

Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal Number: P-271 of 2020

Claim Number: CV2015-02479

BETWEEN

BHAGWANTEE SINGH-WEEKES

And

**BHAGWANTEE SINGH-WEEKES
(As Legal Representative of the Estate of Navin Singh)**

Appellant/Claimant

AND

SOUTH-WEST REGIONAL HEALTH AUTHORITY

Respondent/Defendant

PANEL:

N. BERAUX J.A.

P. RAJKUMAR J.A.

J. ABOUD J.A.

Date of delivery: December 18, 2020

APPEARANCES:

MR. A. RAMLOGAN SC leads MR. J. JAGROO instructed by DR. C. DINDIAL attorneys at law for BHAGWANTEE SINGH-WEEKES

MR. V. DEONARINE instructed by MS K. KAWAL AND MS C. SCIPIO (Senior Legal Officer) attorneys at law for the SOUTH-WEST REGIONAL HEALTH AUTHORITY

JUDGMENT

Delivered by BERAUX JA

1. This is an application by the South West Regional Health Authority (SWRHA) for a stay of execution of payment to the respondent Bhagwantee Singh-Weekes (Mrs. Singh-Weekes) of the sum of eight hundred and fifty eight thousand two hundred and fifty seven dollars and forty eight cents (\$858,257.48). In a judgment delivered on 28th August 2020, Quinlan Williams J ordered SWRHA to pay to Mrs. Singh-Weekes the sum of one million six hundred and sixty four thousand three hundred and thirty four dollars and fifty one cents (\$1,664,334.51) as damages for the negligent death of her son who died of Necrotising Fasciitis ('NF') which had been initially misdiagnosed as sciatica at the San Fernando General Hospital.
2. Mrs. Singh-Weekes has appealed part of the High Court's decision and SWRHA has cross appealed the award for lost years which amounts to the sum of eight hundred and fifty eight thousand two hundred and fifty seven dollars and forty eight cents (\$858, 257.48) referred to earlier.
3. Mrs. Singh-Weekes brought the claim in medical negligence under the **Compensation for Injuries Act Chap. 8:05 ('CIA')** and under the **Supreme Court of Judicature Act Chap. 4:01**. She claimed to be a dependent of the deceased under the **CIA**. The application for a stay

of execution was refused before Dean –Armourer JA in the Court of Appeal Chamber Court and SWRHA has renewed its application before the full court.

4. SWRHA is prepared to pay the sum of eight hundred fifty eight thousand two hundred and fifty seven dollars and forty eight cents (\$858,257.48) into court. Mrs. Singh-Weekes, however, wholly opposes the application for a stay of execution.
5. As to the “lost years” award, SWRHA challenges the judge’s application of a “conservative” multiplier of 13 contending that it was not conservative enough. It further challenges the application by the judge of a multiplicand of one hundred and sixteen thousand four hundred and eighty five dollars and twenty cents (\$116, 485.20), contending that a 5% deduction for contingencies in respect of the multiplicand was too low. It also challenges the award of pre-judgment interest at a rate of 6% as too high.
6. More specifically, SWRHA contends that the deceased, if he had survived, had a 50% chance of having his infected foot amputated due to NF. It contends that no sufficient account was taken by the judge of his diminished prospects of employment as an amputee. Further, the judge in taking account of that likelihood engaged in speculation that the loss of a limb would have empowered him to hire other welders and start a business. Other bases of challenge are that the judge, in arriving at her findings did not take any adequate account of:
 - a) The downturn in the local economy
 - b) The fact that PETROTRIN was no longer in existence and was the deceased’s employers’ main client
 - c) The worldwide (and nationwide) pandemic

7. The relevant passages of the judgment of Quinlan-Williams J are at paragraphs 23 to 39. I have culled the following paragraphs for the purposes of this judgment:

[24]The court is conscious however, that the medical expert along with the medical literature suggested the rates for loss of limb in patients suffering from NF are quite high, at about 50% in surviving cases of NF.

[25] As such, taking into account the vicissitudes of life, Navin Singh's ability to find employment would have been affected. However, this is purely speculative. Navin's disability could have negatively affected his abilities as a welder, it alternatively may have empowered him to hire other welders and begin a business where he was less involved in the day to day activities.

[26] In relation to the economic climate, the court took judicial notice that the deceased was employed at United Engineering Services Limited, a contractor of Petrotrin. The court also took note that Petrotrin is no longer in existence. Many of Petrotrin's employees and contractors have been struggling for jobs negatively affecting the economic conditions. However, there is no evidence that Petrotrin was United Engineering Services Limited's only customer. The claimant, in cross-examination agreed that Petrotrin was United Engineering Services main client. The court considered Trinidad's economic climate in relation to the worldwide coronavirus pandemic.

[27] In the circumstances, the court is of the view the multiplier should be reduced for the vagaries of the deceased (sic) trade as well as the economic uncertainty. A conservative multiplier, the court decided is 13.

...

[36] The income calculated here was net; a 25% deduction was already made for PAYE, NIS and health surcharge. The court considered the deceased (sic) trade as a welder and the evidence from all the pay slips adduced into evidence. Those pay slips reflected additional hours of income remunerated at the rate of time and a half. Two of the three pay slips also showed a figure calculated at the rate of double time. That evidence suggests that a skilled tradesman, such as a welder, may not have the same loss days as a white-collar worker. As such, the court finds that a further 5% deduction is appropriate for contingencies inclusive of holidays and sick days.

[37] Therefore, the multiplicand is \$116,485.20 (\$122,616.00 minus 5%). Using the multiplicand-multiplier formula, the estate would be entitled to \$1,514,307.60 (\$116,485.20 x 13).

Law

8. Part 64.16 of the **Civil Proceedings Rules 1998** (as amended) (CPR):

Except so far as the court below or the court or a single judge may otherwise direct—

(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and

(b) no intermediate act or proceeding is invalidated by an appeal.

9. The decision of the English Court of Appeal in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd. [2001] All ER (D) 258** is relevant. At paragraph 22, Clark LJ quoting rule 52.7 of the UK CPR which is similar to part 64.16 stated:

By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon 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 it grants or refuses a stay. 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 unable 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?

10. It is thus the risk of injustice which exercises the mind of the court in deciding whether or not to grant a stay of execution. As to how that discretion is exercised in this jurisdiction, the tests are as pronounced by de la Bastide CJ (as he then was) in **Emmanuel Romain v WASA CA No. 24 of 1997**, where he stated:

“...there are really two matters to be considered in relation to a stay of execution pending appeal. The first is what are the prospects of the appeal succeeding? ... The other question is whether there are any special circumstances which would justify exceptionally the grant of a stay.”

11. This dicta has been applied by Weekes JA sitting as a single judge in the chamber court in **National Stadium (Grenada) Ltd v NH International (Caribbean) Limited and Others Civ App No 48 of 2011**. The prospects of success must be good prospects. I have understood the question of special circumstances to be disjunctive of the issue of good prospects of success of the appeal, that is to say, it is a separate and distinct issue which stands on its own as a basis for the grant of a stay subject to the balance of injustice question.

12. Mr. Deonarine correctly submitted that SWRHA simply had to show that it had good prospects of success as opposed to demonstrating that it will succeed in its cross appeal. He focussed primarily on the multiplier, multiplicand and particularly on paragraphs [24] – [27] of the judgment of Quinlan –Williams J. He submitted that the trial judge took no proper account of the fact that on a balance of probabilities the deceased, if he had survived, would have survived as an amputee but rather she dismissed the effect of this probability on the basis that it would have empowered him to hire other welders and begin a business where he was involved in the day to day activities. He submitted that she was plainly wrong because:

- i. There was no evidence to support the finding that he would have been so empowered
- ii. None of the cases she relied on dealt with a situation in which the deceased would have survived as an amputee
- iii. The deceased would not have been better off had he survived as an amputee
- iv. The multiplier of 13 was too high because:
 - a) The retirement age for welders should have been 60 years rather than 65 years;
 - b) None of the cases at first instance dealt with the pandemic or the PETROTRIN shut down; and

c) The multiplier used was not conservative enough and should have been reduced.

13. He submitted further that there were also good prospects of success on the rest of the sums contested on the cross appeal as these relate to interest and a five percent (5%) deduction for contingencies. He submitted, in respect of both, that the judge's award was against the weight of authority.

14. Mr. Ramlogan in substance argued that the trial judge could not be said to have been plainly wrong in any of her findings and that consequently the appeal had no good prospects of success.

The appellate chamber court judge's decision

15. The single appellate judge sitting in chambers in refusing the application for a stay found the reasoning of the trial judge on the multiplier/multiplicand to be flawless and that there was no prospect that she was plainly wrong. She found that although the respondent alluded to three special circumstances namely:

- i. That they were under financial strain due to the ongoing pandemic;
- ii. That they were under financial strain due to the downturn in the economy; and
- iii. That in the event that the cross appeal was successful Mrs. Singh-Weekes would be unable to repay the contested sum;

these contentions were not supported by evidence and she found that there was no merit in them.

16. She found that the risk of injustice in the granting of a stay outweighed the risk of injustice in withholding the stay. As a successful litigant, Mrs. Singh-Weekes would be

deprived of the fruits of her litigation for an indeterminate length of time. Further, the claimant waited for many years to have her claim determined. On the other hand the risk of injustice to SWRHA would be the probability that Mrs. Singh-Weekes would be unable to repay the contested sum. She found that “in this regard there was no evidence to suggest that [Mrs. Singh Weekes] would be either unwilling or unable to repay the sum in question. The burden of proving her incapacity fell to the applicant for the stay.”

Analysis

Likelihood of success

17. The substantive appeal will ultimately be decided by another panel. It is not for me to undertake any unduly in-depth analysis of the trial judge’s decision and the facts upon which she based her decision. It is simply a question of assessing whether the issues raised in the cross appeal are viable and sufficiently arguable to cross the threshold of “good prospects of success.”

18. As to the multiplier/multiplicand, I am not persuaded by Mr. Deonarine that the multiplier was unduly high or not conservative enough. Neither am I persuaded that the judge did not significantly discount the multiplicand. In my judgment, it is unusual to have discounted both the multiplier and the multiplicand. That said, I consider that submission to be arguable. The fact that I may not agree with it does not render the same unarguable and unlikely to succeed. It is a sufficiently viable submission which may persuade another panel. In my judgment it meets the threshold of “a good prospect of success.” So, too, the question of the deceased’s employability as a likely amputee had he survived. In this regard, the comments of the trial judge at paragraph [25] of her judgment are open to criticism and in respectful disagreement with the appellate judge in chambers, the trial judge’s judgment cannot be described as “flawless.” An applicant does not have to show that it will win the appeal. I also consider the cross-appeal on the issue of interest to be a viable appeal. I say no more on that.

19. Having found that there is a good prospect of success it is not necessary to consider the question of exceptional circumstances. As I stated earlier, the question of exceptional circumstances is disjunctive of the first question of likelihood of success. Having found that there is a good prospect of success the question of exceptional circumstances is now superfluous.

Balance of justice/injustice

Deprivation of fruits of judgment

20. It is correct that Mrs. Singh-Weekes will be deprived of the fruits of her judgment by the grant of the stay. However, in this case SWRHA has tempered this by offering to pay over to her the balance of the judgment sum which is not the subject of the appeal. That is to say, Mrs. Singh-Weekes will not be totally deprived of the fruits of her judgment, rather, she will still have a substantial part of it at her disposal.

21. SWRHA has also proposed to pay into court the disputed sum of eight hundred and fifty eight thousand two hundred and fifty seven dollars and forty eight cents (\$858,257.48) to be held in an interest bearing account. This certainly disposes of any concern that they will be unable to recover that sum or any part of it should its cross-appeal succeed.

22. In these circumstances, the balance of justice considerations are not as acute as it relates to SWRHA. It is correct, however, that Mrs. Singh Weekes remains deprived of a substantial sum but SWRHA has a viable appeal which meets the threshold of a good prospect of success and in my view should be granted the stay of execution.

23. Before proceeding to the formal order I wish to comment very briefly on two decisions cited in the course of argument: **Rodrigues Architects Ltd v New Building Society Limited**

[2018] CCJ 09 (AJ) and A & A Mechanical Contractors and Company Limited v Petroleum Company of Trinidad and Tobago Limited CA No. S-168 of 2014.

24. The latter decision is a judgment of this court in an application for a stay of execution pending the hearing and determination of an appeal to the Judicial Committee of the Privy Council. In the judgment under appeal **A&A Mechanical** had been ordered to pay money to PETROTRIN.

25. In **A&A Mechanical**, there was an application under section 6 of **The Trinidad and Tobago (Procedure in Appeals to Privy Council) Order in Council 1962** to the Court of Appeal for a stay of execution pending appeal to the Judicial Committee of the Privy Council. In refusing the application for a stay the Court of Appeal (Pemberton, Holdip & Kokaram JJA) adopted and applied the decision of the CCJ in **Rodrigues**. While the guidelines set out in **Rodrigues** provide very helpful guidance on the approach to be adopted in respect of a stay of execution, they are not to be slavishly and inflexibly applied as some species of a mathematical solution to the question. Each case must be decided on its own facts and circumstances and as a matter of necessity mostly require a more flexible approach to the issue.

Disposition

26. In the result:

- i. A stay of execution is granted until the hearing and determination of the cross-appeal subject to the outstanding sum in the amount of eight hundred and fifty eight thousand two hundred and fifty seven dollars and forty eight cents (\$858,257.48) being paid into court and placed in an interest bearing account.

- ii. The outstanding sum to be paid into court on or before the 29th day of January 2021
- iii. Costs of the application will be costs in the cross appeal.

/s/ Nolan P.G Bereaux
Justice of Appeal

I have read the judgment of Bereaux J.A. I agree with it and have nothing to add.

/s/ P. Rajkumar J.A.

I too agree.

/s/ J. Aboud J.A.