

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0028 OF 1997

(On Appeal from the High Court of Fiji
at Lautoka in Action No. HBC0330 of 1996L)

BETWEEN:

HAROON ALI SHAH of 7 Yasawa
Street, Lautoka, Fiji

Appellant
(Original Defendant)

- and -

MARCELLA BUGEJA of 1/30
McFarlane Crescent, Epping, Melbourne,
Victoria, Australia

Respondent
(Original Plaintiff)

Mr G.P. Shankar for the Appellant
Mr John Howard for the Respondent

Date and Place of Hearing: 13 June 1997, Suva
Delivery of Decision: 24 June 1997

DECISION
(Chamber application for a Stay Order)

This is an application for an order to stay execution pending appeal of Judge Lyons' "Ruling" made in the Lautoka High Court on 23 May 1997 whereby he ordered (a) that the Appellant pay Respondent through her solicitors the sum of \$25,013.00 within 7 days and (b) "---that this file HBC0330.96 (LAUTOKA) and file No. HBC0294.93 (LAUTOKA) be forwarded to the Deputy Registrar/Lautoka and that a copy of this Ruling and copies of the two files above be forwarded to the President of the Fiji Law Society for further action in respect of allegation that the Defendant herein has manifestly overreached his client (the Plaintiff)."

On 27 May 1997 the Appellant filed a Notice of Appeal against Lyons J.'s 'Ruling' and on the same day sought an ex parte stay which I granted (except as regards publication in the media) until inter-partes hearing on 3 June 1997. On the adjourned date I extended the interim stay until 13 June 1997 conditioned upon the Appellant paying into Court \$15,000. This order has been complied with. This application was heard on 13 June 1997 when Mr G.P. Shankar, Counsel for the Appellant, informed me that he was seeking stays pending appeal against the 2 orders made by Lyons J. but was not proceeding with the stay application against the media because 'Fiji Times' had already published the 'Ruling' on 24 May 1997 under the heading '*Judge scolds lawyer*'.

The Appellant is Mr Haroon Ali Shah a barrister and solicitor practising in Fiji and the Respondent is an Australian who was involved in a motor

accident in Fiji in January 1992 whilst on a visit to this country. She apparently suffered extensive injuries. On her instructions the Appellant issued proceedings against the driver and the owner of the car for damages for personal injuries (HBC0294/1993L). On 30 July 1996 the claim was settled for \$80,000.00 without the matter proceeding to trial. This amount was paid into the Trust Account of Messrs Suresh Maharaj & Associates, solicitors for the National Insurance Company.

Immediately after the settlement a dispute arose between the parties as to costs. The Respondent says the Appellant claimed \$40,000 whereas the Appellant says that a verbal agreement was reached that the costs would be \$30,000. Respondent then engaged Messrs Howards as her solicitors. It is the Respondent's contention that the Appellant moved the Court to oblige the Insurance Company under the threat of contempt proceedings to pay the settlement monies into his account after she had withdrawn her instructions from the Appellant.

On 6 August 1996 Mr John Howard of Howards wrote to the Appellant. In response the Appellant submitted a bill of costs.

Following negotiations the dispute as to costs appeared to have been resolved on terms.

The compromise is reflected in the following letter Messrs Howards wrote to Mr Anand Singh of Singh & Fatiaki, solicitors for the Appellant, on 15 August 1996:-

"Our Ref: 1309D/2

15 August, 1996

*Mr Anand Singh
Messrs Singh & Fatiaki
Barristers & Solicitors
Lautoka
Fax:666 683*

Dear Sir,

RE: MARCELLA BUGEJA AND HAROON ALI SHAH

We note you act for Mr Shah and we act for Mrs Bugeja.

As requested we write to confirm details of the resolution of this matter as it involves National Insurance.

- 1. Mr Shah will forthwith withdraw contempt proceedings against National Insurance and have the order of 02 August, 1996 in 294 of 1993, dissolved.*
- 2. National Insurance will forthwith effect payment as follows:*
 - a) \$15,000.00 to Messrs H A Shah (office account) on account of his costs in re Marcella Bugeja.*
 - b) \$15,000.00 to Messrs H A Shah Trust Account in trust for Marcella Bugeja pending resolution of costs dispute.*
 - c) \$50,000.00 to Messrs Howards Trust Account in trust for Marcella Bugeja.*

On receipt of your signature on the facsimiled copy indicating Mr Shah's agreement, we will via Mr Maharaj arrange for National Insurance to effect payment immediately.

We trust this accords with your understanding of our discussion yesterday.

Yours Sincerely

*John R. Howard
HOWARDS*

JRH/nd

*cc: Mr Suresh Maharaj
Fax: .667 441"*

Following the compromise the Appellant received \$30,000 (\$15,000 for costs & \$15,000 in trust) from the Insurance Co. The Respondent received \$50,000.

On 1 October 1997 the Respondent issued an Originating Summons against the Appellant seeking a number of declarations and orders in Civil Action No. HBC0330 of 1996L. These read as follows:-

1. *A DECLARATION that in his dealings involving the Plaintiff on or about July 1996 the Defendant engaged in conduct that was misleading or deceptive or was likely to mislead or deceive in contravention of Section 54 of the Fair Trading Decree, 1992, and*
2. *A DECLARATION that in refusing to allow the Plaintiffs insurance settlement proceeds to be paid to her and or in rendering a bill of costs to the Plaintiff in the amount of \$30,000 .00 the Defendant engaged in unconscionable conduct in breach of Section 55 of the Fair Trading Decree, 1992, or*
3. *A DECLARATION that the Defendant exerted undue influence on the Plaintiff in refusing to allow the Plaintiffs insurance settlement proceeds to be paid to her unless the sum of \$15,000.00 was paid to his office account and unless the further sum of \$15,000.00 was paid to his trust account, and by consequence the agreement of 15 August, 1996 as to this is null and void and/or set aside, and*
4. *A DECLARATION that the Defendant received \$15,000.00 in trust for the Plaintiff which monies the Defendant had and received for and on behalf of the Plaintiff,*
5. *AN ORDER that the Defendant forthwith pay to the Plaintiff the sum of \$15,000.00 held by the Defendant in trust for the Plaintiff,*
6. *AN ORDER that the Defendant pay to the Plaintiff interest at the rate of 13.5% per annum on the sum of \$15,000.00 claimed as from 7 September, 1996 until payment in full,*
7. *AN ORDER for damages in favour of the Plaintiff, and*

8. *AN ORDER for costs in favour of the Plaintiff on a solicitor/own client basis."*

Paragraphs 17 and 18 of the Respondent's supporting affidavit filed in this Action read as follows:-

- "17. *THAT I agreed to pay the Defendant \$15,000.00 for his legal fees and disbursements in the knowledge that the sum was excessive, rather than risk the entire settlement amount of \$80,000.00. I also agreed on that basis that the sum of \$50,000.00 be held by Howards in trust for myself and that the balance sum of \$15,000.00 be held by the Defendant in trust for myself.*
18. *THAT I am informed by Howards that by letter dated 15 August, 1996, it received a cheque for \$50,000.00 from Suresh Maharaj & Associates. Attached to the letter was a copy letter from Suresh Maharaj & Associates to Messrs Singh & Fatiaki, Solicitors for the Defendant enclosing a cheque for \$15,000.00 payable to the Defendant's office account and a second cheque for \$15,000.00 payable to: "Messrs Haroon Ali Shah Trust Account in trust for Marcella Bugeja".*

On 7 February 1997 Lyons J. struck out the bulk of the application made in the Originating Summons but indicated that he would remit the file to the Chief Registrar for taxation of a bill of costs in Lautoka High Court Civil Action No. HBC0294 of 93L.

On 11 February 1997 Lyons J. gave his reasons in writing for his ruling delivered on 7 February 1997. He held that the application as pleaded had no prospect of success because the Fair Trading Decree was irrelevant and inapplicable. He held that there was no written agreement as to costs between the parties and that the provisions of Legal Practitioners Act applied. He also expressed the view that the Court has an inherent jurisdiction to make such

orders relative to matters before it as would best serve the purposes of leading to a conclusion of any dispute in respect of applications brought before it. He then made inter alia the following orders -

- “1. *That the application filed by way of Originating Summons on the 1st October 1996 be struck out as frivolous and as having no prospects of success.*
2. *That High Court action (LAUTOKA HBC0294/93L) between MARCELLA BUGEJA -v- MOHAMMED TAHID AZMAD ALI be remitted to the Chief Registrar of the High Court in Suva for taxation of the Defendant's bill of costs in the said matter dated the 5th day of August 1996 or such other bill of costs in taxable form that the Defendant may render pursuant to Orders made by me on the 12th Decemaber 1996 or, pursuant to a further order that I shall make herein.*
3. *That such bill of costs be taxed, as is reasonable, on a full indemnity (solicitor/client basis) on the higher scale.*
4. *That, at the conclusion of such taxation and on the issuing of the Chief Registrar's Certificate in respect thereof, both these matters (HBC0330/96L and HBC0294/93L) be remitted back to me for the making of final orders relative to the dispersal of Trust monies held in Trust by the Defendant and any other party as may be applicable together with such other orders as may be necessary.”*

He also ordered that the 2 files be returned to him after taxing for general house-keeping purposes. He awarded \$550.00 costs to the Appellant.

On 23 May 1997 Lyons J. gave a further 'Ruling' after the 2 files had been returned to him after taxation. It is this 'Ruling' that is under challenge. There does not appear to have been any further submissions made by Counsel representing the parties immediately before this 'Ruling'. The "Ruling" consists of 13 typed written pages. In it Lyons J. outlined the history of dispute between the parties as to costs and came to the conclusion that there

was a strong prima facie case against the Appellant for "overreaching" the client, i.e. the Respondent. He also held that the Court was faced with evidence of a strong prima facie case against a lawyer of a serious ethical breach, that of professional conduct.

He, therefore, ordered the Appellant to pay Respondent's solicitors within 7 days the sum of \$25,013.00 (twenty five thousand and thirteen dollars) made up as follows:-

<i>"To amount held on account</i>	....	\$30,000.00
<i>Less taxed costs</i>	.....	<u>\$ 4,537.00</u>
		\$25,463.00
<i>Less costs in favour of the Defendant of 7/2/96</i>	.....	<u>550.00</u>
		\$24,913.00
<i>Plus costs in favour of Plaintiff of 12/12/96</i>	.....	<u>100.00</u>
TOTAL	.....	<u>\$25,013.00"</u>

As noted at the outset Judge Lyons also directed that the matter be referred to the President of the Fiji Law Society for further action against the Appellant.

The Appellant's Notice of Appeal filed on 27 May 1997 reads as follows:-

1. **THAT** *the Learned Trial Judge erred in law and in fact in arriving at his decision for the following reasons.*

- 1.1 *The Learned Judge failed to disclose the full award of the taxing master to the Appellant.*
- 1.2 *The Learned Judge erred in proceeding to deliver a decision in the matter when he had referred to the matter to a taxing master.*
- 1.3 *That by proceeding to deliver a decision, the Learned Judge has denied the Appellant a right to take the taxing master's award for revision to a Judge as he was otherwise entitled to do under the Rules of the High Court.*
- 2.1 *The Learned Judge erred in law and in fact in proceeding to find facts or Affidavits when there was conflicting matters so deposed.*
- 2.2 *In any event, the Learned Judge erred in proceeding to find on matters of facts on the Affidavit filed in the action proper when he had earlier dismissed the action as frivolous and vexatious.*
3. *The Learned Judge failed to give an opportunity to the Appellant to be heard on the matter prior to making his final orders and consequently is in breach of principles of natural justice.*
4. *The Learned Judge's decision is ultra-vires and outside the framework of the Rules of the High Court and in particular Order 62 thereof.*
5. *The Learned Judge erred in law and in fact in holding that the sum of \$15000.00 (Fifteen Thousand Dollars) was not agreed partial costs whereas the evidence adduced by the Appellant clearly indicated the converse.*
6. *The Appellant intends to file further grounds once a transcript of the case is made available to him."*

On 3 June 1997 the Appellant gave notice that he will argue and rely on the following additional Grounds of Appeal:

- "1. *That the learned Judge was wrong, acted unfairly and unreasonably in making order for taxation of costs in Civil Action No. HBC 330 of 1996L (which in fact was disposed by another Judge)-*
 - (a) *When in fact there was no proper and lawful application in writing in accordance with the High Court Rules and/or Legal Practitioners Act.*

- (b) *When in fact after the Respondent terminated the Appellant's instructions, the Respondent and/or her new Solicitors agreed and/or authorised the Insurance Company to pay \$15,000.00 [FIFTEEN THOUSAND DOLLARS] to the Appellant to be retained as his costs and the another \$15,000.00 (FIFTEEN THOUSAND DOLLARS) to be held by Appellant in Trust account pending resolution of the dispute, and \$50,000.00 [FIFTY THOUSAND DOLLARS] paid to Respondent and/or her new Solicitors. The Respondent is estopped to wriggle and resile from that agreement.*
2. *That the learned hearing Judge having dismissed the originating Summons No. HBC 330 of 1996L became functus officio and had no powers authorities and jurisdiction to make the orders which the learned Judge purported to do because-*
- (a) *Inherent powers are only applicable when there are no statutory provision and provision under the rules.*
- (b) *There was no proper and lawful application by Respondent seeking the order which the learned Judge made.*
3. *That the learned Judge was wrong in holding that agreement as to costs can only be in writing when in fact writing is merely evidence of consensus and/or agreement orally reached by the Parties.*
4. *That the orders made by the learned Judge are in excess of jurisdiction and/or in breach of rules of natural justice, fair procedure and fair hearing."*

I now have had the benefit of perusing the relevant Lautoka Civil Action files and note that on 23 May 1997, i.e. on the same day as the 'Ruling' was given, the Deputy Registrar Lautoka forwarded in compliance with the Judge's direction certain Rulings and records to "Haroon Lateef Esq., Barrister & Solicitor---" presumably in his capacity as President of the Fiji Law Society.

In the circumstances the question whether I ought to consider granting or refusing pending appeal a stay in respect of the Judge's direction to the

Deputy Registrar has now become academic. Consequently I will refrain from giving any ruling on the matter except to say that the Fiji Law Society will no doubt take notice that the matter is now sub-judice.

I will, therefore, now proceed to deal with the stay application as regards Judge Lyons' order that the Appellant do pay to the Respondent through her solicitors the sum of \$25,013.00 within 7 days.

Both Counsel have made written and oral submissions. The Appellant has also filed an affidavit in support of his application. Mr Shankar on behalf of the Appellant has, amongst other things, raised the question of *functus officio*, lack of jurisdiction and of denial of natural justice. He said that there will be no prejudice to the Respondent since \$15,000.00 has already been deposited into Court. He also undertook to prosecute the appeal with due diligence.

For the Respondent Mr Howard emphasised the principles on which a Court generally acts on stay applications. He argued that the Appellant's affidavit does not disclose in what way his appeal will be rendered nugatory other than stating that the Respondent resides abroad. He contended that there were no special circumstances to warrant a stay. He would like the whole amount to be paid into Court although he would prefer the amount be paid to his client. He also argued that since the appeal involves orders relating to costs there can be no appeal without leave by virtue of Section 12(2)(e) of the Court of Appeal Act. Section 12(2)(e) says that -

" No appeal shall lie -

(a) -----

(b) -----

(c) -----

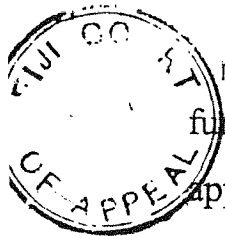
(d) -----

(e) without the leave of the Court or judge making the order, from an order of the Supreme Court or any judge thereof made with the consent of the parties or as to costs only;-----"

It will be useful if I deal with this point first. The grounds of appeal as filed clearly raise the question of jurisdiction of the Court to make the orders relating to costs in the particular circumstances of this case. Jurisdiction is a fundamental question of law and hence is appealable as of right against any final order even though they relate to costs. The appeal is not against "costs only" but it is also a challenge to the jurisdiction to make the order concerned. I am, therefore, of the view that no leave is necessary.

As far as the matter on appeal is concerned the Respondent was successful in the Court below and as such , all other things being equal, is entitled to receive the fruits of her success as ordered. It is , therefore, for the Respondent to demonstrate that a stay is warranted at least in a form that is fair to both parties.

Appellants'
 The ~~Respondent's~~ appeal raises some issues which are both complex and fundamental. Prima facie at least some of the issues are clearly arguable. The appeal cannot be characterised as one that is obviously destined to fail or one designed to delay payment. There were at least 7 rulings in the Court below and the course taken was quite novel but this is not to hold they were inappropriate. Nevertheless some definitive ruling by the Court of Appeal would be useful even if the Appellant is not successful. If the total amount is



paid to the Respondent the Appellant is likely to have difficulty in recovering it, if he is successful, bearing in mind that she lives in Australia.

Whilst the principle on which a stay is normally granted are generally well settled each case ultimately depends on its own peculiar facts and circumstances. No doubt this Court enjoys a very wide discretion in dealing with such applications but the discretion has to be exercised judicially and fairly.

As I have indicated this is an unusual case. There is need to balance the competing interests of the parties on the scale of fairness.

In my view the ends of justice will be met if I granted stay on terms whereby the interests of both parties are protected. In this regard I bear in mind that in the event the appeal fails the Respondent will be entitled to interest on judgment on any unpaid amount.

I, therefore, grant stay against the payment Order on the following terms -

- (i) That the sum of fifteen thousand dollars (\$15,000.00) paid into Court on 6 June 1997 by the Appellant do remain in Court's jurisdiction pending further order of this Court;
- (ii) That the Registrar be at liberty to deposit the said amount in an interest bearing account;

- (iii) That within 14 days the Appellant places in his trust account with a commercial bank the sum of ten thousand and thirteen dollars (\$10,013.00) pending further order of this Court;
- (iv) That the Appellant prosecute his appeal with due diligence;
- (v) That each party do have liberty to apply;
- (vi) That the costs of these proceedings before a single judge be determined by the Court of Appeal.



Moti Tikaram

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Sir Moti Tikaram
President, Fiji Court of Appeal

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