IN THE FIJI COURT OF APPEAL

IN CHAMBERS

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0045 OF 1997S
(High Court Civil Appeal No.HBM0007 of 1997/L)

BETWEEN:

TAUZ KHAN

APPELLANT/APPLICANT

-and-

NETANI WAQANIVERE

RESPONDENT

Mr.H.A. Shah for the Appellant/Applicant
Mr. C.B. Young for the Respondent

Place of Hearing : Suva
Date of Delivery of Order : 7 November, 1997

ORDER

The appellant is seeking an order staying execution of the judgment of the Magistrates'Court, Lautoka, dated 3 May 1996; by that judgment that Court ordered the appellant to pay $4,836.40 to the respondent as damages. The respondent's claim arose out of a motor vehicle accident. A taxi belonging to the appellant but driven by another person (who was the second defendant in the Magistrates'Court) collided with the appellant's car and damaged it. The appellant did not appear at the hearing of the claim, although notice of it had been served on him. The appellant applied to have the judgment, which was given in his absence, set aside but the learned Magistrate refused; he gave full reasons for doing so. The respondent commenced bankruptcy proceedings against the appellant in the Magistrates' Court.

The appellant appealed to the High Court against the Magistrate's refusal to set aside the judgment. He also applied in the Magistrates Court to stay the bankruptcy proceedings; that application was rejected. I have not been informed by the parties what has happened to those proceedings. However, it seems likely that they were terminated when the appellant complied with an order made by Lyons J. on 14 February 1997 for $4,836.40 to be placed by the appellant in an interest-bearing account in the joint names of the appellant's solicitor and the respondent's solicitor as trustees.

In the High Court Lyons J. dismissed the appeal. The appellant then applied to him for an order staying execution of the Magistrates' Court's judgment pending an appeal to this Court. Lyons J. rejected the application, giving full reasons for doing so. The appellant then applied in this Court for a stay of execution. The parties appeared before Tikaram P. on 9 September 1997 and agreed that the application should be dealt with by a single judge, that they would file written submissions and serve them on one another and that the application should be decided without an oral hearing.

Both parties have filed their written submissions. The application for the stay was supported by an affidavit sworn by the litigation clerk of the appellant's solicitor, whose office is in Lautoka. The respondent has sworn a lengthy affidavit in reply, which has also been filed. In the litigation clerk's affidavit she deposed *simpliciter* that "the Respondent does not have the means to reimburse the appellant in the event the monies are released to the respondent

and the respondent ultimately loses the civil claim in the Magistrates'Court". She did not depose how she knew that. She deposed also that no prejudice would be caused to anyone if the money continued to be held in trust in the interest-bearing account pending the determination of the appeal. The respondent stated in his affidavit that he has ample ability to repay the $4,836.40 if it is paid out to him, as he is a full-time bailiff, owns three motor vehicles and a residential property and holds a 30-year lease of a 17.4015 hectare block of native land in Ba province. He deposed also that the litigation assistant of the appellant's solicitor is not known to him and is in no position to know his financial status and that the appellant himself is not in a position to do so. It is apparent from the details of the parties in the title of the appeal that the appellant resides in Suva and the respondent in Lautoka.

Before considering any other relevant matters I note that every ground of the appeal to this Court commences -

"THE Learned Appeal Judge erred in law and in fact",

that is to say involves a question of mixed fact and law. Section 12(1)(c) of the Court of Appeal Act (Cap.12) provides that an appeal from any decision of the High Court in its appellate jurisdiction lies on grounds involving only questions of law. Unless, therefore, the notice of appeal is amended, the appeal will be dismissed. That, on its own, is a reason why the interlocutory application with which I am dealing must be dismissed at this stage.

However, even if the notice of appeal raised only questions of law, I should have dismissed the application. Both the learned Magistrate and Lyons J. correctly stated the principles to be applied in dealing with an application for stay of execution of a judgment. The

fact that an appeal is pending does not of itself operate as a stay of execution (see O.XXXVII r.6 of the Magistrates' Courts Rules and rule 25(1) of the Court of Appeal Rules). However, the Magistrates' Court had power to order a stay, as did Lyons J. and as do I. The discretion whether or not to order it must be exercised judicially, that is to say for proper reasons, which are to be stated, after the parties have been given an opportunity to be heard on the matter. However, it is well established that a successful party is not to be deprived of immediate enjoyment of the fruits of his success unless there are special circumstances, in particular a substantial risk that it will not be possible for the *status quo ante* to be restored if the appeal is successful. In this present case the stay should be granted only if there is a substantial risk that, if the money is paid out to the respondent, it will not be possible for the appellant to recover it if the appeal succeeds; there are no other special circumstances.

The respondent has sworn in his affidavit that he is a man of some financial substance. The only evidence that he is not is that of the litigation clerk of the appellant's solicitor. She has not stated how she has acquired her knowledge of that. The respondent has sworn that he does not know her. The onus of establishing the risk that the respondent will be unable to repay the money if the appeal succeeds rests on the appellant. He has not discharged it; on the contrary the evidence that the respondent will be able to repay it is cogent.

Accordingly my discretion must be exercised in favour of the respondent, that is to say to dismiss the application for stay of execution.

I order, therefore, that the application be dismissed and that the appellant is to pay in any event, the costs of the proceedings in respect of it which I fix as $300.

I.R. Thompson

Mr Justice I.R. Thompson
Justice of Appeal

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