

CHOPPY v NSJ CONSTRUCTION

(2011) SLR 215

P Pardiwalla assisted by Hoareau for the applicant
F Bonte for the respondent

Ruling delivered on 27 June 2011 by

EGONDA-NTENDE CJ: The applicant is seeking an order for a stay of execution of the judgment of this court in the head suit or head suits pending the hearing and determination of an appeal by the Court of Appeal filed against the said judgment. The applicant was the plaintiff in Civil Side No 27 of 2010 in the Supreme Court and the respondent was the defendant. The respondent was the plaintiff in Civil Side No 29 of 2010 before the Supreme Court and the applicant was the defendant.

The parties appeared before me on 1 March 2010 and agreed to refer Civil Side 27 of 2010 to an arbitrator of their own choice for a binding decision in respect of the matters that were in dispute between the parties. In addition Mr Charles Lucas appearing for the then plaintiff, now applicant told the court in course of the proceedings for that day –

..... My Lord and finally for just the court's information there is a plaint filed by the defendant in this case. It will be called tomorrow. My client had been served with a summons. I have put myself to task this weekend to prepare his defence tomorrow when the case is called before the Master. I shall be filing my defence. It would be filed by then and I shall be making a motion to consolidate both cases and so doing whosoever sits as arbitrator will have the two platters in his hands as one. That is what I would like to tell the court but of course I shall only be making the motion tomorrow.

The following day on 2 March 2010 both parties' counsel appeared before the Master in Civil Side No 29 of 2010 and the following transpired –

Civil Side No 29 of 2010
Mr Bonte for the plaintiff
Mr C Lucas for the defendant

Court to Mr Lucas
Is the matter going to be defended?

Mr Lucas
Master there is another matter before the same parties that is before the Chief Justice. It is case no 27 of 2010 which was before the Court yesterday morning. May this matter be consolidated with the other one before the Chief Justice. But for today's sake I have filed a defence.

Court
Which date has been given.

Mr Lucas

Unfortunately the matter has been stayed by the Chief Justice because we shall be referring both cases to an arbitrator. This process is being done now.

Court

So even for this case it will be before the Arbitrator?

Mr Lucas

Yes Master.

Court

So I do not give you a date?

Mr Lucas

No Master.

Court

The two cases, that is Case No 29 of 2010 and Case No 27 of 2010 are consolidated together. And both cases will be taken before the Chief Justice.

The two civil suits thus consolidated by an order of court on the application of Mr Lucas counsel for the applicant at the time, the parties appeared before the arbitrator who heard their matter and made an award dated 21 September 2010 which after it was objected to by the applicant was confirmed in terms of section 206 of the Seychelles Code of Civil Procedure as a judgment of this court on 4 March 2011.

The application was supported by an affidavit sworn by Mr Choppy, director of the applicant. In his affidavit Mr Choppy adumbrated the history of this matter before the arbitrator and this court. He went on to aver, that on the advice of his attorney, the appeal before the Court of Appeal had a good chance of success as the judge who heard his objection had not called for the record of the arbitrator. In addition Mr Choppy stated that Nouvobanq had granted a year-long guarantee to pay the respondent in case the appeal was not successful.

Mr Pesi Pardiwalla, counsel for the applicant submitted, if I understood him correctly, that the only matter the applicant wished to contest on appeal would be that this court was in error in its judgment to confirm the portion of the award that ordered the applicant to pay the respondent R7,099,646.68 in so far as the respondent had not filed a counter-claim in this court against the defendant. As there were no pleadings to support such a claim it was wrong for the arbitrator and subsequently this court to make a monetary award to the respondent. Mr Pardiwalla submitted therefore that there was an arguable case on appeal. The appeal was not frivolous or vexatious.

Mr Pardiwalla further submitted that the judgment debt will be secured by a bank guarantee that would assure the respondent, if successful on appeal, that he receives the fruits of the judgment of this court. He submitted that the grant or refusal of a stay is within the discretion of this court, which should in the circumstances of this case be exercised in favour of the applicant. He further contended that as the respondent had not asserted that it would be able to pay back the decretal amount if unsuccessful on appeal there was no obligation on the applicant showing that the respondent in fact is not able to pay back should the appeal succeed.

Mr Pardiwalla referred to the case of *Ciarnan Convery v Irish News Limited*[2007] NICA 40, a decision of the Court of Appeal of Northern Ireland in support of his submission.

The respondent opposed this application and an affidavit in opposition sworn by the personal guarantor of the respondent's obligations was filed. Mr Gregoire Payet supported the averment that this application was frivolous and vexatious, and that a stay of execution would continue to inflict on the respondent irreparable loss and damage which cannot be compensated for by way of damages.

At the hearing of the application, Mr France Bonte, counsel for the respondent, handed written submissions to the court. In essence Mr Bonte supported the decision of the arbitrator and submitted that this application was being made in bad faith merely to protract the proceedings and deny the respondent the fruits of its labour. He submitted that if the court was inclined to grant this application, the applicant be ordered to deposit the decretal amount in court.

In considering whether or not to grant a stay of execution the court may have regard to the following principles, as enunciated in *Alexander v Cambridge Credit Corp Ltd*(1985) 2 NSWLR 685 at 694 –

- (a) The onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all the parties.
- (b) The mere filing of an appeal does not demonstrate an appropriate case or discharge the onus.
- (c) The court has a discretion involving the weighing of considerations such as balance of convenience and competing rights of the parties.
- (d) Where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, courts will normally exercise their discretion in favour of granting a stay.
- (e) The court will not generally speculate upon the appellant's prospect of success, but may make some preliminary assessment about whether the appellant has an arguable case, in order to exclude an appeal lodged without any real prospect of success simply to gain time.
- (f) As a condition of a stay the court may require payment of the whole or part of the judgment sum or the provision of security.

The applicant's notice of appeal contains several grounds of appeal though Mr Pardiwalla indicated that principally it is only one matter that he wishes to put before the Court of Appeal for determination. That there was no pleading supporting an award of R7,099,646.68 to the respondent. It must be pointed out that the award did not order the applicant to pay R7,099,646.68 to the respondent. What it did was to declare that R7,099,646.68 was the contract sum, after taking into account all variations and additional works to the contract. What the respondent would be entitled to, and the applicant obliged to pay is the difference between the sums already paid and this figure of R7,099,646.68 being the contract sum as found by the arbitrator. The arbitrator ordered the applicant to pay all outstanding sums due and the retention monies initially deducted on all earlier payments.

As shown above the respondent filed a suit against the applicant, Civil Side No 29 of 2010 and the applicant's counsel at the time applied that it be consolidated with Civil

Side No 27 of 2010 so that both claims are taken to arbitration together. The court made an order for consolidation of both suits on 2 March 2010. On Civil Side No 29 of 2010 the respondent claimed R3,137,784.66 as outstanding at the time of filing that suit, payable 60% in rupees and 40% in Euros. On the face of these proceedings it would appear that the claim that there had been no counter-claim from the respondent cannot hold given the consolidation of Civil Side No 29 of 2010 to Civil Side No 27 of 2010. Nevertheless I would not speculate on the chances of success of this appeal, given the many other grounds still open to the applicant on the notice of appeal.

The applicant has put forth a bank guarantee as security for payment of the decretal sum should the appeal fail. It is only for a period of one year after which it will expire. It contains other conditions that would avoid it. I am not sure how long the appeal may take to be heard and determined. A bank guarantee or any guarantee would only be good if it was irrevocable until the Court of Appeal has finalised the hearing and determination of the appeal in question. As this bank guarantee is qualified, in my view, it is not sufficient security to protect the interests of the respondent should the pending appeal fail.

The award of arbitrator did not award the respondent interest on the outstanding sums. Neither did the judgment of this court, which confirmed the award of the arbitrator. It follows that should the appeal not succeed and a stay had been granted the respondent would suffer real prejudice that would not be compensated. It would have been prevented from earning the fruits of his judgment while no recompense was provided for being put out of funds for the period it would be prevented from enforcing the same.

That being the case, a further consideration I need to take into account is whether if the appellant paid the respondent the due amounts now the respondent would be able to pay back if the appeal was successful. The onus for proving to court that the respondent would be unable to pay the decretal amount is on the appellant. Kerr LCJ stated in *CiarnanConvery v Irish News Limited* (supra) at [12(4)] –

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 that claim with evidence.

The appellant has not asserted, let alone provided any evidence, that the respondent would not be able to pay the decretal sum, in event of a successful appeal. I do not agree with the stance taken by Mr Pardiwalla that it was for the respondent to assert that it would be able pay in the event that the appeal was successful to trigger the appellant to refute the same.

In the result I find that the balance of convenience in this matter lies in refusing the application for a stay rather than granting it as the respondent would suffer loss that would not be compensated. In any case the applicant has failed to show that the respondent would not be able to repay the decretal amount if the appeal was successful. This application is dismissed with costs.

**Record: Miscellaneous Application No 60 of 2011, arising in Civil Side No 27
and 29 of 2010**