SUPREME COURT OF SEYCHELLES

Reportable
[2024]
MA 259 of 2024
Arising in MC 02 of 2024

LOUISEL CONSTANCE — **Applicant**
(rep. by F. Elizabeth)

and

THE REPUBLIC — **Republic**
(rep. by G. Ferley)

Neutral Citation:	*Constance v R* (MA 259 of 2024 (Arising in MC 02 of 2024)) [2024] (11th December 2024).
Before:	Govinden CJ
Summary:	Application for stay of execution
Heard:	28th November 2024
Delivered:	11th December 2024

RULING

GOVINDEN CJ

[1] The Applicant has applied for an order staying the execution of the judgment of the Supreme Court delivered on the 26th September 2024, pending the hearing and determination of the appeal. This Court has ordered that a *writ habere facias possessionem* be issued against the Respondent, who is the Applicant, and that the possession of title H14683 be restored to the Petitioner, who is now the Respondent, the Attorney General representing the Ministry of Land Use and Housing.

[2] The Application is brought on the grounds of existence of an Appeal with a strong likelihood of success; irreparable harm; balance of convenience; and urgency. The Application is supported by an Affidavit.

[3] The Applicant states that the primary grounds of appeal include: the failure of the Supreme Court to grant a fair hearing, contrary to Constitutional right; erroneous issuance of a *writ habere facias possessionem* despite the existence of contentious factual and legal issues that warranted a full oral hearing; and that ruling is based on misinterpretations of statutory provisions regarding the Attorney-General's authority and involvement in civil matters.

[4] During the Court proceedings on the 28th November 2024, the Counsel for the Applicant, submitted that authority given to Mr Guy Ferley by the Attorney General to represent the Respondent in court was defective in law. It was submitted that while the court made a ruling that the application was defective it also gave the applicant, now Respondent, another opportunity to get a proper authority. Counsel submits that the Court of Appeal will have to decide whether it was proper to give the respondent a second bite at the cherry. Counsel relied on decision of *Lesperance v Ernestine & Anor* (SCA 15 of 2020) [2023] SCCA 14 (26 April 2023). In that case counsel was supposed to file submissions, but had not done so. The court gave another opportunity to file the submissions and counsel did not file it again. The judge decided to do her own research and gave the judgment based on the said research. The Court of Appeal held that it was not proper and returned the case back to the Supreme Court.

[5] Counsel for the Applicant further submitted that an appeal does not act as a stay of execution; that the court has equitable powers conferred by section 6 of the Courts Act to grant a stay of execution as an equitable remedy and this can be done only if justice so requires, in a particular case, when no sufficient legal remedy is provided by any statute for the judgment debtor\appellant to obtain this protection of a stay pending appeal (*Avalon (Pty) Ltd & Ors v Berlouis* (CS 150/2001) [2003] SCSC 20 (8 September 2003)).

[6] Counsel further referred to *McDonald Pool versus Despily William* 1996 SLR 192 which held that there are five grounds that would justify a stay of execution: (1) Whether an appellant would suffer loss which could not be compensated in damages; (2) where special circumstances of the case are required; (3) if there is proof of substantial loss that may otherwise result; (4) if there is substantial question of law to be adjudicated upon at the hearing of the appeal; and (5) if the appeal would otherwise be rendered nugatory. It was submitted that the Application is based on grounds 1, 4 and 5.

[7] With regards to first ground, the Applicant in the Affidavit stated that that he will suffer irreparable harm and damage and he will be dispossessed of the business and livelihood, causing significant personal and financial hardship, without the possibility of compensation should the appeal succeed. Further, that it will be impossible to reverse the consequences if the appeal is successful, as it may not be possible to recommence the business or be compensated for the damage caused during the execution of the writ. The Applicant further stated in the affidavit that the balance of convenience lies in favour of granting a stay of execution as the Respondent will not suffer any substantial prejudice as the status quo will be maintained pending the outcome of the appeal. On the other hand, the Applicant faces the risk of irreversible loss and financial ruin if the judgment is executed prior to the determination of the appeal.

[8] Denis Barbe in the Affidavit in reply stated the following with regards to the irreparable harm and balance of convenience grounds. He has personal knowledge that the Applicant is operating many other kiosks, mainly on Government lands, for example at Roche Caiman Eden Village, Roche Caiman opposite Fresh Cut butcher's shop, Perseverance 1 and on land belonging to himself at Cote D' Or, Praslin. Denis Barbe states that the Applicant makes these averments in bad faith, knowing that he is a very successful businessman.

[9] It is also averred that the balance of convenience should not be a deciding factor in deciding whether a stay should be granted or not. Denis Barbe states that, on the contrary, the Respondent will suffer serious prejudice if the stay is granted for the following reasons:

> *"(a) the Applicant, by refusing to remove his kiosk is obstructing the completion of the project.*
>
> *(b) the contractor Laxmanbhai Company Limited which is doing the project, by way of a donation, needs to complete the project urgently as it needs to deploy to other projects it is undertaking.*
>
> *(c) Government needs to have all the kiosks completed to allocate to the other small businessmen and businesswomen some of which vacated the site of the project to allow the construction to be done."*

[10] It is further stated in the Affidavit in Reply that Denis Barbe have been advised that the primary consideration as to whether a stay should be granted or not is whether there is a substantial issue of law or fact which requires determination by the court; and that the affidavit of the Applicant does not reveal that there is such a question.

[11] Counsel for the Applicant further referred to *Chang-Tave v Chang-Tave* (CS 153/2002) [2003] SCSC 7 (6 March 2003) and *Avalon (Pty) Ltd & Ors v Berlouis* (CS 150/2001) [2003] SCSC 20 (8 September 2003) and submitted that what is not clear, whether an applicant have to prove all of grounds that would justify a stay of execution or one of them will suffice or two of them will suffice. It was submitted that if the applicant can satisfy the court on one of these considerations, then the court should grant a stay. Counsel further referred to *Elmasry & Anor v Hua Sun* (SCA 28 of 2019) [2020] SCCA 2 (23 June 2020) and submitted that the sixth ground was added by the Court of Appeal.

[12] The relevant paragraph of the judgement states:

> *"[14] The circumstances a court would consider in granting a stay of execution 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 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)?"*

[13] Applicant's Counsel submitted that present case does not concern money judgment but the principle applies. If the appellant succeeds and the judgment has been executed there are no chances that the appellant would be able to recover its business at Beau Vallon. Counsel further cited paragraph 16 of *Elmasry* judgment:

> *"[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. There is no averment in the application for Stay that there are substantial questions of law and facts to be adjudicated upon."

[14] The Counsel further emphasised that at this stage *"The court is not expected to go into the intricacies of the question of law to be decided in the appeal".*

[15] It was submitted that the first ground of appeal addresses a point of law –whether the court should have dismissed the case outright when it made a finding that the authority given to Mr. Ferley by the Attorney General by e-mail was defective and not sufficient in law. Ground 2 is that the court erred in law when it ruled that the constitutional mandate of the Attorney General is conferred in the Article 76 of the Constitution in respect of civil matters is not provided for under the Constitution, and is rather a creature of Section 29(1) of the Seychelles Code of Civil Procedure. Consequently, the court erred when it refused to refer the matter to the Constitutional Court by way of referral.

[16] Thirdly, it was submitted that the learned Chief Justice erred in law when he ruled that since Section 29(1) provides that any suit brought against the Government of Seychelles has to be in the name of the Attorney General, the Attorney General can either appear personally or appear through one of his subordinate officers or through an attorney at law in private practice.

[17] Grounds four and five directly relates to the ruling of 26th September. Ground four states the learned Chief Justice erred in law when he proceeded to give judgment on the pleadings only instead of ordering a hearing on the merits of the case since the parties had raised several contentious factual and legal issues which could only have been decided after

proper oral hearing and by tendering of exhibits in court. It was submitted that the applicant therefore has been deprived of his constitutional right to a fair hearing.

[18] Finally, it was submitted that the learned Chief Justice erred in law when he ordered a *writ habere facias possessionem* to be issued against the appellant since the appellant has raised a reasonable and serious defense. Counsel further submitted that those grounds of appeal are not frivolous and vexatious; that they are substantial grounds for appeal based on law. Counsel further argued that it is imperative that the Court of Appeal has an opportunity to make a decision on those points of law because this is a novel case. Counsel stated that he has never come across a case where the Attorney General gave an Attorney in private practice the authority to represent the Government of Seychelles. Therefore, it was argued that it is a novel point that needs to be decided by the Court of Appeal whether determination by the trial court was correct or there was an error. Further, Counsel stated that the Attorney General himself would benefit from such a judgment from the Court of Appeal, which would establish whether the Attorney General can delegate the power given to him.

[19] Counsel for the Respondent in reply also cited paragraph 16 of *Elmasry* judgment, submitting that the directions were quite clear and it is that the most important element that needs to be satisfied in seeking a stay is to satisfy the court *prima facie* that there are substantial questions of law and fact to be adjudicated upon. Respondent submitted that there is no question of law to be decided. Counsel submitted that the Applicant's submission on law that it is not permissible for the Attorney General to delegate his function to a private attorney is not correct at. It was submitted that the Attorney General has such powers. Counsel referred to criminal cases as an example, where section 63 of the Criminal Procedure Code clearly states that the Attorney General by writing under his hand may appoint any advocate of the Supreme Court or person employed in the public service, not being a police officer, being the rank of Sergeant, to be a public prosecutor for the purpose of any case. Counsel further referred to section 64 stating that a public prosecutor may appear and plead without any written authority before any court in which any case of which he has been charged, he's under inquiry trial or appeal and if any private person instructs advocate to prosecute in any such case, the public prosecutor may conduct the prosecution and the advocate so instructed shall act therein under those directions. Therefore, Counsel submitted that the Attorney General has powers to delegate in criminal

matters and he has powers to delegate in civil matters. Counsel submitted that the main issue to be decided before this Court is whether the Applicant in this matter has demonstrated that there is a substantial issue of law to be tried. It was submitted that there is no such question to be tried and therefore, in accordance with the Elsmary judgment, the matter should end here. Counsel further submitted that the learned Chief Justice dealt with this matter succinctly; and delegating powers of the Attorney General is permissible; it is also permissible under the Criminal Procedure Code. Counsel further submitted that the Constitution also doesn't state that the Attorney General shall be the sole advisor to the Government, it says that the Attorney General shall be the principal legal adviser to the Government, not the sole; and it is not exclusive. The wording of the Constitution is inclusive.

Determination

[20] In determining this application, based on the authority of *Elmasry & Anor v Hua Sun* (SCA 28 of 2019) [2020] SCCA 2 (23 June 2020) and others, this Court must evaluate whether there is substantial question of law to be adjudicated upon at the hearing of the appeal.

[21] I have scrutinized my decision in the light of the Notice of Motion, the Reply, and submissions made. Upon analysis of the grounds of appeal as presented by the Applicant, I find that there is no substantial question of law to be adjudicated upon at the hearing of the appeal for the following reasons.

[22] It is evident that the Applicant has not presented any grounds of appeal that shows that he has any likelihood of success on appeal.

[23] With regards to the defective authority of Mr Ferley to represent the Attorney General, I made it clear that it did not nullify the proceedings and that an authority proper in form can be granted. The authority being granted by the Attorney General, the Court proceeded to accept it and the case proceeded on this basis. I note that no attempt has been made by the Applicant to appeal against what amounts to an interlocutory ruling within this proceeding and when the court granted to Mr Ferley time to bring proper mandate to the court, no significant protest was made by Mr Elizabeth.

[24] The second ground of appeal has no reasonable chance of success as the capacity to act and legal mandate of the Attorney General in civil matters is derived from the Civil Code

as compared to the Constitution. The Attorney General is a creature of the Constitution, however, his legal authority to act in a civil capacity is conferred by an Act. Whilst the Constitution has set out his Constitutional and Criminal law competence, his civil law competence is provided in the Seychelles Code of Civil Procedure. Hence, *prima facie* no Constitutional cause of action arose and the motion for referral to the Constitutional Court was rightly held to be frivolous and vexatious.

[25] The third ground relates to the application of Section 29(1) of the Seychelles Code of Civil Procedure. There is nothing in that provision which prevents the Attorney General from deciding who he instructs to bring the case to court. The only legal duty cast upon him is that the Action has to be brought in the name of the Attorney General if it a civil action for or against the Government. I do not find any reasonable ground of success here. There is no controversial and substantial point of law to be determined by the Apex court.

[26] Ground 4 is out rightly erroneous. Matters such as *writ habere facias posessionem* are decided on the pleadings filed by both parties. In this case the court was satisfied that there was sufficient facts before it that would enable it to come to a proper and just determination of the case. Moreover, neither the Applicant's Counsel nor that of the Respondent made any attempts to ask this court to use its discretion to call for oral evidence on matters that they felt needed further evidence in support. Both parties did not object to the case being decided based on the facts submitted in the pleadings and were seemingly satisfied that the case be decided on documents submitted to the court.

[27] The fifth ground also presents little chance of success. The Respondent, now Applicant, failed to present a valid defence in reply to the Petition, as he had no lawful title, his title was defective as he allegedly acquired possession from a person who was not the owner of the impugned parcel. Moreover, he was informed by the Government, the rightful owner, of the basis of the invalidity of his claim to lawful possession.

[28] Having come to the above conclusion, that there is no reasonable chance of success in the appeal, the issue of irreparable harm to the Applicant does not arise; and cannot arise in this case as there would be no loss pending appeal; or even after the appeal. To the contrary, the loss would be on the part of the Respondent, which is carrying out a development in the public interest on the Beau Vallon beach front, a project which has been curtailed as a result of this action.

[29] Accordingly, this application for stay of execution of the Court's judgment delivered on the 26th September 2024 is dismissed with cost in favour of the Respondent.

Signed, dated and delivered at Ile du Port on 11th December 2024.

Govinden CJ