

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.A. 3/92

IN THE MATTER of the Judicature Ordinance
1961

BETWEEN

CHRIS PHILIPP of Motootua,
Public Servant trading as
SAMOA HANDCRAFT INCORPORATED

APPELLANT

A N D

L.T. ENDEMANN & COMPANY LTD
a duly incorporated company
having its registered
office at Maluafofou

RESPONDENT

Counsel : Puni for Appellant
Drake for Respondent Company

Judgment : 15 April 1992

JUDGMENT OF RYAN, C.J.

This is an application for a stay of execution in respect of a judgment given on 17 March this year pursuant to which the Respondent had a judgment in its favour against the intended appellant in the sum of approximately \$79,209 plus costs. That figure may require some adjustment insofar as interest is concerned.

Mr Puni concedes that a stay of execution is at the discretion of the Court and that the mere fact that an appeal has been filed does not stay a decision. He went on to concede that in rorm circumstances that a stay of execution would not be granted unless there are such special circumstances in the case to justify it. He correctly points out that the Court can stay the execution of the judgment on conditions. A list of assets has been filed which show that the intended appellant, as Mrs

Drake puts it, is a man of substance and it seems to have numerous sources of income. There is jurisdiction in the Court to order payment to the Court but it seems to me to that that would achieve little. There have been some recent decisions in the New Zealand High Court on the issue and I refer to in particular to Chappell v Pemberton, the decision of Doogue J in September 1986 and I quote from Sim & Cain in Practice and Procedure 12th Ed. under Rule 35 of the Civil Procedure Rules 2047 pg 619 L. 2 :

"For present purposes it is probably enough to say that the discretion is to be exercised under the Rule in the manner which on the balance of all factors involved, best meets the overall justice of the case...As I understand my position, I am required to balance the plaintiff's rights to the fruit of his judgment and the defendant's rights to pursue his appeal. The defendant has offered certain security for the judgment, in the form of a second mortgage but this is unacceptable to the plaintiff. I have been referred to no judgment which suggests I must consider the detriment to a defendant in meeting a judgment, as this must surely always be the case. On the other hand, there are judgments which make it plain the detriment to the plaintiff of not having the fruits of his judgment are to be considered."

After reviewing the facts His Honour dismissed the application for stay. The second case is between UDC Finance Ltd v Lloyd also 1986 decision but of Wylie J, where a stay of execution was also refused. A passage from his judgment reads as follows:

"Balancing as best I can the competing interests and more importantly the rights of the parties, it seems to me that the first defendant will not be deprived of any right or suffer any great hardship if a stay is not granted, whereas

if a stay is granted the plaintiff is likely to be prejudicially affected and will be deprived for the time being of his right to the fruits of his judgment. In those circumstances I think the justice of the case requires that a day should not be granted."

Mrs Drake referred me to a decision of Nicholson C.J., in Samoa Iron and Steel Fabrication where this question was dealt with and of course there is also a decision of mine last year in this Court in a case involving the Samoa Observer where I ordered a partial stay of execution.

One of the major matters of concern to me in the judgment that I delivered was the point that I brought to Mr Puni's attention today during argument and that involved the failure of the appellant to even take action in an endeavour to meet with his associates to resolve the problem. I am told from the Bar today that Mr Philipp has done his best to get at least two other directors to have a meeting but for some reason not of his making, the meetings have not been held. I think Mr Philipp will have to take stronger action given those circumstances.

Another matter which was brought to my attention relates to the fact judgment has also been given against one Roebeck and this was given in August 1991, but execution has not been sought in respect of that judgment. That it seems to me is rather curious. An explanation put forward by Mrs Drake that the Respondent here was awaiting the outcome of the claim against Mr Philipp seems to me not to be very convincing. During the course of the judgment I mentioned at page 4 the penultimate paragraph of that the bona fides of the appellant and the fact that work to a value of \$21,631 was carried out after the appellant found out that there had been no incorporation of an incorporated society or limited Company. I think the best course to take in this situation bearing in mind that fact, the assets of the appellant, the unsatisfied judgment in respect of Roebeck and the general discretion which the Court has, is to order a stay of execution only in respect of the sum of \$57,578.00. That will leave a balance figure that I have mentioned of \$21,631 plus costs available to the Respondent

to execute a judgment against. I will not require the appellant to pay any further monies into the Court pending the outcome of the appeal.

However a condition to the stay is that none of the assets set out in the list supplied to the Court are to be disposed of by the appellant without leave of the Court.

The Respondent is entitled to costs insofar as this application is concerned and I fix that figure at \$150.00.


.....
CHIEF JUSTICE