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THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

APPLICATION NO. 1 OF 2008

IN THE MATTER OF SECTION 26 OF THE PROCEEDS OF CRIME AND MONEY LAUNDERING (PREVENTION) CAP 181 OF THE LAWS OF SAINT VINENT AND THE GRENADINES REVISED EDITION 2009

AND

IN THE MATTER OF A VARIATION OF A RESTRAINT ORDER (Application No. 1 of 2008)

BETWEEN:

ANTONIO GELLIZEAU — APPLICANT

AND

THE STATE — DEFENDANT

Appearances: Ms. Sejilla McDowall for the Applicant, Ms Nicole Sylvester, Ms Patina Knights and Mr Mikhail Charles for the Defendant

2014: May 23, 29
June 4

JUDGMENT

BACKGROUND

[1] **Henry, J. (Ag.):** By Order dated May 30, 2008, His Lordship, Justice Frederick Bruce-Lyle ordered that the Applicant[1] Antonio Gellizeau:

[1] The Respondent in the present Appli cation for stay of execution.

(1) (is) "prohibited from transferring, selling, parting with or chargingall realizable property/assets owned or controlled by" (him)[2] "whehterin" (his) "name or not, whether solely or jointly owned or held, and whether located in or out of Saint Vincent and the Grenadines."

(2) "must not:

(i) remove from Saint Vincent and the Grenadines any of' his "assets whether held in" his "name or not and whethersolely or jointly owned and:

(ii) in any way dispose of or transfer, sell, part with, charge or diminish the value of' (his)"assets whetherthey are in or outside of Saint Vincent and the Grenadines, whether in" (his) "name or not and whether solely or jointly owned.

This prohibition includes but is not restricted to the following assets:..."

[2] The Order then lists a number of items of property consisting of eleven motor vehicles, two boats/yachts, five items of real property, and seven bank accounts as assets affected by the Restraint Order. The Order provided for its variation or discharge, duraiton and exceptions in the following terms:

"**VARIATION OR DISCHARGE OF THIS ORDER-** Persons affected by this Order may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person) but anyone wishing to do so must first inform the Office of the Director of Public Prosecutions giving seven (7) clear days notice.

DURATION OF THIS ORDER - This Order will remain in force until it is varied or discharged by a further Order of the Court.

EXCEPTIONS TO THIS ORDER

No exceptions and conditions are made to this Order for living and legal expenses since the Defendant allegesthat he is a self-employed business man."

[3] The Order identified the following 13 persons and entities as a non-exhaustive listing of third parties affected by it:-

St. Vincent Co-operative Bank Ltd.
Bank of Saint Lucia
Shirley Greaves

[2] For the sake of clarity, the pronoun "you" and cognate expressions have been replaced by "him" and "his"

Elsie Gellizeau
Delores Glasgow-Williams
Duane Horne
Gideon Yorke
Lennox Wellington Haynes
Elizabeth Cox
Thomas Gellizeau
Raheem Dilon Gelizeau
Antonio Junior Shane Mario Gellizeau
Art Shipping Agency

[4] On April 25, 2014, the Applicant filed a Notice of Application for an Order varying the Restraint Order to allow for payment of legal expenses and disbursements in the sum of US$66,200.00 (EC$179,858.78) (actually, reasonably and properly incurred) to his lawyers. The Application was considered by His Lordship Justice Rajiv Persad on May 21, 2014 who ordered that:

"(1) The Restraint Order made by the Honourable Mr Justice Frederick Bruce-Lyle on 30th May, 2008 cited as Restraint Order No. 1 of 2008 ("the Restraint Order") be varied to the following extent-

(A) The amount of $163,231.35 EC be payable to the Applicant's Solicitors as legal fees, actually, reasonably and properly incurred in accordance with the invoice date (sic) 24th April, 2014 for work done in support of applicaiton to extend time in the Court of appeal proceedings.

(B) That the sum mentioned in subsection 1(A) be released from the account of Ms. Elizabeth Coy at the St. Vincent Co-Operative Bank in particular fixed deposit account 802237.

PROVIDED THAT:

(1) Within three working days of receiving the funds into their client account, the Applicant's Solicitors will inform the Financial Intelligence Unit and the Office of the Director of Public Prosecutions with a statement of receipt.

(2) The Restraint Order will remain in force in relation to the other subject material covered under Restraint Order No. 1 of 2008 (arising out of Application No. 1 of 2008).

(3) Costs reserved."

APPLICATION FOR STAY OF EXECUTION- GROUNDS

[5] By Notice of Application filed on May 22, 2014, the State/Respondent[3] has applied for a stay of execution of Justice Persad's May 21st Order ('the Order") "pending hearing of the Appeal." The Application is supported by an Affidavit and a Supplemental Affidavit of Colin Williams, Director of Public Prosecutions filed respectively on May 22 and 28, 2014. The grounds of the Application are:

"(a) The Applicant was Respondent in an Application by Antonio Gellizeau (now Respondent) to vary Restraint Order no. 1 of 2008.

(b) Restraint Order no. 1 of 2008 granted on the 30th May 2008 by Honourable Justice Frederick Bruce-Lyle restrains several assets, including a St. Vincent Co-operative bank Account No. No. (sic) 802237 in the name of Elizabeth Coy which is believed to be an asset belonging to Antonio Gellizeau

(c) Antonio Gellizeau was convicted of money laundering on the 12th of March 2012. He was sentenced to a term of 10 years imprisonment on 22nd July 2013.

(d) Counsel on behalf of the Respondent filed an application in the Appellate jurisdiction of the Eastern Caribbean Supreme Court for extension of time to appeal against his conviction and sentence on the 2nd December 2013.

(e) The Respondent applied on the 25th April 2014 for a variation of Restraint Order No. 1 of 2008 for a release of assets to satisfy legal fees payable to his solicitors.

(D The Honourable Justice Persad, on the 21st of May 2014, granted the variation of Restraint Order No. 1 of 2008, permitting the release of **EC$163,231.35** from an asset that was completely restrained, that is, the St. Vincent Cooperative bank Account No. 802237 in the name of Elizabeth Coy to pay for legal expenses incurred for work done specific to an Application to extend time in Court of Appeal proceedings.

(g) The Applicant being dissatisfied with the order made by Honourable Justice Rajiv Persad dated 21st May 2014 INTENDS to appeals (sic) on grounds outlined in the Notice of Appeal filed simultaneously.

(h) The Applicant has put forward the following draft grounds of appeal.

1. The learned judge erred when he granted an order to vary restraint Order No. of 2008 to permit the Applicant to satisfy legal fees incurred in defending an impending application to appeal.
2. The learned judge erred when (sic) did not require the Applicant to fully justify the reasonalebness of the quantum of fees sought.

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[3] The Appli cant for stay of executio n

(i) The Applicant has good prospects of succeeding on the appeal.

In the circumstances the Applicant now applies to this Honourable court for a stay of the execution of the order of Honourable Justice Rajiv Persad as contained in his Order dated 21st May 2014, pending the hearing of the Appeal of the applicant in this matter.

G) It is settled law that the court will grant stay of proceedings where it is just and convenient to do so in the circumstances.

(k) If the order made on the 21st of May 2014 by Honourable Justice Rajiv Persad is not stayed then the sum of **EC$163,231.35** will be deducted from the St. Vincent Cooperative bank Account No. 802237 in the name of Elizabeth Coy without any limitations.

(l) As a result this would render any decision at the level of the Court of Appeal in relation to the effect of the order nugatory and set an unfavourable precedent for future like applications.

(m) In all the circumstances, it would be in the interest of the administration of justice for the court to grant a stay of execution of the order of Honourable Justice Persad dated the 21st of May 2014 pending the hearing of the Application to appeal against the decision flowing from said Order."

[6] At the hearing Ms McDowall on behalf of the Respondent stated that there are two grounds on which the appeal is being pursued. She also indicated that having read the written submissions filed on behalf of the Applicant, the Respondent accepts that there must be special circumstances for the grant of a stay of execution and that the court must look at all of the circumstances of the case to decide whether or not to grant or refuse a stay. She also agree with the statements in the written submissions that the court must consider whether injustice would result on either side if the stay is granted and whether there are arguable grounds of appeal. She urged that paragraphs 6 - 9 of the supplemental affidavit of Colin Williams address the grounds of appeal. Counsel for the Respondent did not file any written submissions.

NOTICE OF OPPOSITION - GROUNDS

[7] The Applicant filed a Notice of Opposition and Affidavit of Kemilia Anderson in support on May 27, 2014. They also filed written submissions on May 28, 2014. The grounds of the opposition are stated to be:

"1. The Respondent vigorously opposes the Applicant's application to stay the variation of restraint order made on the 21st may, 2014 and entered on the 22nd May, 2014.

2. The Courts (sic) discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if the stay is granted or refused. In the instant matter the respondent

contends that to grant the stay will seriously prejudice the respondent and create an injustice to him.

3. The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour. It is contended that there is no such good reason advanced by the Applicant.
4. The Applicant has failed to meet the threshold required for a stay to be granted:-
   a) The Applicant has failed to set out any grounds in its Notice of Application upon which to have the Honourable Court exercise its discretion.
   b) The Applicant has failed to assert and show that it will be personally and financially ruined without a stay. There is no such evidence before the court.
   c) Further, the Applicant has failed to show how its appeal has a good prospect of success, bald assertion of such is insufficient - again there is no such evidence before this Honourable Court.
5. In the premise thEi Respondent humbly prays that the Application for a stay of execution for the variation of restraint Order No. 1 of 2008 be dismisse.d"

[8] Counsel for the Applicant Ms Sylvester submitted that "the heart of the issue is whether or not in the circumstances of this case, a stay should be granted". She submitted further that the general proposition is that where an unsuccessful party seeks a stay of execution pending an appeal, they must be able to satisfy the court that without a stay of execution they will be ruined and there is a prospect of success before the Court of Appeal - **LinotypeHell Finance Ltd. V Baker [1992] 4 All E.R. 887.** Ms Sylvester added that although the Respondent did not indicate which legal provision they were seeking to invoke to obtain a stay of execution, the court could exercise that power only under Rule 26.1(2) (q) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("the Rules"), as there is no recourse to the inherent jurisdiction of the Court when there are Rules governing the issue under consideration - **Attorney General v. Universal Projects Limited [2011] UKPC 37 at para. 27.**

[9] Ms Sylvester submitted further that the court has an unfettered discretion regarding the grant of a stay of execution and the terms of such a grant, that a stay will be granted only if there are special circumstances set out in an affidavit and that the affidavit and supplemental affidavit of the learned OPP do not show that any such circumstances exist. In fact she submitted, paragraphs 8 and 9 of the learned DPPs supplemental affidavit is clear that the appeal was lodged seeking "guidance of the Court of Appeal regarding the impact of confiscation proceedings" and that is not a special circumstance. She added that a fundamental principle governing the grant of a stay of execution is that a successful litigant should not be deprived of the fruits of its judgment. Ms Sylvester argued that this application relates to payment of legal fees for work already completed before the Court of Appeal and that section 8 of the Constitution confers on the Applicant a right to legal representation embodied in a fair trial. In addition, she pointed out that the Respondent's affidavit in support fails

to adduce any evidence that they will be ruined if a stay is not granted. She relied on the cases of **Andrew Popely v. Ayton Limited et al Saint Vincent and the Grenadines High Court Civil Claim No. 1 of 2005** and **Marie Makhoul v. Cicely Foster**[4] in support of this latter submission.

[10] Ms Sylvester referred also to the case of **Customs and Excise v. Norris [1991] 2 All E.R. 395 at page 396j** in support of her submission that there is on duty on the Applicant's family to pay his legal expenses. In this regard, she remarked that the Restraint Order under the headings "Exceptions to this Order" made no exceptions for monies to be released for living expenses or other reasons as it expressly stated that the Applicant was a self-employed businessma.nThis factor she said was taken into account by the learned judge in varying the Restraint Order as the Applicant had since been convicted, is currently imprisoned and is therefore no longer self-employed and able to meet his legal expenses from other sources. She submitted further that the Respondent had not made full, frank and clear disclosure to the court, provided no evidence of injustice to them or alleged that their appeal would be stifled.

FINDINGS

(11] Rule 26.1(2)(q) of the Civil Procedure Rules 2000 ("CPR") provides:

> "Except where these rules provide otherwise, the court may -
> (q) stay the whole or part of any proceedings generally
> or until a spEicifieddate or event;"

The court is empowered to entertain and dispose of applications for stay of execution pursuant to this Rule. This Application will be considered accordingly.

[12] The Court of Appeal decisions in the cases of **Marie Makhoul**[5] and **Marguerite Desir v. Sabina James Alcide**[6] are authorities which rehearse the principles on which a stay of execution will be granted. Essentially, the i uiding principles require the court to:

(i) take steps to ensure that its judgments are not rendered valueless;[7] being mindful that "the normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting a stay;"[8] in other words, the court must "hold a balance and give full and

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[4] **HCVAP 2009/014**

[5] ibid

[6] **HCVAP 2011/0030**

[7] **Marguerite Desir Case at para . 3** per Edwards C.J. (Ag.), (as she then was)

[8] ibid

proper weight to the starting principle" that "there must be good reasons advanced for depriving a successful litigant from reaping the fruits of a judgment";[9] The mere existence of arguable grounds of appeal is not enough, by itself, a good reason."[10]

(ii) be mindful that "a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success; that it is not enough to make a bald assertion to the *effect* that an applicant would be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay;"[11] and

(iii) assess the evidence in support of the application to determine whether it is full, frank and clear; consider "whether there is a risk of injustice to one or both parties if it grants or refuses a stay;"[12] "In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be able to enforce the judgment? On the other hand, 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 able to recover any monies paid from the respondent?"

[13] The facts and the issue in this matter essentially pit the Respondent against the Applicant in connection with an Order of the court releasing funds to the Applicant for the purpose of discharging his contractual obligations to his attorneys for payment of legal fees for legal services they have provided to him in prosecuting his appeal against conviction. The funds were ordered released from one of seven bank accounts ostensibly owned by the Applicant, and with respect to which the Court previously made an Order restraining the Applicant from dealing with them. Under the rubric "Exceptions to this Order" the court directed that "no exceptions and conditions are made to the Order for living and legal expenses since the Defendant alleges that he is a self-employed business man." The language of this provision seems to suggest that the exceptions and conditions would have been considered and allowed in respect of **living and legal expenses** if the "Defendant/Applicant" was not gainfully employed. If that is so then his current employment status is a relevant consideration as it seemed to have been at the time of the Order. It is

[9] Per Justice George-Creque JA (as she then was) in the **Marie Makhoul case,** para. 3, and Edwards C.J. (Ag.) (as she then was) in the **Marguerite Desir case, para. 3**

[10] **Peggy Huggins and Others v. Jozeyl Morris, Saint Vincent and the Grenadines HCVAP 2008/009 (delivered 24th February 2009, unreported) at para.** Ii, cited with ap pro val by Edwards C.J. (Ag.) (as she then was) in the **Marguerite Desir case, para. 3**

[11] Per Staunton L.J. in **Linotype-Hell Finance Ltd. V. Baker (1992) 4 All E.R. 887** cited with approval by George-Creque JA (as she then was) in the **Marie Makhoul case at para . 4**

[12] Per Clarke L. J. in Hammond **Studdard Solicitors v. Agrichem International Holdings Limited (2001) EWCA Civ 2065 at paras. 13 and 22** cited with approval by Edwards C.J. (Ag.) in the **Marguerite Desir case at para. 3**

worth noting that the Applicant is not now gainfully employedand is serving a sentence of 10 years imprisonment as a consequence of his conviction, the subject of his appeal in this matter. It is against this factual background that the guiding principles will be assessed.

[14] In his two affidavits the learned Director of Public Prosecutions on behalf of the Respondent avers that there are pending confiscation proceedings in respect of the restrained assets. The court takes judicial notice of the fact that the Court of Appeal ordered the suspension of those confiscation proceedings on May 27, 2014. This evidence was not adduced by the respondent. The court has been informed that an appeal has since been filed by the Respondent on May 23, 2014, containing the two grounds of appeal set out in the applicationcontaining the same grounds as in the application.

[15] The affiant in his affidavits:

(i) rehearsed the facts surrounding the grant of the restraint and variation orders[13];
(ii) listed the two grounds of appeal;
(iii) stated that there is a reasonable prospect of success if the appeal is heard;
(iv) asserted that it is just and convenient for a stay to be granted[14];
(v) provided an update on the progress of its application for extension of time to appeal heard by the Court of Appeal on May 27, 2014;
(vi) provided an update on the release of funds by St. Vincent Cooperative Bank;
(vii) indicated that they have lodged an appeal against the variation of the restraint order[15];
(vii) stated that the grounds of appeal have merit, and that Justice Persad accepted an invoicewithout detailed cost assessment or an account;
(ix) declared that the implications of legal aid on the variaiton of restraint orders is an under litigatedarea of law in the jurisdiction on which the Respondent is seeking clarity through the appeals process;
(x) stated that the execution of the Restraint Order impacts on confiscation proceedings initiated by the State and that that is effectively the thrust of the application for stay of execution.[16]

[16] While the Respondent's affidavit contains two possible grounds of appeal, only one seems to have been framed appropriately and might disclose an arguable ground of appeal. The first ground fails to indicate in what way the learned trial judge is alleged to have erred. In addition, the

[13] Paragr aphs 1 to 7 of the affidavit filed on May 22, 2014

[14] Paragraphs 8 to 12 of the May 22nd affidavit

[15] Paragraphs 2 - 7 of the Supp lemental Affidavit filed on May 28, 2014

[16] Paragraphs 8 - 10 of the Suppl emental Affidavit filed on May 28, 2014

affidavits do not disclose any special circumstances on which a stay of execution could legitimately be granted. The respondent has failed to advance any good reasons for depriving the Applicant of the funds which have been ordered released under the variation order. The respondent makes no assertion that they will face ruin if a stay is not granted. The evidence which they have adduced falls short of establishing that they would face such ruin in the absence of a stay. The court cannot fabricate evidence and in this regard, the Respondent has not discharged the evidentiary burden which rests on them.

[17] In assessing the risk of injustice to the parties, no evidence was presented by either side on this issue. What is clear however is that the Applicant would likely be hindered in the prosecution of his appeal if the stay is granted as he is presently unemployed and has very little opportunity to earn income to enable him to pay his attorneys. If a stay is granted, in all probability he might not be able to proceed with his appeal. The court takes into consideration also that the success of confiscation proceedings will be contingent on the outcome of the appeal against conviction and even if the Applicant's appeal is dismissed, the Respondent must still establish to the satisfaction of the court that the respective assets are owned solely by the Applicant or that he has some reailzable interest in them, and that they are the proceeds of a particular crime. The court also takes account of the constitutionally protected right of each person to be represented by a legal practitionre of one's own choosing at one's expense.

[18] The court holds the view that if the stay is refused, the Respondent's ability to proceed with the appeal would not be affected in any way. In addition, there is a considerable quantity of property which is still under restraint which the Respondent would have access to if confiscaiton proceedings prove successful. I am satisfied that the remaining property is substantial enough to meet the justice of the case if a confiscation order is eventually made. In view of the fact that the Court of Appeal has suspended the confiscation proceedings, nothing much turns on what would happen to the property if a stay is refused as the property is not in danger of being disposed of while the suspension is in force.

[19] In view of the foregoing, it is apparent that the Applicant is the party likely to suffer more injustice if the decision went against him. I am not satisfied that the Respondent has provided full, fair and frank evidence in support of the application for stay of execution. The balance of the merits is against the Respondent.

ORDER

[20] The application for stay of execution of the Variation Order is accordingly refused. The costs of this application shall be costs in the appeal proceedings.

[21] I am grateful to counsel for the Respondent for the assistance rendered in their writtensubmission.s

Esco L. Henry

HIGH COURT JUDGE (Ag.)