

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2022] SCSC  
MA84/2022

In the matter between:

**AYYOUB SALAMEH**  
*(Represented by Mr Clifford Andre)*

**Applicant**

*And*

**NORTH ISLAND COMPANY LIMITED**  
*(Represented by Mr Basil Hoareau)*

**Respondent**

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**Neutral Citation:** *Ayyoub Salameh v North Island Company Limited* (MA84/2022) [2022] SCSC (5 July 2022).

**Before:** Judge Esparon

**Summary:** Application for Stay of Execution of Judgment

**Heard:** 17<sup>th</sup> May 2022

**Delivered:** 5<sup>th</sup> July 2022

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**ORDER**

Application seeking for an order of this Court for stay of Execution of Judgment pending Appeal in accordance with section 230 of the Seychelles Code of Civil procedure read with Rule 20 of the Court of Appeal Rules. The Court declined to grant the Order for the stay of Execution of Judgment and the Application is dismissed with cost.

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**RULING**

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**ESPARON J**

## Introduction

- [1] This is an Application Seeking an order from this Court to stay execution of Judgment pending Appeal before the Court of Appeal from the Courts Judgment dated 8th April 2022 in (2021) SCSC 349, CA 23/2021, CA 23/2021.
- [2] The Applicant Ayyoub Salameh has averred in Paragraph 4 of his Affidavit that it is in the interest of Justice that I be given the opportunity to be heard on my Appeal and that given the fact that upon my Lawyer checking with the Registry of the Supreme Court on the 25th April 2022, the money paid to the Court was not refunded or any request for the refund had not been made by the Respondent and there is no greater prejudice to be caused to them should the Court grant a stay.
- [3] The Applicant further avers in paragraph 5 of his Affidavit that based on the above I pray that the Court be pleased to allow for a stay of execution against me pending the determination of the Appeal filed by me before the Seychelles Court of Appeal, as I feel and believe that the Appeal has more than greater prospect of Success in the Court of Appeal.
- [4] The Respondent in his Affidavit in reply sworn by Mr. Vincent Meriton in his capacity as Director of North Island has averred in paragraph 4 of his Affidavit that;
- A) the Affidavit of Ayyoub Salamah, sworn in support of the Notice of motion seeking for a stay of execution of the Judgment of the Supreme Court delivered on the 8th April 2022 in (2021) SCSC 349,CA 23 /2021 is defective and bad in Law;
  - B) The said affidavit does not disclose all the material and necessary facts to satisfy all the conditions for granting of a stay of execution of judgments;
  - C) There is no order or any part of the judgment, which necessitates the execution of the judgment by the Respondent and thus the application for stay of execution of Judgment is baseless and without any merits.

## **Submissions of counsel**

- [5] Counsel for the Applicant submitted to the Court that the Applicant believes that the grounds of Appeal has a high probability of success and that there is no prejudice to be caused to the Respondent since the money is already with the Court.
- [6] Counsel for the Applicant submitted as regards to the point of law raised by the Respondent in his Affidavit in reply namely that the Affidavit does not disclose all materials and necessary facts to satisfy for granting of stay of execution of judgment since the Appeal is attached to the Application and that there are averments in the Affidavit that there is no prejudice that is going to be caused to the Respondent and that the Appeal has a more than greater prospect of success in the Court of Appeal.
- [7] Counsel for the Applicant also submitted as regards to the point of law raised by the Respondent namely that there is no order or any part of a Judgment which necessitates the execution of the Judgment by the Respondent and relied on Rule 20 of the Court of Appeal Rules which provides that you can make an Application against an order.
- [8] On the other hand Counsel for the Respondent submitted that there is no order or any part of the Judgment that necessitates the execution of a Judgment since the order that was made for the stay of execution of Judgment upon the Appeal from judgment of Employment tribunal which had nothing to do with the Judgment and hence that order was made only in respect of the stay. When the Court made an Order allowing the Appeal and as consequence the Court made an Order saying that this sum of 95,000 euro's amongst other orders paid as a deposit in compliance with the condition imposed for a stay of execution by the Respondent should then be released by the Registrar and hence it had nothing to do with the Appeal and was only an ancillary matter. There is no Judgment or order in favour of the Respondent for the Respondent to go and execute.
- [9] As for the other point that the Affidavit does not disclose all material and necessary facts to satisfy the Condition of the granting of the stay, Counsel for the Respondent submitted

that the Affidavit must disclose all facts or all conditions upon which one is relying in support of an application for stay of execution. Counsel for the Respondent relied on the case of Dr. Ashraf Elmasry and Ors V/S Margaret Hua Sun SCA MA 37/2019 (arising in SCA 28/2019).

- [10] Counsel for the Respondent drew the attention of the Court to Paragraph 4 of the Affidavit and submitted that paragraph 4 does not disclose any necessary condition or factors which the Court will take into account in granting a stay.
- [11] Counsel for the Respondent further submitted that in the case of Elmasry (Supra) the Court laid emphasis on the fact that the Applicant has to set out his facts which will support or establish that there is a substantial question of law and fact to be adjudicated upon at the hearing of Appeal and that merely saying that the applicant has an arguable case and the Appeal filed has some prospect of success is not sufficient.
- [12] Counsel for the Respondent further submitted that at paragraph 5 of the Affidavit of the Applicant, the Applicant merely avers that the Appeal has more than a greater prospect of success in the Court of Appeal. Counsel also relied on the case of De Chamoy Lablache V/s De Charmoy Lablache whereby the same principle of the law was applied.
- [13] As regards to the point raised by the Respondent in his Affidavit in reply namely that the Affidavit is defective, Counsel for the Respondent relied on the case of Union Estate (Propriety) Limited V/S Herbert Mittermayer (1979) SLR and submitted to the Court the last paragraph of the Affidavit whereby the Applicant avers that the averments contained are true to the best of my knowledge, information and belief. Counsel for the Respondent pointed out that that the Applicant does not distinguish what averments are his belief, what averments are within his knowledge and what are these as regards to his information and hence Counsel for the Respondent further submitted that this renders the Affidavit defective and in effect it is tantamount to the Application not being supported by a valid Affidavit. Hence he submitted that the Application should be dismissed.

## **The Law**

[14] 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”.

[15] Rule 20(1) of the Seychelles Court of Appeal Rules provide that;

An Appeal shall not operate as a stay of execution or proceedings under the decision Appealed from:

Provided that the Supreme Court or the Court may on Application supported by affidavits, and served on the Respondent, stay execution of 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 non-performance of any act 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.

[16] 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)

### **Determination**

[17] We shall deal with the Points of law raised by the Respondent in his Affidavit in reply since this court feels that it has some very pertinent issues which may have an impact even on the merits of the Application. As regards to the 1<sup>st</sup> point of law raised by the Respondent as to the fact that the Affidavit of the Applicant being defective, this court has meticulously Considered the case of Union Estate Management (Propriety) Limited v

Herbert Mittermayer (1979) SLR where the Court held that ‘an Affidavit based on information and belief must disclose the source of the information and the grounds of the belief. It is therefore necessary for the validity of an Affidavit that an Affidavit should distinguish what part of the Statement is based on knowledge and what part is based on information and belief and that the source of the information and grounds of a belief should be disclosed.

[18] Upon the perusal of the Affidavit of Applicant namely paragraphs 5 and 6 of the said Affidavit it appears that the Applicant stated that he has received the information from his lawyer about the money not being refunded at paragraph 4 of his Affidavit and at paragraph 5 the Applicant states his belief about that the Appeal has more than a prospect of success in the Court of Appeal.

[19] This Court has considered the submissions of Counsel for the Respondent and Counsel for the Applicant in this matter, in view that the Applicant has distinguished in his Affidavit which part of his statement is based on his information and what part is based on his belief and at paragraph 4 gave the source of his information, this court finds that the Affidavit is not defective on this point when applying the case of Union Estate Management (Propriety) Limited V Herbert Mittermayer (1979) SLR to the present case.

[20] As regards to the second point of law raised by Respondent namely that the said Affidavit does not disclose all the materials and necessary facts to satisfy all the conditions for the granting of the stay of execution of the judgment this Court will rely on the Authority of the case of Dr. Ashraf Elmasry and or V/S Margaret Hua Sun SCA MA 37/2019 (arising in SCA 28/2019) where the Court of Appeal held the following;

‘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 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 the hearing of the Appeal, that the Applicant has an arguable case and the appeal filed has some prospect of success.’

[21] In the case of D.L de Chamoy Lablache and P.L. DE Charmoy Lablache (2019) SCSC 962 (MA/195/2019) the court held that ‘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.’

[22] This Court has perused the Affidavit in support of the Applicant namely paragraph 5 of the said Affidavit where the Applicant makes only a bare statement that he feels and believe that the Appeal has more than a greater prospect of success in the Court of Appeal and hence this Court finds that the Affidavit filed in this case does not contain any material that can serve the basis for the assessment of the arguability of the Appeal. Further the Applicant has not brought sufficient materials before the court prima-facie, in his Affidavit to satisfy the sine qua non condition that needs to be adjudicated upon namely that there are substantial question of law and fact to be adjudicated upon at the hearing of the Appeal.

[23] As for the last point raised by counsel for the Respondent namely that there is no order or any part of the Judgment which necessitates the execution of the Judgment by the Respondent and thus the Application for the stay of execution of Judgment is baseless and without any merits whatsoever, this court will agree with the submissions of Counsel for the Respondent that there is no Judgment or Order to be executed on behalf of the Respondent since the Court has allowed the Appeal and remitted the matter to the Employment tribunal to rehear the matter.

[24] In this regard guidance may be sought with the case of University of Seychelles- American Institute of Medicine Incorporation of medicine Limited V/S Attorney General SCA MA 5/2013 where the court of Appeal, Justice A.FT. Fernando, held that ‘in view

of the dismissal of the Plaint, the necessity to grant a stay of Execution of Judgment cannot arise.’ Hence in the present matter this Court finds that since the Court allowed the Appeal and remitted the matter back to the Employment Tribunal for rehearing, the necessity to grant a stay of execution of Judgment or order cannot arise in the present matter.

[25] Furthermore the issue of the Application for the stay of execution of the Judgment of the Employment tribunal and the order of this Court to release the 95 000 euro’s and certain vessel has nothing to do with the Appeal which was only ancillary to the Appeal. There is no Judgment or Order given in favour of the Respondent to be executed. Hence this Court finds that this Application is baseless and serves no purpose since there is no Judgment or order to be executed in order to grant Stay of execution of Judgment pending Appeal.

[26] As a result of the above, this Court declines to grant the Order of stay of Execution of Judgment pending Appeal to the Applicant and I accordingly dismiss the Application with cost.

Signed, dated and delivered at Ile du Port this 5<sup>th</sup> of July 2022.

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Esparon Judge