounds to arrive at a decision whether or not to grant a stay. As I have stated above the affidavit is very weak and lacking. The Memorandum of Appeal has not been attached thereto. That means that this Court cannot decide whether or not having a cursory look at the memorandum that the appeal has merit and also whether or not as claimed, there is a serious question of law to be decided. The Court cannot, based on these averments appreciate if the appeal has "*a chance of success.*" The Applicants through the affidavit does not argue that there are substantial questions of law to be adjudicated upon by the appellate court. The Court cannot therefore raise and address such grounds for stay of execution.
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- [14] The Applicants aver that it is in the interest of justice that a stay be granted pending the hearing and disposal of the appeal. However, it is not pleaded in which manner not granting a stay will compromise the interest of justice. Submission of Counsel does not address the point either. Nonetheless, I have weighed the interests of the parties. However, I could not in the absence of averments or submission conclude that the appeal has a good chance of success. On the balance of convenience, I fail to see and be convinced that the Applicants will suffer hardship and irreparable damage that unless the stay of execution is granted the appeal would be rendered nugatory. In fact, the affidavit does not make any averments in that respect.
- [15] The Applicants have not satisfied any of the grounds laid down in **Pool v Williams** (supra) and neither have they satisfied Court that a stay is necessary to the ends of justice on the given set of facts and circumstances.
- [16] I dismiss the application for stay of execution. However, I will draw to the Respondents' attention that they may be required to reimburse the judgement debt to the Petitioner should the appeal be successful in the event that judgment debt has already been paid to the Respondents.

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Signed, dated and delivered at Ile du Port on 12 January 2021

A handwritten signature in dark ink, appearing to be 'Vidot J', written over a horizontal line.

Vidot J