

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2019] SCSC ..421

MA 29/2020

Arising in CC 49/2015)

In the matter between:

SAVOY DEVELOPMENT LIMITED

(rep. by Serge Rouillon)

Applicant

v/s

LEONARD JACKSON

(unrepresented)

Respondent

Neutral Citation: *Savoy Development Limited v Jackson* (MA 138/2021 arising from CA 06/2021) [2021] SCSC421..... (14th July 2021).

Before: Pillay J

Summary: Stay of Execution

Heard: 24th June 2021

Delivered: 21.8.21 July 2021

ORDER

Motion for stay of execution is

RULING

PILLAY J

- [1] By way of a motion filed on 16th June 2021, with supporting affidavit filed by Alexander Khlebnikov, the Applicant in the case seeks 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 Supreme Court.

- [2] Mr.Khlebnikov averred the Applicant being dissatisfied with the Judgment of the Employment Tribunal has lodged an Appeal to the Supreme Court.
- [3] He averred that there is a substantial question of law to be adjudicated upon at the hearing of the appeal and the Applicant has high chances of success in the appeal based on their grounds of appeal. He further averred that if the judgment is executed before the disposal of the appeal, the Applicant will suffer substantial irreparable loss and prejudice which could not adequately be compensated in damages and would render the appeal nugatory.
- [4] He averred that if the Applicant is successful in its appeal it would have difficulty retrieving it from the Respondent who is based overseas and the Applicant is financially capable of satisfying the judgment in the event the judgment is maintained.
- [5] With the affidavit is attached the judgment of the Employment Tribunal, the calculation of the dues of the Respondent as well as the grounds of appeal of the Applicant.
- [6] 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.”

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

- [8] 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.”

- [9] 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. *The 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.*

[10] 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 JA 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, what 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)?

[11] 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)

[12] 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.

[13] 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 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 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.*

- [14] In terms of the first question, in *Lablache de Charmoy v Lablache de Charmoy SCA MA08/2019 (17 September 2019)* Robinson JA in considering whether the appeal had a good chance of success stated thus:

“...it is not enough for Counsel to reproduce or exhibit grounds of appeal. The affidavit should plainly develop the substantial questions of law to be adjudicated upon by the appellate court.”

[15] On the affidavit in the case at hand there is insufficient information for me to make a finding that there is a substantial question of law to be decided nor is there any indication of the substantial irreparable loss averred.

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

Signed, dated and delivered at Ile du Port on ... 14th July 2021.



Pillay J