

## SUPREME COURT OF SEYCHELLES

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**Reportable/Not Reportable/Redact**

[2021] SCSC *ASA*

MA114/2021

Arising in MC112/2020

In the matter between:

**SAVOY DEVELOPMENT LIMITED**

*(rep. by Ms. Manuella Parmentier)*

**Applicant**

and

**DARIA TODOROVA**

**1<sup>st</sup> Respondent**

**YURIY NESTERENKO**

*(rep. by Mr. Frank Elizabeth)*

**2<sup>nd</sup> Respondent**

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**Neutral Citation:** *Savoy Development Limited v Todorova & Anor* (MA114/2021) [2021] SCSC *ASA* (23 July 2021).

**Before:** E. Carolus J

**Summary:** Application for stay of execution of an order dismissing an application for leave to appeal out of time.

**Delivered:** 23 July 2021

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### ORDER

The application for stay of execution delivered on 21<sup>st</sup> May 2021 in MC112/2020 is dismissed with costs.

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### RULING ON MOTION

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**CAROLUS J**

#### Background

[1] This ruling arises from an application to stay the execution of an order of this court delivered on 21<sup>st</sup> May 2021 (“the Order”) in MC112/2020. In terms of the Order the Court dismissed an application by Savoy Development Limited (“Savoy”) for leave to appeal out of time (“the Principal Application”) against an Order of the Employment Tribunal (“the

Tribunal's Order"). In terms of the Tribunal's Order Savoy was to pay Daria Todorova and Yuriy Nesterenko (respondents in the present application) the sum of £700 each per month for shelter.

- [2] The grounds for the dismissal of the Principal Application as stated at paragraph 21 of the Order are that *"the averments in the affidavit in support of the application were not sufficiently substantiated as the relevant documents were not exhibited to the affidavit. In consequence the Court does not have sufficient material before it to exercise its discretion to grant leave to appeal out of time"*. The Court did not consider or make any determination on the merits of the application.
- [3] As a consequence of the dismissal of the Principal Application, the Court in the Order also dismissed two motions filed by Savoy in the same matter , namely: (1) MA30/2021 for a stay of execution of the Tribunal's Order, pending the determination of the Principal Application and any subsequent appeal; and (2) MA31/2021 for the urgent hearing of the Principal Application. The Order further dismissed yet another application by Savoy in MC 20/2021 for the respondents to deposit into the Supreme Court account, the funds received by them in satisfaction of the Tribunal's Order, pending the determination of the Principal Application and any subsequent appeal to the Supreme Court against the Tribunal's Order.

#### **Application for Stay of Execution**

- [4] Savoy has now filed the present application to stay the execution of the Order of dismissal delivered on 21<sup>st</sup> May 2021. The application is made by way of Notice of Motion supported by an affidavit sworn to by Aleksandr Khlebnikov who avers that he is a representative of Savoy Development Limited and authorised to make the said affidavit on its behalf. Other supporting documents are also exhibited to the affidavit.
- [5] In his affidavit Mr. Khlebnikov avers that the respondents are former employees of Savoy, a company incorporated under the Companies Act, 1972. He avers that the respondents had initiated a grievance procedure against Savoy before the Employment Tribunal for non-payment of their salaries and housing allowances and certain deductions from their salaries in ET46/20 and ET47/20. He further avers that the Tribunal made two orders dated 22<sup>nd</sup>

October 2020 ordering Savoy to pay each of the respondents the sum of £700 per month for shelter. The two orders are exhibited to the affidavit.

- [6] He avers that the orders were made *exparte* on a motion filed by the respondents; that it was stated in the orders that service of the Notice of Motion filed by the respondents had been effected on the applicant's counsel, therefore the motion was heard *exparte* and the orders made; but that service was in fact made to an email namely manuella@plc.sc which the registry erroneously thought belonged to the applicant's counsel. He further avers that the respondents had claimed the sum of €700 in the proceedings before the Tribunal but Savoy was ordered to pay them £700 which was the wrong currency.
- [7] Mr. Khlebnikov avers that Savoy received a copy of the two orders on 28<sup>th</sup> October 2020. On 29<sup>th</sup> October 2020, its counsel filed a motion supported by affidavit to set aside the orders of the Tribunal which was dismissed by order of the Tribunal delivered on 4<sup>th</sup> December 2020 due to a procedural irregularity. The order of the Tribunal is exhibited to the affidavit.
- [8] He avers that thereafter on 11<sup>th</sup> December 2020, Savoy filed an application in the Supreme Court by way of Notice of Motion for leave to file a Notice of Appeal against the decision of the Tribunal out of time which was dismissed on 21<sup>st</sup> May 2021. It is this order of 21<sup>st</sup> May 2021 which is sought to be stayed by the present application. Exhibited to the affidavit in the present case is the Notice of Motion for leave to appeal out of time (which was dismissed on 21<sup>st</sup> May 2021) as well as the Memorandum of Appeal exhibited in support of the said Notice of Motion, and intended to be filed by Savoy if it was granted leave to appeal out of time.
- [9] Aleksandr Khlebnikov avers that Savoy has high chances of success on appeal since it never received proper notice of the Notice of Motion filed by the respondents in the proceedings before the Tribunal. Further that Savoy is not satisfied with the judgments of the Employment Tribunal and the Supreme Court in the case and that it will be appealing against the ruling before the Court of Appeal. He also avers that if the judgment is executed before disposal of the appeal Savoy will suffer substantial loss and prejudice which could not adequately be compensated in damages and would also render the appeal nugatory. He

further claims that the award is substantial and if Savoy is successful on appeal it would have difficulty retrieving it from the respondents whereas it is financially capable of satisfying the judgment in the event that it is maintained. Finally Mr. Khlebnikov avers that the respondents are non-Seychellois and are only in Seychelles until completion of their cases with Savoy, and that should the judgment be executed they will leave the jurisdiction with the result that Savoy, if successful in its appeal, is unlikely to ever be able to recover anything from the respondents.

- [10] In his affidavit Mr. Khlebnikov prays for an order that execution of the appeal be stayed pending the hearing and disposal of the appeal.
- [11] The respondents oppose the application and have raised not less than 5 pleas in *limine litis*. In addition they have each filed an affidavit in reply addressing the points raised in *limine litis* as well as the merits of the application. Counsel for both parties have also filed written submissions on both the pleas in *limine litis* and the merits of the application which I have carefully considered.
- [12] Further, in her submissions counsel for the respondent states that since she is not in receipt of an affidavit in reply from the 2<sup>nd</sup> respondent Yuriy Nesterenko he is deemed not to be objecting to the application. In consequence no submissions can be made by counsel on his behalf. I note that the Court file contains originals of affidavits signed by both respondents respectively. Both affidavits were sworn before the Deputy Registrar on 7<sup>th</sup> June 2021 who signed the documents. The affidavits were both filed on 8<sup>th</sup> June 2021 as attested by the stamp of the Seychelles Supreme Court. The Court records therefore show that the 2<sup>nd</sup> respondent did file an affidavit in reply.
- [13] Each of the pleas in *limine litis* will be dealt with *seriatim* in the analysis below. The Court will then deal with the application on the merits. In doing so the Court will have regard to the applicable law, the evidence before it, submissions of counsels and relevant case law.

## **Analysis**

### *Pleas in Limine*

#### 1<sup>st</sup> Plea in *Limine Litis*

- [14] The first plea in limine relates to the status of Manuella Parmentier who is counsel for the applicant in these proceedings. In the caption of the Notice of Motion filed in the present application, the applicant is stated to be "*Savoy Development Limited (Represented by Manuella Parmentier)*". The Notice of Motion is signed by Manuella Parmentier as the applicant's attorney and bears her stamp of attorney-at-law. The affidavit in support of the Notice of Motion is sworn by Aleksandr Khlebnikov as a representative of the applicant company. The respondents plead that Manuella Parmentier being the lawyer of the applicant, cannot represent the applicant in her personal as well as her professional capacity as its attorney-at-law on the basis that she is stated in the caption of the Notice of Motion to be representing the applicant. Counsel for the applicant on the other hand submits that this is merely a typographical error and the caption should have read "Care Of [Manuella Parmantier]". It is true that at first glance the caption as it appears, gives the impression that Ms Parmentier is representing the applicant in a capacity other than as its attorney-at-law. However I agree with her that had this been the case she would have been the one to sign the supporting affidavit which as stated above was sworn by Aleksandr Khlebnikov as a representative of the applicant. It is clear that this was an error which I find is not fatal to the application. The 1<sup>st</sup> plea in limine therefore fails.

2<sup>nd</sup> Plea in *Limine Litis*

- [15] This takes us to the second plea in limine litis raised by the respondents that Aleksandr Khlebnikov has no legal capacity to represent the applicant and that even if he has such capacity, he has failed, refused or neglected to attach the same to his affidavit which is fatal to the application. Counsel for the respondents submits that Aleksandr Khlebnikov has sworn the affidavit on behalf of the applicant and has stated that he is the representative of the applicant but has failed to attach his authority to represent the company to his affidavit either by way of a company resolution passed by the directors of the company or a power of attorney granted to him by a director of the company. He further submits that this failure of Aleksandr Khlebnikov to attach his authority to his affidavit renders his affidavit defective as the court has no way of ascertaining whether his assertion is indeed correct. He relied on the cases of *Gilbert Esparon & Ors v Larry Moustache & Ors* (CS 108/ 2009) [2012] SCSC31 (03 July 2012), *Ah-Yu v Didon & Anor* (MC 58/2016) [2018] SCSC 53

(25 January 2018), *Louis v Constitutional Appointment Authority* SCA 26 of 2007, *Morin v Pool* (2012) to state that the supporting affidavit is defective ab initio and that the Court should neither condone such defect nor rely on the affidavit. I note that none of the cases cited by counsel for the respondent deal expressly with the issue arising in this case namely, the necessity for the authority of the deponent in an affidavit in support of an application being exhibited to such affidavit. On her side counsel for the applicant has merely submitted that this issue was never raised in the Principal Application (MC112/2020) and no objections were raised regarding the authority of the deponent in the affidavit in support of that application. She states that no documentary proof of his authority was provided in that application and since the respondents did not have any issue accepting the affidavit then, they cannot now in the absence of such documentation claim that he had no authority to sign the supporting affidavit in the present application.

[16] First of all, although the present application arises out of the Principal Application (MC112/2020) in that the former seeks a stay of execution of the order made in the latter, they are two separate applications and the affidavits in support of each of them must comply with rules relating to the validity of affidavits. In my view the fact that an objection was not raised in a previous application does not prevent it from being raised in a subsequent albeit related one. Furthermore I note that whereas the supporting affidavit in MC112/2020 is sworn by Yuri Khlebnikov as a Director of the applicant, the supporting affidavit in the present application is sworn by Aleksandr Khlebnikov as a representative of the applicant. The Court has no idea if they are one and the same person.

[17] In the case of *Trevor Zialor v R* (SCA MA 16/2017) (17 October 2017) at paragraph 12 of its Order the Court of Appeal stated:

[12] *Learned counsel states that he has the authority to swear to the affidavit on behalf of Appellant. I note that no such authority is exhibited to the affidavit. Any document to be used in combination with an affidavit must be exhibited to the affidavit. (See In Re Hinchliffe, A Person of Unsound Mind, Deceased, Court of Appeal, 5 November 1894 [1895] 1 Ch. 117). In view of that finding, I will not dwell further on this point.*



[18] Had counsel for the applicant taken the time to read the order that her client now wishes to appeal against she would have noticed that this same passage is reproduced at paragraph 20 thereof.

[19] In *Dr Ashraf Elmasry & Elena Kozlova v Hua Sun* SCA MA37/2019 [2020] (30 June 2020), an application for a stay of execution of part of a judgment of the Supreme Court pending Appeal, the supporting affidavit was signed by one Mr. Nabil Elmasry, on behalf of or as representing both applicants, individually and separately. The following was stated at the commencement of the affidavit: "*We, Dr. Ashraf Elmasry and Elena Kozlova herein represented by Mr. Nabil Elmasry by virtue of a power of attorney dated 20<sup>th</sup> August 2015, electing our legal domicile in the Chambers of Mr. Frank Elizabeth of Suite 212B, Premier Building, Albert Street, Victoria, Mahe, Seychelles hereby make oath and say as follows:*" The Court stated the following at paragraph 9 of its Ruling:

9. *The Power of Attorney has not been attached to the Affidavit. I am of the view that the Power of Attorney had necessarily to be attached as this Court is unable to know otherwise in which capacity the Applicants are before the Court. A mere statement that the Applicants are represented by Mr. Nabil Elmasry does not suffice*  
...

[20] It went on to say in the same paragraph:

*In the case of D.L. de Charmoy V P.L. de Charmoy, SCA MA 08/2019 (17 September 2019) this Court stated: "In Re Hinchliff, A person of Unsound Mind, Deceased, [1895] 1 Ch 117, the Court of Appeal held that any document to be used in combination with an affidavit must be exhibited. In the same light 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. Counsel for the applicant should be mindful that the affidavit stands in lieu of the testimony of the applicant." Re Hinchliff had been quoted with approval in the cases of Trevor Zialor V The Republic SCA MA 2017 (unreported 17 October 2017) and Marie-Therese Boniface V Maxime Marie SCA MA 01/2019 (unreported 28 May 2017).*

[21] In *Bordino v Government of Seychelles* MA13/2020 [2021] (25 February 2021) the Court of appeal dismissed an application for stay of execution of a judgment of the Supreme Court, *inter alia* on the ground of irregularities in the form of the affidavit. It stated at paragraph 6 of its Ruling:

6. *Firstly, I consider the form of the affidavit. The affidavit was deposed to by Gianni Bordino. The affidavit does not state the occupation of Gianni Bordino. If Gianni Bordino is of no "occupation", the words "of no occupation" should have been added after his address. It is worthy of note that the affidavit does not even give the address of Gianni Bordino: see, for example, Hyde v Hyde, 59 L. T. 52 and Re Levy, 37 W. R. 396, in which affidavits giving no address were rejected.*

[22] In my view if the omission of the occupation and address of the applicant himself amounts to irregularities which are fatal to the validity of an affidavit, this should be even more so where the Court has no evidence before it to ascertain whether the deponent in the supporting affidavit has the requisite authority to swear the affidavit on behalf of the applicant. I note in that respect that the supporting affidavit in the present application is sworn by Aleksandr Khlebnikov as a representative of the applicant but he does not state specifically in what capacity he is representing the applicant.

[23] On the authority of the cases cited above, I find that that no document authorising Aleksandr Aleksandr Khlebnikov to swear the affidavit on behalf of the applicant having been exhibited to the affidavit, the affidavit is defective rendering it invalid and the application unsupported by any evidence. The 2<sup>nd</sup> plea in *limine litis* therefore succeeds.

### 3<sup>rd</sup> Plea in *Limine Litis*

[24] The third plea in *limine litis* is that the application is bad in law and ought to be dismissed with costs as it is not clear from the motion what Supreme Court Order the applicant is appealing against. Counsel for the applicant submits otherwise.

[25] The Notice of Motion in the present case states the following:

*TAKE NOTICE that SAVOY Development Limited, the Applicant above-named, will move this Honourable Court on the 2<sup>nd</sup> day of June 2021 at 2:30 o'clock in the afternoon or as soon thereafter as is possible for an order that the execution of the order delivered by the Supreme Court in the above case be stayed pending the hearing and disposal of the Applicant's appeal before the Court of Appeal against the decision of the Supreme Court and subsequently if successful,, and this for the reasons set out in the attached Affidavit ...*

Emphasis added.



- [26] Counsel for the respondents submits that it is unclear what Supreme Court order is being referred to as the date of the order, the case number or the order itself is not specified. Counsel for the applicant on her part submits that paragraph 11 of the applicant's supporting affidavit makes clear which order is being appealed against. Paragraph 11 is reproduced below:

*11. On the 11<sup>th</sup> day of December 2020, the applicant filed a notice of motion to file its notice of Appeal against the decision of the Employment Tribunal out of prescribed time, and this was dismissed on the 21<sup>st</sup> May 2021.*

- [27] I agree with counsel for the respondents that at least the date of the order of the Supreme Court which is sought to be stayed pending the appeal against such order, and the number of the case in which the order was made, should have been specified in the Notice of Motion. However although the Notice of Motion is infelicitously drafted, it makes reference to "the decision of the Supreme Court" and when read together with the supporting affidavit in which the only Supreme Court decision which is referred to is that of the 21<sup>st</sup> May 2021 at paragraph 11 (reproduced above), it can reasonably be inferred that it is this decision which is being appealed against. The third plea in limine litis fails.
- [28] Having said that, it is also my view that the fact that the respondents and their counsel have stated the case number from which the appeal arises namely MC112/2020 in their affidavits and submissions respectively, does not absolve counsel for the applicant from the responsibility of properly drafting her pleadings.
- [29] It is also worth noting that the order being appealed against, in dismissing the Principal Application also dismissed other applications namely MA31/2021 arising in MC112/2020 (application for urgent hearing of the Principal Application), MA30/2021 (application for a stay of execution of the Tribunal's Order), and MC 20/2021 (application for the respondents to deposit the funds received by them in part satisfaction of the Tribunal's Order into the Supreme Court account). The decision on appeal against the dismissal of the Principal Application would necessarily have an effect on the dismissal of those other applications.

4<sup>th</sup> Plea in *Limine Litis*

- [30] Counsel for the respondents also pleads that the application is procedurally flawed as the judgment has already been executed and the applicant has already made partial payment of the judgment debt to the respondents in the form of two cheques. Relying on the case of *Attorney General v Joseph Mazorchi & Or* (SCA Civil Appeal No. 8 of 1996) 09 April 1998, he submits that this Court has no jurisdiction to hear this application and is *functus officio*. Counsel for the applicant for her part submits that whilst it is correct that the order of the Family Tribunal has been partly executed the order has not been wholly executed. She contends that the application for stay was correctly made for the remaining sum not to be executed pending the appeal.
- [31] Counsel for the respondents does not elaborate on how the Court is *functus officio* in relation to the point raised namely that the present application is flawed as the judgment has been partially executed. I also do not see the relevance of the case of *Attorney General v Joseph Mazorchi* (supra) to the point raised, although I can see its relevance to an appeal of the Tribunal's Order. In that case the Court of Appeal identified the question for its determination as "*whether the Court had jurisdiction to set aside its own judgment on account of [an] irregularity and to make an order for a re-hearing of the appeal*". The irregularity complained of was that the respondents were not heard before judgment was delivered. Being satisfied that this amounted to a serious procedural irregularity which rendered the proceedings a nullity the Court set aside its judgment and ordered a re-hearing of the appeal. It stated:

*We are here not concerned with the question of rectifying a clerical or incidental mistake, but are faced with what appears to be an irregularity which taints the validity of the proceedings and renders them a nullity. In such a situation, the doctrine of functus officio has no application and is therefore, of no consequence. Further, where a procedural irregularity of the nature complained of has occurred, as in this case, a judgment or an order given in these proceedings, must surely be treated as a nullity. In the circumstances, the Court must exercise its inherent jurisdiction to set aside the said judgment or order.*

- [32] In regards to the point raised, given that the Tribunal's Order is for a monthly payment, it is my view that although the applicant has started making payments, as it is yet to make

other payments the Tribunal's Order can therefore be the subject matter of a stay contrary to counsel for the applicant's contention. I therefore find no merit in the 4<sup>th</sup> plea in *limine litis*.

5<sup>th</sup> Plea in *Limine Litis*

- [33] The fifth plea in *limine litis* is to the effect that the present application for stay of execution is procedurally flawed and premature as the Court is yet to grant the applicant's application for leave to file its appeal out of time in MC 112/2020. It is further averred that the Court cannot grant a stay of execution when there is no pending appeal before the Court of appeal. Counsel for the respondents submits that in the absence of a connecting and principal suit such as a pending notice of appeal before the Court of Appeal against the ruling of the Supreme Court dated 21<sup>st</sup> May 2021, this application must fail. It is submitted that the Court can only grant a stay of execution pending hearing and disposal of an appeal and since there is no pending appeal the Court should dismiss the application. The respondents submit that the present application can only be filed after leave to appeal out of time is granted and an appeal is actually filed.
- [34] In order to deal with the matters raised a distinction needs to be made between the decision being appealed against and the decision which is sought to be stayed.
- [35] Following the Tribunal's Order, the applicant filed in the Supreme Court the Principal Application (MC112/2020) for leave to appeal out of time against that order. It also filed in the Supreme Court: (1) MA31/2021 arising in MC112/2020 an application for the urgent hearing of the Principal Application; (2) MA30/2021 arising in MC112/2020 an application for a stay of execution of the Tribunal's Order, pending the determination of the Principal Application and any subsequent appeal; and (3) MC 20/2021 for the respondents to deposit into the Supreme Court account, the funds received by them in satisfaction of the Tribunal's Order, pending the determination of the Principal Application and any subsequent appeal to the Supreme Court against the Tribunal's Order. The Principal Application for leave to appeal against the decision of the Tribunal out of time was dismissed by virtue of the Ruling dated 21<sup>st</sup> May 2021. Leave to appeal against the decision of the Tribunal out of time not having been granted, all the three other applications

including the application for stay of execution of the same decision of the Tribunal pending appeal automatically fell without having to hear any of them on the merits. Therefore at this point in time, for all intents and purposes the Tribunal's Order still stands and remains executable. The applicant has now filed the present application for a stay of execution pending appeal. I have found above (3<sup>rd</sup> plea in limine) that the appeal is an appeal to the Court of Appeal against the decision of the Supreme Court dismissing the application for leave to appeal out of time which at the same time also dismissed the three other applications (including the application for stay of execution of the Tribunal's Order).

[36] The question which arises is which order is sought to be stayed by the present application: is it the Tribunal's Order or the Supreme Court's Order of dismissal. I have mentioned that the Notice of Motion has been unfelicitously drafted. I make the same observation in respect of the supporting affidavit. It appears from the affidavit that the applicant is applying for a stay of execution of the Supreme Court's Order of the 21<sup>st</sup> May 2021, dismissing all applications before it including the application for stay of the Tribunal's Order. However it would make no sense for the applicant to seek a stay of that order of dismissal. It is obvious that the order which ought to be stayed must be the order of the Employment Tribunal which was sought to be stayed in MA30/2021. MA30/2021 was dismissed on the basis that leave to appeal against the Tribunal's Order was not granted. It bears stating that the application in MA30/2021 was premature in that it could only have been applied for and granted after leave was given to appeal against the Tribunal's Order and such appeal filed in the Supreme Court.

[37] Since leave was not granted by the Supreme Court to appeal out of time against the Tribunal's Order, in my view, the Supreme Court cannot consider any application for stay of execution of that order pending appeal. Until the Court of Appeal makes a determination as to whether or not the Supreme Court was right to dismiss the application for leave to appeal out of time, the ruling of the Supreme Court stands. Until such determination is made, no application for stay of execution of the Tribunal's Order pending an appeal against such Order for which leave has not been granted to be filed, can be canvassed before the Supreme Court. In the circumstances, it is my view that in order to obtain a stay of execution of the Tribunal's Order, the proper procedure would be to file a Notice of Appeal

against this Court's order of dismissal of 21<sup>st</sup> May 2021 before the Court of Appeal and apply for a stay of execution of the Tribunal's Order in that Court.

- [38] Counsel for the applicant claims that an appeal has already been filed before the Court of Appeal against the ruling of the Supreme Court. However at paragraph 13 of the affidavit in support of the present application it is averred that:

*That we are not satisfied with the judgments of the Employment Tribunal and the Supreme Court in the case and we will be appealing this ruling before the Court of Appeal.*

- [39] I would appear from the above that filing of an appeal to the Court of Appeal would be done in the future. Furthermore the applicant has not brought any evidence that such appeal has indeed been filed. No notice of an appeal filed in the Court of Appeal was exhibited to the supporting affidavit. It suffices to remind counsel of Robinson JA's observation in *Lablache de Charmoy v Lablache de Charmoy* (reproduced at paragraph 20 hereof) which was referred to in the case of *Dr Ashraf Elmasry & Anor v Hua Sun* (supra).

- [40] For the reasons stated above, the 5<sup>th</sup> plea in *limine litis* succeeds.

- [41] Although the present application falls to be dismissed on the 2<sup>nd</sup> and 5<sup>th</sup> pleas in *limine litis* for the reasons hereinbefore stated, I will still proceed to examine the matter on the merits.

#### *The Merits*

- [42] I do not propose to rehash the source of our law relating to applications for stay of execution which has been done in previous cases. Earlier authorities have also established the circumstances that a court should consider in deciding whether or not to grant a stay of execution, which have been consistently applied by our courts. These were summarised in the case of *Dr Ashraf Elmasry & Anor v Hua Sun* (supra) as follows:

- 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 if successful, would be rendered nugatory,*

- v. *If a stay is granted, and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment,*
- vi. *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)?*

[43] The grounds on which the present application is made as set out in the supporting affidavit are as follows:

- 12. *... the applicant has high chances of success in the ... appeal on the merits, in view that at no point in time did the Applicant receive proper notice of the notice of motion filed by the Respondents.*  
[...]
- 14. *That if the judgment is executed before disposal of the appeal, the Company will suffer substantial loss and prejudice which could not adequately be compensated in damages and would also render the appeal nugatory.*
- 15. *That the award is substantial and the Applicant if successful would have difficulty retrieving it from the Respondents.*
- 16. *That the Applicant is financially capable of satisfying the judgment in the event that it is maintained.*
- 17. *That the Respondents are non-Seychellois and are only in Seychelles until the completion of their case with the Applicant, and should the judgment be executed, they will leave the jurisdiction and the Applicant is unlikely to ever be able to recover any summons from the Respondents, should they be successful in their appeal.*

[44] In the *Elmasry* case (supra) the Court further stated at paragraph 16:

*The sine qua non or 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. An appeal arises from a trial that has already taken place and a judgment that has been delivered by the original Trial Court. In a civil case the Trial Court decides the case on the basis of the pleadings, the issues, and the evidence both oral and documentary that had been led before the Court. 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 either party. Undoubtedly in any proceedings before a court one party succeeds and the other fails*



*unless a consent judgment has been entered into. 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 questions 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 its bare minimum disclose the questions of law and facts upon which the Trial Judge erred and thus has 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 or facts. In the Sri Lankan case of **KARUNASEKERA v REV. CHANDANANDA** (2004] 2 Sri L.R it was stated: “The court is not expected to go into the intricacies of the question of law to be decided in the appeal: it is sufficient if the court is satisfied that it prima facie appears that there is a substantial question of law to be decided in the appeal.” It is only then that the prejudice to the applicant and or respondent becomes relevant for consideration. If the Applicant fails at this hurdle, in my view, the rest of the grounds that are considered in granting a Stay need not be looked into.*

Emphasis added

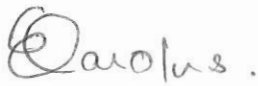
- [45] In the affidavit in support of the present application for stay, it is averred that the applicant has high chances of success in the appeal on the merits in view that at no point in time did the Applicant receive proper notice of the notice of motion filed by the Respondents. It is important to note that the appeal relevant to this case is to the Court of Appeal against the decision of the Supreme Court of the 21<sup>st</sup> May 2021 and not an appeal against the Tribunal’s Order. The Supreme Court dismissed the application for leave to appeal out of time for the reason that: “*the averments in the affidavit in support of the application were not sufficiently substantiated as the relevant documents were not exhibited to the affidavit. In consequence the Court does not have sufficient material before it to exercise its discretion to grant leave to appeal out of time*”. As a consequence the other applications also fell. The aforementioned averment in the present application regarding high chances of success in the appeal is more relevant to an appeal against the Tribunal’s Order rather than an appeal against the Supreme Court’s decision. This Court cannot on the basis of such averment ascertain whether the applicant has an arguable case and its chances of success on appeal against the Supreme Court decision and the reasons. There are no reasons given for the same. Furthermore, no Notice of Appeal has been filed from which the Court could have ascertained, in the words of Fernando (President) in the *Elmasry* case “*the*

*questions of law and facts upon which the Trial Judge erred and thus has to be adjudicated upon at the hearing of the appeal". This Court is therefore not satisfied that "it prima facie appears that there is a substantial question of law to be decided in the appeal".*

[46] Having found thus and in line with the pronouncement in the *Elmasry* case that "[I]f the Applicant fails at this hurdle ... the rest of the grounds that are considered in granting a Stay need not be looked into", I find no necessity to consider any of the other grounds.

[47] For the reasons given, I dismiss the application with costs.

Signed, dated and delivered at Ile du Port on 23 July 2021

A handwritten signature in cursive script, appearing to read 'E. Carolus J.', written above a horizontal line.

E. Carolus J