

SUPREME COURT OF SEYCHELLES

Reportable

[2024]

MA/2023

(Arising in CA02/2023)

In the matter between:

Tony Lablache

Philina Lablache

(rep. by Mr. Frank Elizabeth)

Applicants

and

Josianne Vital

(rep. by Mr. Divino Sabino)

Respondent

Neutral Citation: *Lablache & Anor v. Vital* (MA322/2023 arising in CA02/2023) [2023] (19 January 2024)

Before: A. Madeleine, J

Summary: *Stay of Execution*

Heard: Written submissions

Delivered: 19 January 2024

ORDER

Stay of execution is refused. Application is dismissed.

RULING

A. MADELEINE, J

The Application

[1.] This is an application for stay of execution of the Judgment this court dated 14 August 2023 in *Civil Appeal 02/2023 Tony Lablache & Philina Lablache v Josianne Vital*

(hereinafter referred to as the “Appeal”) whereby the said Appeal was dismissed and the decision of the Rent Board of 10th February 2023 was affirmed.

[2.] The present application is supported by the respective Affidavits of the Applicants herein (and Appellants in the Appeal) made on 13th September 2023. Their Affidavits state in identical terms that -

- (i) the Applicants have filed an appeal against the Judgment of this Court;
- (ii) the Applicants are informed by their Attorney, Mr Frank Elizabeth, and verily believe that they have good grounds of appeal and a high likelihood of succeeding as appear in the notice of appeal, especially on the grounds relating to locus standi capacity to enter into the lease agreement pursuant to Article 1108 of the Civil Code, 2020;
- (iii) the Applicants fear that if the Respondent takes step to enforce the Judgment before the Court of Appeal has had a chance of hearing the appeal filed, the appeal will be rendered otiose insofar as the order for eviction is concerned, and the Applicants will suffer hardship and be caused irreparable loss and damage as the Applicants and their minor child do not have alternative accommodation;
- (iv) the Respondent will not be caused any hardship, prejudice or financial losses if the appeal fails as the Respondent will be able to recover the sums awarded and costs;
- (v) additionally, no injustice will be caused to the Respondent by the grant of a stay of execution;
- (vi) there is a good case for the court to exercise its discretion to grant a stay of execution pending the disposal of the appeal;

- (vii) the Applicants are advised by their Attorney, Mr Frank Elizabeth, and verily believe that in deciding whether to grant a stay the court should consider the special circumstances that present themselves in this case;
- (viii) the Applicants are advised by their Attorney, Mr Frank Elizabeth, and verily believe that the balance of convenience lies in favour of granting and justifying a stay as they will suffer irreparable loss and damages if stay is refused which cannot be adequately compensated by damages in the event that the judgment is executed and they are evicted;
- (ix) the Applicants are informed by their Attorney, Mr Frank Elizabeth, and verily believe that the Respondent can be compensated by damages for any inconvenience, if any, that may be caused to the Respondent by the granting of the application for stay;
- (x) the Applicants are informed by their Attorney, Mr Frank Elizabeth, and verily Believe that by granting the stay, the court will be doing no more than permitting their appeal to be heard and disposed of as otherwise the appeal will be rendered nugatory if the Respondent is allowed to execute the judgment of the supreme court whilst the appeal remain pending before the Seychelles Court of Appeal;
- (xi) the Applicants are informed by their Attorney, Mr Frank Elizabeth, and verily believe if the stay is not successful and the Applicants are subsequently successful in their appeal, and the appeal will be rendered nugatory as the Applicants would have been evicted from the property;
- (xii) the Applicants are informed by their Attorney, Mr Frank Elizabeth, and verily believe there are several real questions of law and fact to be determined by the Seychelles Court of Appeal when the appeal is heard as disclosed by the notice of appeal;

- (xiii) it is necessary and in the interest of justice for the court to make an order granting stay of execution of the judgment of the supreme court pending the hearing and determination of the appeal for the reasons provided in the Applicants' affidavits;
 - (xiv) there are exceptional circumstances that justify staying the execution of the judgment of the supreme court, included but not limited to, the substantial questions of law raised by the appeal;
 - (xv) there are real prospect of success when the appeal is heard and disposed of and that the appeal and this application are not frivolous and vexatious;
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- (xvi) the application is made in good faith and the appeal raises serious grounds of appeal on both law and fact;

(emphasis added)

The Respondent's Affidavit in reply

[3.] The application is resisted on grounds set out in the Respondent's Affidavit in reply dated 10th October 2023, namely that -

- (i) The Respondent applied to the rent board for the eviction of the Applicants from the premises and claimed rental arrears as they refused to pay rent from end of December 2021;
- (ii) The rented premises is situated on land of which the Respondent is the sole owner and in terms of the rental agreement they agreed to renovate the apartment at their own cost in return for a discount from the rent;
- (iii) The Rent Board found that the Applicant's were following and conducting themselves in line with the rental agreement until December 2021 when they refused to make rental payments;

- (iv) Despite requests, the Applicants refused to pay rent and it was only when the Respondent threatened eviction that the Applicants came up with objections that they never raised from the time that they started occupying the premises back in 2017;
- (v) The Rent Board ruled in the Respondent's favour and ordered the Applicants to pay all rent owed being SR50,000/- as of October 2022 and to continue to pay rent. The Rent Board also ordered that should they refuse to pay rent and cover arrears by 1st May 2023, then they must vacate the premises;
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- (vi) The Applicant's appealed the Rent Board's decision and applied for stay of execution to the Supreme Court;
- (vii) Both appeal and application for stay of execution of the Rent Board's Ruling to the Supreme Court were dismissed.
- (viii) The Respondent then filed for execution whereupon the Applicants paid SR.105,000/- one off to Respondent's Attorney by bank transfer on 22nd September 2023 in order to stave off eviction after having stated that they could only pay by instalment;
- (ix) The Respondent is a pensioner, and her sources of income are her pension and the rental income which she was not receiving prior to the one off payment;
- (x) The Applicants have well paid jobs, the 1st Applicant is a draughtsman and the 2nd Applicant is Senior Planning Officer at the Planning Authority, and it is difficult to comprehend how they can argue that the Rent Board Ruling will cause them any hardship;

- (xi) The Applicants agreed to rent the apartment for SCR5000/- per month and with the cost of living the rental would assist the Respondent tremendously.
- (xii) The Applicants frequently go on holidays locally and abroad. They are therefore not in any hardship, financial or otherwise.
- (xiii) It is difficult to see how complying with the order would cause them any hardship and it is also difficult to see how the balance of convenience is on their side. As per the Rent Board order, eviction will only occur if they don't pay the rent and arrears;
- (xiv) The Applicants cannot claim hardship for eviction as they are the cause of triggering the eviction order by refusing to pay rent;
- (xv) Respondent has been advised by her counsel Mr. Divino Sabino that the Applicants have little or no chance of success for their appeal to the Court of Appeal as the grounds of appeal are re-hashed from the appeal from the Rent Board to the Supreme Court, which have already been addressed and dealt with.
- (xvi) In light of the fact that Applicants have made rental payments covering arrears up to the end of August 2023 in response to execution proceedings, the merits of the application is questionable.

[4.] The parties agreed to proceed with the hearing of the application by way of written submission. Respective written submissions have been filed and considered by the court.

The Applicants' Submissions

[5.] The Applicants submission are, with respect, of no assistance to the court as it is based on an application for leave to appeal an earlier order of this Court dated 23rd June 2023 refusing a stay of execution of the original order of the Rent Board and on law applicable to leave to appeal an interlocutory Judgment.

The Respondents' Submissions

- [6.] The Respondent relied on the case of *Elmasry & Or v Hua Sun SCCA 2* (30 June 2020) to submit that the court should dismiss the application because the supporting affidavits contain mere statements that the Applicants have “good grounds of appeal”, that the grounds raises “real questions of law and fact to be decided” with “real prospect of success” without giving reasons for this view. According to the Respondent, the omission to elaborate their view is fatal. The Respondent further submitted that the grounds of appeal are rather weak and dubious.
- [7.] The Respondent also submitted that the application should be dismissed because the Applicants have failed to show that they are likely to suffer substantial loss if stay is not granted. Their eviction from the premises is triggered by non-payment of rental arrears and rent due. Thus, the Applicants are the cause of the potential hardship but they also have the remedy to avert it. There is greater hardship on Respondent’s side as a pensioner who relied on rental income to support her finances. The Applicants continued occupation without paying rental deprives the Respondent of the opportunity to rent out to third parties. Further, there is a certain degree of cruelty on the part of the Applicants in allowing the state of affairs to continue to exist while evidence suggest that they are well off and when faced with execution process, they managed to pay the Respondent all rental due at the time in one go. Remaining in the premises, not pay rent and deprive the Respondent, a pensioner, a source of income is malicious, cruel and ought to be reprimanded.

Law and Analysis

- [8.] In terms of section 230 of the Seychelles Code of Civil Procedure (hereinafter referred to as the “SCCP”), an appeal does not operate as a stay of execution of the Judgment appealed from unless the court or the appellate court so orders on an application made to it.¹ A

¹ Section 230 SCCP: “*An appeal does not operate as a stay of execution or of 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 proceedings shall be invalidated except so far as the appellate court may direct*”

judgment creditor should, as a rule, be able to execute the judgment given in his or her favour. It is only in exceptional cases that the court or the appellate court may stay the execution of a judgment pending the determination of the appeal and on such terms imposed.

[9.] In *Elmasry* (Supra), the Court of Appeal per Fernando PCA summarized the circumstances in which courts in earlier cases have exercised their discretion to grant a stay of execution. Namely, –

“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)?”

[10.] Fernando PCA gave guidelines for decisions on stay of execution of money judgments having regard to the provisions of Section 230 of the SCCP and Rule 20(1) of the Seychelles Court of Appeal Rules (hereinafter referred to as the “Elmasry guidelines”). The guidelines are reproduced below -

“C has obtained a money judgment against D who appeals and applies for a stay of execution. C objects. The Court must ask the following questions:

Q1 Has D satisfied me that there is a substantial question of law to be adjudicated upon at the hearing of the appeal and that his appeal has a good prospect of success?

If yes, proceed to Q2. - If no, a stay should not be granted.

Q2 Has D satisfied me that he will be ruined, or his appeal otherwise be stifled if forced to pay C immediately instead of after the (unsuccessful) appeal? –

If yes, a stay can be granted subject to considering the answers to Q4. - If no, a stay should not be granted unless a positive answer is given to Q3.

Q3 Has D satisfied me that there is no reasonable probability that C will be able to repay the monies paid to C by D? –

If yes, a stay should be granted, subject to considering the answers to Q4. - If no, a stay should not be granted.

Q4 What are the risks that C will be unable to enforce the judgment if the stay is granted and D’s appeal fails? Depending on the extent of that risk and other relevant circumstances can there be a compromise solution: payment of all or part of the relevant sum to await determination of the appeal; a stay only of part of the judgment sum; provision of security for part of C’s payment to D? A compromise solution should be a last resort, the basic rule being that a money judgment must be complied with, so that a claimant is entitled to recover the money straightaway and not to suffer further losses or lost opportunities in the period till the appeal is heard.”

- [11.] The judgment sought to be stayed by this application upheld the Rent Board's decision of 10th February 2023 whereby the Applicants had been ordered to settle rental arrears in the sum of SCR50,000/- by 1st May 2023, failing which they would be evicted from the leased premises. The Rent Board also ordered the Applicants to pay the monthly rent due on the first day of each month.
- [12.] Upon Respondent's attempt to execute the judgment, the Applicants paid SR105,000/- being rental due up to August 2023, and thereafter remained in the premises.
- [13.] In applying the *Elmasry* guidelines, the first question that I must ask myself is *whether the Applicants have satisfied me that they have a substantial question of law to be adjudicated upon at the hearing of the appeal and that the appeal has a good prospect of success?*
- [14.] The Notice of Appeal and Judgment have been produced in the Applicant's respective affidavits. The grounds of appeal listed in the notice are as follows –

"GROUND 1

1. *The learned trial Judge having made a finding that the Respondent lacked legal capacity to enter into the lease agreement with the Appellants in terms of Article 1108 of the Civil Code 2020 should have allowed the appeal and she committed an error of law when she failed to do so.*

GROUND 2

2. *The learned trial Judge's findings that the Appellants' conduct upon the death of Mr. Philip Vital and upon the Respondent becoming owner of the Premises to be consistent with tacit confirmation or ratification of the Agreement is erroneous in law and in fact in that the Appellants' conduct do not have the legal effect of making an otherwise illegal and defective Agreement in law, lawful and valid.*

GROUND 3

3. *The learned trial Judge erred in law when she made a finding that the tenancy created under the Agreement is valid as the Respondent clearly lacked the legal capacity in terms of Article 1108 of the Civil Code to enter the Agreement with the Appellants.*

GROUND 4

4. *The learned trial Judge erred in law when she made a finding that the Respondent had locus standi to bring the action against the Appellants in law."*

- [15.] Upon taking a cursory look at the above grounds of appeal, I am satisfied that they raise substantial questions of law to be determined by the Seychelles Court of Appeal. I therefore answer the first question of the Elmasry guideline in the affirmative and I proceed to question 2. Namely: *whether the Applicants have satisfied me that they will be ruined, or their appeal otherwise stifled if forced to pay the Respondent immediately instead of after the (unsuccessful) appeal?*
- [16.] The Applicant's Affidavit state in identical terms that if stay is not granted, the Applicants and their minor child will suffer hardship and irreparable loss and damage in that they have no alternative accommodation. As regards rental payment due monthly pursuant to the rent Board's order, the Applicants have not shown how they will be ruined if they remain in the premises and continue to pay the rental until disposal of the Appeal. It is undisputed that both Applicants are employed and their inability to pay the monthly rental of SCR5,000/- have not been made out.
- [17.] The Applicants have not shown how their Appeal will be stifled by the payment of rental and accumulated arrears immediately instead of after the determination of the Appeal. It is clear that their eviction from the premises will be averted by payment of rent. They are

both in employment and have not shown how the rental of SR5,000/- per month will affect them.

[18.] I therefore answer the second question of the Elmasry guidelines in the negative and proceed to the third question: *Have the Applicants satisfied me that there is no reasonable possibility that the Respondent will be able to repay the monies paid to her by the Applicants?*


[19.] The supporting affidavits of the Applicants are silent on the Respondent's ability to repay the SCR105,000/- received or of any subsequent rent paid if their appeal is successful. Their affidavits merely state that the Applicants will suffer more prejudice if stay is refused than the Respondent would if the stay is granted and that the Respondent can be compensated by damages for any inconvenience that may be caused by the granting of the stay. On this basis, the balance of convenience lies in their favour for the grant of a stay.

[20.] I note from the supporting affidavit of the Respondent that she is the sole owner of the land on which the rented apartment stands, and that her sources of income are her pension and should have included the rental due from the Applicants in respect of the premises. According to the Respondent's Affidavit, she is denied the opportunity to rent out the premises to third parties by reason of the Applicants occupation thereof without paying rent. I am satisfied that if rent due is paid coupled with Respondent's sole ownership of the land on which the premises are located there is a reasonable possibility that the Respondent will be able to repay the monies paid to her if the Applicant's Appeal is eventually successful. Thus, the answer to the third guideline is in the negative.

[21.] In applying the same Elmasry guidelines, if the answer to the third question is negative, then a stay should not be granted. I therefore refuse stay.

[22.] Application is dismissed.

Signed dated and delivered at Ile du Port on 19 January, 2023.


A. Madeleine, J

