

**NATIVE LAND TRUST BOARD v SHANTI LAL, APISAI AND BANSI,
SUSU (CBV0009 of 2011)**

SUPREME COURT — CIVIL JURISDICTION

5 GATES P

17, 20 January 2012

10 **Practice and procedure — judgments and orders — stay of execution of orders —
award of damages — whether stay should be granted — principles for granting stay
— Administration of Justice Decree s 8(1) — Agriculture Landlord and Tenant Act
s 40 — Supreme Court Act ss 7(3), 11.**

15 The Court of Appeal awarded damages to the first respondent, for breach of his
entitlement to quiet enjoyment of his native lease. The petitioner sought a stay of the
execution of these orders.

Held —

20 (1) The petitioner failed to show that if a stay was not granted, his right of appeal
would be rendered nugatory. If the award of damages was paid out by the petitioner, the
monies could be returned to the petitioner on reversal of the order, as there was no
evidence to show a lack of financial probity of the first respondent. Further, the grant of
stay would not injuriously affect the first respondent. The petitioner is acting bona fide in
bringing this appeal, there are no third parties involved and no question of novelty or
importance involved. There is no public interest in favouring a stay and the overall balance
25 of convenience and consideration of the status quo favours no impediment being placed
in the way of the successful litigant attaining the fruits of his judgment.

Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd Civil Appeal
ABU0011.04S, followed.

30 (2) The chances of the petitioner achieving special leave for his petition are well short
of the special or exceptional chances required for a stay.

Dorsami Naidu v The Chief Registrar No. ABU0038 of 2010, 2 March 2011,
followed.

Application for stay is dismissed.

35 **Cases referred to**

Annot Lyle (1886) 11 PD 114; *Philip Morris (New Zealand) Ltd v Liggett & Myers
Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 41 (CA); *Stephen Patrick Ward v
Yogesh Chandra* CBV0010, cited.

40 *Linotype-Hill Finance Ltd v Baker* [1992] 4 All ER 887, followed.

I. Lutumailagi and L. Macedreu instructed by *Taukei Land Trust Board Legal
Services Department, Suva* for the Petitioner.

45 *V.P. Mishra* instructed by *Messrs Mishra Prakash & Associates, Lautokathe*
for the 1st Respondent.

[1] **Gates P.** Shanti Lal was the successful appellant in the court below. On
18th February 2012 pursuant to orders of the Court of Appeal the Master is to
assess damages. In the case of Shanti Lal that is in connection with a substituted
finding of liability for breach of his entitlement to quiet enjoyment of his native
50 lease. The native lease had expired and his solicitors, no doubt rightly, only
pursued a claim for damages.

[2] Accordingly the Petitioner seeks a stay of execution of the orders pending the determination of its Special Leave application before this court. The stay is opposed by the 1st Respondent. The 2nd Respondents did not appear at the hearing.

- 5 [3] The summons is supported by the affidavit of one Mesake Ledua, the Manager South Western Region of the Petitioner. No affidavit has been filed in opposition by either the 1st or 2nd Respondents.

Proceedings in the High Court

- 10 [4] Shanti Lal as plaintiff had claimed damages and compensation for breach of contract, breach of statutory duty, trespass and unlawful conversion and detention of goods. He had purchased a native lease which expired on 31 December 2000. Amongst other things he said it was a lease of 13 acres. The Petitioner said it was of only 3½.

- 15 [5] The file at the Petitioner's office was in a muddle. On occasions the NLTB treated the lease as being of 13 acres and on other occasions as of 3½ acres only. In fact the judge tabulated 21 instances where the Petitioner had dealt in documentary form on the basis of 3½ acres, and 7 occasions where it appeared to be dealing with 13 acres. In the High Court, the judge found the lease to have
20 been over 3½ acres only.

- [6] There was no challenge on the question of consent to the transfer of the lease to Shanti Lal. Unfortunately the previous lease-holder Ms Devi was never granted a registrable lease or any instrument of title over the subject land. The
25 judge found that Ms Devi could only have disposed of the interest in the land that she had held and no more than that.

- [7] As for the improvements to the land in the form of the residence and its extension of facilities, both courts accepted the testimony of Shanti Lal that he had never sought nor been granted consent to such alterations. The proviso to
30 s 40 of ALTA was clear that in such circumstances the tenant would not be entitled to compensation.

- [8] The unjustifiable intrusion by the 2nd Respondents onto the land was found by the judge to have been a direct interference with his possession. Her ladyship also held that the Petitioner was not responsible for such conduct. The judge
35 dismissed the claim against the Petitioner but awarded aggravated damages against the 2nd Respondents in the sum of \$10,000 with damages for the unlawful conversion of property of a further \$10,000. The sums had been fixed at higher figures but reduced because of breaches by Shanti Lal in the terms of his tenancy.

- 40 **Proceedings in the Court of Appeal**

- [9] Izaz Khan J regarded the mistake as being not common to the parties. He found NLTB to have been mistaken but neither Ms Devi or Shanti Lal were so confused as to the amount of acreage involved. The judge reviewed the evidence
45 and found that NLTB knew that both tenants had been farming over 13 acres not simply 3½. His lordship accepted that there was no document of title in respect of the extra 10 acres. However his conclusion was:

- 50 'In these circumstances, it is not open to the NLTB to complain that the appellant was only entitled to 3½ acres of land and not 13 acres. It is estopped from doing so'.

- [10] His lordship went on:

‘Therefore the appellant was entitled to the occupation of 13 acres. If he did not have legitimate documentary title to the 10 acres to which the trial judge has referred, it was incumbent on the NLTB to furnish him with one. They were certainly not entitled to assert that as he only had documentation for lease of 3½ acres he was only entitled to 3½ acres and not 13 acres which was claimed by him.’

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[11] The Court of Appeal allowed the appeal and awarded the 1st Respondent damages for breach of his entitlement to quiet enjoyment, with the quantum of damages to be determined by the Master. The Petitioner was ordered to pay the 1st Respondent a share of the costs fixed at \$1,000 in the High Court and \$2,000 in the Court of Appeal.

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The stay application

[12] The petition for special leave was filed pursuant to s 8(1) of the Administration of Justice Decree 2009. A stay, if appropriate, can be ordered by a single judge of the Supreme Court [section 11 Supreme Court Act].

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[13] I had set out the approach to such applications in a ruling in *Stephen Patrick Ward v Yogesh Chandra* CBV0010.10 20th April 2011. It was this:

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‘[4] The issue for determination is whether the Petitioner’s case prior to the hearing is sufficiently exceptional to allow for some interlocutory relief. For at the Supreme Court, that is at final Court of Appeal stage, the hurdles to be overcome for a petitioner seeking special leave are formidable. Sufficiently exceptional may be a stronger test than that favoured in New South Wales where the hurdle was said to be overcome if ‘the applicant could demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour’: *Alexander v Cambridge Credit Corp Ltd* [1985] 2 NSWLR 685 at 694; applied in *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103.’

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[14] The court considering a stay should take into account the following questions. They were the principles set out by the Court of Appeal and approved subsequently and applied frequently in this court. They were summarised in *Natural Waters of Viti Ltd v rystal Clear Mineral Water (Fiji)Ltd* Civil Appeal ABU0011.04S 18th March 2005. They are:

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(a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See *Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 41 (CA).

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(b) Whether the successful party will be injuriously affected by the stay.

(c) The bona fides of the applicants as to the prosecution of the appeal.

(d) The effect on third parties.

(e) The novelty and importance of questions involved.

(f) The public interest in the proceeding.

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(g) The overall balance of convenience and the status quo.’

[15] If the stay were not granted the Petitioner’s right of appeal would not be rendered nugatory. If the Master makes an award of damages against the 1st Respondent which the Petitioner pays out, the monies can be similarly returned to the Petitioner. No evidence has been placed before this court of the lack of financial probity of the 1st Respondent. He would have had to pay his security for costs at the Court of Appeal stage and is represented at this court by senior counsel.

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[16] In the *Annot Lyle* (1886) 11 PD 114 at 116 Lord Esher MR said:

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‘If in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the respondents are foreigners, or for other good reason, this must be shown by affidavit, and may form a ground for ordering a stay.’

5 So no damage or prejudice can be shown to occur to the petitioner's cause. It may succeed in law and gain a reversal on the issue of whether 3½ or 13 acres was the estate in question, and it may receive back any compensation and damages paid out to Shanti Lal which it considers a wrongful order in law. The Petitioner has failed to show that if a stay be not granted its appeal would be rendered nugatory or that it would face irretrievable loss.

[17] There is no question of the Petitioner facing financial ruin by paying out the damages: *Linotype-Hill Finance Ltd v Baker* [1992] 4 All ER 887.

10 [18] I conclude that a grant of stay would not injuriously affect the 1st Respondent [principle (b)]. I am told he is elderly and is no doubt anxious to have this matter concluded.

[19] There is no doubt in my mind either that the Petitioner is acting bona fide in bringing this appeal [principle (c)].

15 [20] The lease has expired. The claim is one for damages and compensation. No third parties are involved [principle (d)].

20 [21] The foundation of the case was whether the extra 10 acres were or should have been included in the native lease. This was a finding of fact not of law. The Court of Appeal said the NLTB were estopped by their conduct from denying that they were treating the lease as one of the full 13 acres. There is no novelty of law raised in this opinion [principle (e)], nor is it one involving questions of great importance. Had the Petitioner's staff maintained a tidy file, and had the staff sorted out any misconceptions early on, there would have been early clarification and no estoppel working adverse to its interests.

25 [22] Following that conclusion of fact, there is no public interest favouring a stay [principle (f)].

[23] The overall balance of convenience and consideration of the status quo favours no impediment being placed in the way of the successful litigant attaining the fruits of his judgment [principle (g)].

30 [24] The next consideration for the grant of stay is whether there is a likelihood of the Petitioner achieving special leave for his petition. That exercise would concern the rejection by the Court of Appeal of the High Court judge's factual conclusion as to the acreage of the estate and its conclusion that estoppel applied. Even if this court favoured the High Court judge's conclusion, would that finding
35 meet the criteria of s 7(3) of the Supreme Court Act? Those criteria were:

' (3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises---

40 (a) a far-reaching question of law;
(b) a matter of great general or public importance;
(c) a matter that is otherwise of substantial general interest to the administration of civil justice.'

45 [25] I must conclude, as did Marshall J in *Dorsami Naidu v The Chief Registrar* No. ABU0038 of 2010, 2nd March 2011, that the chances of success 'are well short of the special or exceptional chances required for a stay'. The Petitioner's application for stay must be dismissed.

[26] There will be costs to the 1st Respondent of \$1,000.