

SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC
MA194/2022
MA210/2022

In the matter between:

SPECIAL OPERATIONS SECURITY

(Represented by Mr Brian Julie)

and

Applicant

WILLIAM CADEAU

(Self-represented)

1ST Respondent

DOMINIQUE GERRY

(Self-represented)

2nd Respondent

Neutral Citation: Special Operations Services v William Cadeau, Dominique Gerry
(MA194/2022) (MA210/2022) [2023] SCSC (16th January 2023)

Before: Judge Esparon

Summary: Application for Stay of execution of Judgment pending Appeal

Heard: 6th December 2022

Delivered: 18th January 2023

ORDER

Application for Stay of execution of Judgment pending Appeal pursuant to section 230 of the Seychelles Code of Civil Procedure-The Court declined to grant a stay of Execution of Judgment pending Appeal- Both Applications are dismissed with cost.

RULING

ESPARON J

[1] This is an Application for Stay of Execution of Judgment pending Appeal. For the purpose of the ruling, MA 194 of 2022 and MA 210 of 2022 has been consolidated since they relate to the same issues.

The pleadings

[2] The Application is supported by the Affidavit of Daiyam Ebrahim who has averred at paragraph 8 of his Affidavit that ‘I would suffer loss which may not be compensated in damages and that there is a substantial matter in law to be adjudicated.’

[3] The Applicant has averred inter alia in his Affidavit that ‘ the tribunal proceeded ex-parte without serving Notice on the Applicant in breach of his right to fair hearing and that the Order has been signed by 2 members without the consent of the Appellant contrary to Schedule 6 paragraph 6(1) of the Employment Act 1995.

[4] The 1st Respondents has filed an Affidavit in reply and has averred in his Affidavit that ‘ there are no grounds for this Honourable Court to grant a stay of execution of Judgment on the guiding principles for determining whether or not to stay execution of Judgment pending determination of the Appeal;

(a) Where special circumstances of the case so requires;

(b) There is proof of substantial loss that may otherwise result;

(c) There is a substantial question of law to be adjudicated upon by the Appellate Court;

(d) Where if the stay is not granted, the appeal if successful, would be rendered nugatory.’

[5] The 1st Respondent has further averred in his Affidavit that ‘the Appellant had not shown how he will be ruined without a stay of execution and that the Appeal does not disclose any prospect of being successful and has no valid and substantial grounds.

[6] Furthermore the deponent has averred in his Affidavit that ‘the matter should be disposed urgently since the Applicant is only applying delaying tactics, in not having the Respondent enjoying the benefits of the Employment Tribunal Judgment.’

[7] The 2nd Respondent has averred in his Affidavit in reply the following ;

- a) ‘it has not been shown in the Applicant’s Affidavit how and what loss he will suffer if the stay of execution is not granted. He merely stated that he will suffer loss which could not be compensated in damages.
- b) The Applicant has not stated in his Affidavit what is the substantial matter of law to be adjudicated upon at the hearing of the Appeal.
- c) The grounds of Appeal are extremely vague and do not reveal any important facts or substantial question(s) of law to be adjudicated upon.
- d) On the Contrary, it is the Respondent who is not enjoying the fruits of his Judgment.’

[8] The 2nd Respondent further avers in his Affidavit that the ‘deponent has failed to justify in what way that he will be ruined if the stay of execution is not granted and that the Applicant has no prospect of success in the Appeal.’

Submissions

[9] Counsel for the Applicant has relied on the case of Pool V/S William, where the Court took into consideration certain circumstances in granting a stay of execution.

[10] He submitted to the Court that the case was heard in his client’s absence when he was out of the jurisdiction.

[11] Counsel for the Applicant further submitted that the law is clear since it requires that the case should be heard by 3 members unless the parties agree and in this case it was only heard by 2 members.

[12] Counsel for the Applicant further submitted that in the event the stay is not granted, the Applicant will suffer substantial loss in that the amount awarded is way above of what had been anticipated that it would be.

[13] The 1st Respondent who represented himself before the Court relied on the case of Daniella Lablache de Charmoy and Patrick Lablache and has submitted to the Court that it has not been shown in the Affidavit of the Applicant how much he will suffer, how much loss he will suffer and whether he will be ruined in the circumstances and that the Applicant is only seeking to protract the matter.

[14] The 2nd Respondent relied on his Affidavit for the purpose of his submissions.

The Law

[15] The law as regards to the stay of execution of 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.’

[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))

[17] In the case of Elmasry and Ors V/s Magarett Hua Sun, Civil Appeal SCA MA 37/2019 (arising in SCA 28/2019), Justice Fernando listed down the circumstances which the Court would consider in granting a stay which have been stated as follows in earlier Seychelles Authorities;

- 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 is successful, would be rendered nugatory,
- v) If a stay is granted, and the Appeal fails, what are the risk that the Respondent will be unable to enforce the Judgment,
- vi) If the stay is refused, and the Appeal succeeds, and the Judgment is enforced in the meantime, what are the risk of the appellant being unable to recover the subject matter of the execution (in money Judgment which have been paid to the Respondent).

[18] 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 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 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 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 the bare minimum disclose the question of law and facts

upon which the Judge erred and thus 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 and facts.’

Determination

[19] This Court has meticulously considered the submissions of counsel for the Applicant and the Respondents in the matter as well as the pleadings filed in the present case by way of Affidavit and has taken cognizance of the grounds of Appeal filed as regards to the matter and without going in the merits of the case, this Court notes that the grounds of Appeal as it is averred in the Affidavit in support of the Application relates to the interpretation of schedule 6 paragraph 6(1) of the Employment Act and as to issues as to the right to a fair hearing and hence this Court finds that the Applicant has satisfied this Court Prima-facie that there are substantial questions of law and facts to be adjudicated upon at the hearing of the Appeal and that the Applicant has an arguable case and that the Appeal filed has some prospect of success.

[20] After finding that the Applicant has satisfied the Court Prima-facie that there are substantial question of law and facts for the Court to adjudicate at the hearing of the Appeal and that the Applicant has an arguable case with some prospect of success, this Court shall now deal with issues of prejudice to the parties in the event the stay is granted.

[21] In the case of DI. de Charmoy Lablache and P.I de Charmoy Lablache (2019) SCSC 962 (MA/ 195/2019), the Court stated;

‘moreover, in an Application 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 the Judgment. The present matter concerns payment of money. It has not been shown that the Respondent is impecunious and will not be able to return the money if the Court of Appeal were to reverse the Supreme Court decision. In the circumstances I do not find that the Applicant runs the risk of a decision in its favour on Appeal being rendered nugatory.’

- [22] In the case of Macdonald Pool V/S Despilly William civil side No. 244 of 1993, the Court held that ‘one of the conditions for the Court to grant a stay of execution of Judgment is that there must be proof of substantial loss that may otherwise result.’
- [23] In the case of Avalon (Pty) Ltd and Ors V/S Berlouis SLR 2003 the Court held the following;
- ‘where the appellant/judgment debtor claims that he has valid or substantial grounds of Appeal, the burden is on him to show that the injury he will suffer due to the inconvenience, loss and hardship by a refusal of stay is greater than that which the Respondent will suffer by the grant of the stay.’
- [24] In the case of Choppy V/S NSJ Construction, Supreme Court 60/2011, the Court relied on the case of Ciarnan Convery V Irish News Limited (2017) NICA 40, a decision of the Court of Appeal of Northern Ireland where Kerr LCJ Stated;
- [25] ‘ the ability of the plaintiff to repay damages in the event of a successful appeal is relevant to the question whether a stay should be granted but if the defendant maintains that the Plaintiff will not be able to repay, he must support his claim with evidence.’
- [26] In the case of Choppy (supra) Egonde-Ntende CJ stated;
- ‘The onus for proving to the Court that the Respondent would be unable to pay the decretal amount is on the Appellant.’
- [27] In the present case the Applicant has only made bare averments in his Affidavit that ‘I would suffer loss which may not be compensated in damages.’
- [28] First and foremost this Court bears in mind in the light of the above authorities as cited in this Judgment that the onus for proving to the Court that the Applicant will suffer substantial loss that may otherwise result in the event that the stay is not granted and that the Respondent would be unable to pay the decretal amount is on the Applicant. This court has to remind itself in deciding whether to grant a stay or not that the Court has to ensure that a successful party is not denied the fruits of the Judgment.

[29] In the present matter it is evident that it concerns payment of money. Since the onus of proving to the Court that the Applicant will suffer substantial loss that may otherwise result in the event the stay is not granted and that the Respondent would be unable to pay the decretal amount is on the Appellant, this Court finds that it has not been shown through the averments made in the Affidavit in support of the Application for stay by the Applicant that the Applicant will suffer substantial loss that may otherwise result if the stay is not granted and that the Respondent is impecunious and will not be able to return the money if this Court on Appeal were to reverse the decision of the Employment Tribunal.

[30] In the circumstances, I do not find that the Applicant runs the risk of a decision in its favour on Appeal being rendered nugatory. Hence this Court also holds that the balance of convenience lies with the Respondent in not granting a stay of execution of Judgment pending Appeal.

[31] As a result of the above, this Court makes the following Order;

- i) I accordingly decline to grant the stay of execution of Judgment pending Appeal and hence dismiss both Applications with cost.

Signed, dated and delivered at Ile du Port on the 18th January 2023.

Esparon J