

SUPREME COURT OF SEYCHELLES

Reportable

[2024]

MA46/2024

Arising in MC 4/2024

Ex-Parte:

X-TRIM FITNESS CENTRE (PTY) LTD

(rep. by Guy Ferley)

Applicant

Neutral Citation: *Ex-Parte: X-Trim Fitness Centre (Pty)* (MA46/2024 Arising in MC 4/2024)
[2024] (4 March 2024).

Before: Pillay J

Summary: Motion for an order granting the Applicant additional time to acquire a bank guarantee in accordance with the Order delivered on 23rd February 2024

Heard: 1st March 2024

Delivered: 4th March 2024

ORDER

[1] Application is denied.

RULING

PILLAY J:

[1] The Applicant by way of a motion registered on 29th February 2024, supported by affidavit of Chantal Pinchon sworn on 29th February 2024, seeks orders for:

- a) *granting the Applicant additional time to acquire a bank guarantee in accordance to the Order delivered by this Honourable Court on the 23rd of February 2024;*
- b) *the maintenance of the cancellation of the warrant of levy dated 19th January 2024, granted by this Honourable Court on the 23rd day of February 2024; and*

c) *permitting the Applicant to operate its gym at Orion Mall upon the Applicant transferring the sum of SR 440, 000.00cts into the bank account of Global Property Limited on the 29th day of February 2024.*

- [2] The deponent states that she is a Director of the Applicant company and is authorised to swear the affidavit.
- [3] It is not in dispute that a warrant of levy dated 19th January 2024 signed by the Registrar of the Supreme Court ordered and directed for the seizure and sale of the Applicant's movables including a writ for possession.
- [4] Subsequent to an application dated 1st February 2024, in MC4 of 2024, indeed, on 23rd February 2024 this Court made the following orders:

[44] I cancel the seizure made pursuant to the warrant to levy dated 19th January 2024 on the following conditions:

- (i) *The Applicant shall pay the sum of **SCR 440, 000.00** by bank transfer into the Respondent's bank account by 12 noon on 29th February 2024.*
- (ii) *The Respondent shall provide the Applicant with its bank details latest Monday 26th February 2024.*
- (iii) *The Applicant shall provide the Court with a bank guarantee for the balance of the debt in the sum of **SCR 709, 347.95** by 12 noon on 29th February 2023 calculated as follows (SCR1, 285, 347.95 – SCR 176, 000.00 = SCR 1, 109, 347.95 + SCR 40, 000.00= SCR 1, 149, 347.95 – SCR 440, 000.00= SCR 709, 347.95).*

[45] I further cancel the writ to place in possession contained in the warrant to levy dated 19th January 2024 and order that the Applicant not be evicted from its leased premises, provided the Applicant complies with the above order with regard to payment by 29th February 2024.

- [5] She avers that the Applicant has transferred the sum of SCR 440, 000.00cts into the bank account of Global Property Limited in compliance to the above order.

- [6] She avers that she has been advised by the Applicant's bank, namely the Seychelles Commercial Bank and the Mauritius Commercial Bank (Seychelles) Ltd, that it would take more than two months to process the bank guarantee for the Applicant. She further avers that it is thus impossible for the Applicant to acquire the bank guarantee within the time frame ordered by the Court as it is a decision not dependent on the Applicant.
- [7] The deponent further avers that the Applicant has to show the bank that it is earning an income in order to secure the said guarantee, hence it prays the Court for permission to operate its gym at Orion Mall pending the bank guarantee process.
- [8] The deponent states that the Applicant undertakes to continue paying its rent by the 7th of each month and to pay the SCR 200, 000.00 that will be due and payable by the end of June 2024.
- [9] The deponent provided the transfer slip dated 29th February 2024 to show that payment of SCR 440, 000.00 has been made.
- [10] The application is subject to the equitable jurisdiction of the Court. I do not propose to rehearse the law applicable. The laws were addressed in MC4/2024 and are applicable in the matter at hand.
- [11] Let me start with the issue of the bank guarantee. What is a bank guarantee?
- [12] A banker's guarantee is essentially a guarantee from a bank, on behalf of a company, to fulfill payment or obligations of a contract to their bank guarantee beneficiary. It functions like a 'security deposit' placed by the company with the bank as a third party. When the contract is fulfilled or payment made in full, the funds placed with the bank by the company are released back to the company. Or in the event that the company fails to meet the terms of the contract, the bank will pay the beneficiary on their behalf.
- [13] What this suggests is the bank essentially becomes the debtors' guarantor for payment of the debt in circumstances such as the present one. It cannot be said that a bank guarantee is the same as a loan. It may be so in circumstances where bank needs collateral but it need not necessarily be so.

- [14] The Applicant had initially sought for the warrant of levy to be cancelled on the basis that it was in the process of applying for a loan in MC4/2024. The Applicant was not granted time for the loan to be processed but was ordered to provide a bank guarantee. If as the deponent avers, the banks that were approached informed them that the process would take up to 2 months, it suggests that the Applicant has no ability to honour its debts hence the requirement by the bank that it provide collateral in order for it to give a bank guarantee. To grant the Applicant time to go through that process would mean that we are back to the starting line.
- [15] It is further noted that the transfer of SCR 440, 000.00 was done in the morning of 29th February 2024 past 11am. Learned counsel submitted that this was because his clients had to wait for the bank details of the Judgment Creditor. There is nothing on file showing when the Applicants sought the banking details of the Judgment Creditor however there is an email showing that counsel for the judgment creditor provided the details on the morning of 28th February 2024 before 9am. It is noted that per the order of 23rd February 2024, at paragraph [44] (ii), the Respondent was to send the bank details by Monday 26th February 2024. There is nothing on file to show that the Applicant sought the said details at the soonest. With the case of *Mussard v Laurencine (SCA 39 of 2009) [2010] SCCA 15 (10 December 2010)* in mind, I am hard pressed to agree that the Applicant has been vigilant.
- [16] I note paragraph [20] of the decision in MC4/2024:
- I further accept her excuses as to the mistake made for the payment of SR 200, 000.00 that was due in October 2023, though I note that the payment was due on October 2023 and the issues that arose in Providence only occurred in December 2023. However, I cannot accept her plea for time to negotiate with the judgment creditor as regards payment of the debt. The debt is due and owing. There was no, and there is no, appeal against the judgment by consent. It is a valid judgment for which the Judgment Creditor is entitled to seek execution in the absence of payment.*
- [17] As I said in MC4/2024, “*I am conscious of the severe implications of the process of execution for, and to, the parties. It is a measure of last resort*”. I must admit I have struggled to come to a decision that will be just and fair according to the equitable doctrine

however on the basis of the current application, I cannot accept the Applicant's excuses as to why the payment of SCR 440, 000.00 was made at the 11th hour. It strikes me that the Applicant is not vigilant but indolent. Furthermore, to grant further time for the bank guarantee to be given would amount to revoking the order in MC4/2024, which was made after considering the Applicant's request for time to get a loan and the circumstances of the matter. To now give more time would be basically this Court going back and agreeing to that initial request.

[18] As regards the application to maintain the cancellation of the warrant of levy and an order for the Applicant to reopen the gym, the order dated 23rd February 2023 is in two parts.

[19] I reproduce it again:

[44] I cancel the seizure made pursuant to the warrant to levy dated 19th January 2024 on the following conditions:

- (i) The Applicant shall pay the sum of **SCR 440, 000.00** by bank transfer into the Respondent's bank account by 12 noon on 29th February 2024.*
- (ii) The Respondent shall provide the Applicant with its bank details latest Monday 26th February 2024.*
- (iii) The Applicant shall provide the Court with a bank guarantee for the balance of the debt in the sum of **SCR 709, 347.95** by 12 noon on 29th February 2023 calculated as follows (SCR1, 285, 347.95 – SCR 176, 000.00 = SCR 1, 109, 347.95 + SCR 40, 000.00 = SCR 1, 149, 347.95 – SCR 440, 000.00 = SCR 709, 347.95).*

[45] I further cancel the writ to place in possession contained in the warrant to levy dated 19th January 2024 and order that the Applicant not be evicted from its leased premises, provided the Applicant complies with the above order with regard to payment by 29th February 2024.

[20] The order is in two parts. The seizure is cancelled subject to (i), (ii) and (iii) being done. The writ of possession, being that the eviction is cancelled subject to the physical payment of SCR 440, 000.00 and the bank guarantee which is the bank securing the payment of the balance of SCR 709, 347.95.

[21] The Court cannot allow the Applicants to reopen and operate its business there being no bank guarantee given as ordered for the release of the seizure. Simply put, the goods and chattels have been seized for the purpose of sale in order to recover the judgment debt. The cash payment and the bank guarantee, was for the purpose of settling the debt so that the goods and chattels could be released.

[22] In consideration of the above, the Court cannot exercise its discretion in favour of the Applicant. Accordingly the application is denied.

Signed, dated and delivered at Ile du Port on *4th March 2024*

