[2012] JMCA App 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 89/2012

APPLICATION NO 135/2012

BETWEEN	**THE BOARD OF MANAGEMENT OF THE BETHLEHEM MORAVIAN COLLEGE**	**APPLICANT**
AND	**DR PAUL THOMPSON**	**1ST RESPONDENT**
AND	**THE TEACHERS APPEALS TRIBUNAL**	**2ND RESPONDENT**

Patrick Foster QC and Mrs Symone Mayhew for the applicant

Leroy Equiano instructed by the Kingston Legal Aid Clinic for the 1st respondent

Alethia Whyte instructed by the Director of State Proceedings for the 2nd respondent

18 July and 20 August 2012

IN CHAMBERS

PHILLIPS JA

[1] The notice of application before me sought an order for a stay of execution, pending the determination of the appeal, of the order of Daye J, made on 25 May 2012, granting an order of certiorari to quash the decision of the Board of Management of the

Bethlehem Moravian College to dismiss the 1st respondent for professional misconduct, and for the costs of the application to be costs in the appeal.

[2] The applicant filed its notice and grounds of appeal on 21 June 2012. The applicant based its grounds in respect of this application on having filed its notice of appeal timeously, that pursuant to the Court of Appeal Rules (CAR) a single judge of appeal may grant a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal, but more importantly, on the basis that the applicant had a realistic prospect of success on appeal, and that there was a risk of injustice to the applicant in the event that a stay of execution was not granted.

[3] The application was supported by three affidavits: two by Lowell Morgan, attorney-at-law and chairman of the applicant, and one by Mrs Symone Mayhew, attorney-at-law representing the applicant. The 1st affidavit of Lowell Morgan sworn to on 20 June 2012, indicated that the 1st respondent had been provisional principal at the Bethlehem Moravian College ('the College') from 2003 to 2005, when he was appointed principal of the College, a position which he held until his services were terminated by the applicant in December 2008.

[4] Mr Morgan further deposed that in March 2008 on receipt of certain complaints of professional misconduct in respect of the 1st respondent, the applicant took the decision that disciplinary action should be taken against him, and pursuant to the provisions of the Education Regulations, referred the matter to its personnel committee

which decided to lay charges against the 1st respondent and to conduct a hearing in respect of those charges.

[5] He testified that the disciplinary hearing commenced on 17 September 2008, and in December 2008, the personnel committee found the 1st respondent guilty of all the charges and recommended to the applicant that the 1st respondent be dismissed. The applicant accepted the recommendation and by letter dated 12 December 2008 terminated the services of the 1st respondent. The 1st respondent appealed the decision to the 2nd respondent, which heard the matter on 1 June and 1, 2 and 13 July 2009, dismissed four of the grounds of appeal and allowed three, but did not think that those which were allowed ought to have resulted in overturning the decision of the applicant terminating the services of the 1st respondent.

[6] It was his further evidence that subsequent to the ruling of the 2nd respondent, the 1st respondent, on 20 October 2009, filed a claim for judicial review of the decision of the applicant. The claim was heard on 10 and 11 March 2011, and on 25 May 2012 Daye J made the order quashing the decision of the applicant. A stay of execution of that decision was given for a period of 42 days, which expired on 6 July 2012. Having received advice, however, that it had good prospects of appeal, the applicant, as indicated previously, duly filed its notice and grounds of appeal.

[7] Mr Morgan deposed that throughout the period between December 2008 and May 2012, there had been acting appointments in respect of the office of principal at the College, but (as he deposed in his second affidavit, sworn to on 6 July 2012) the

College was being affected by the absence of a permanently appointed principal as those who held temporary appointments refrained from making long-term plans and decisions relating to the College.

[8] Mr Morgan testified that the position had been duly advertised on several occasions since May 2010, several applications had been received, and after an interview process, recommendations were made to the Teaching Council for the permanent appointment of a new principal, which had been made in May 2012, but with retrospective effect to January 2012. He stated that there had not been any order in place restraining the appointment, and no promises had been held out to the 1st respondent that no appointment would be made. He further indicated the reasons the stay of execution of the order of Daye J should be granted, which in essence were that there was a risk of injustice in the absence of a stay, as the 1st respondent would be entitled to obtain a similar position in the teaching service, which would result in administrative difficulties if the applicant was successful on appeal. Also, he deposed, the 1st respondent would be entitled to obtain all outstanding sums due to him since the termination of his employment which was approximately J$10,000,000.00 and there was no evidence that those funds, once paid, would be returned. If, however, the 1st respondent was successful on appeal he would obtain all entitlements and therefore did not stand to be prejudiced in any way.

[9] The 1st respondent filed an affidavit in response sworn to on 10 July 2012, and while he admitted the factual chronology of events as they unfolded, he was adamant that the appeal had no chance of success. He expressed great concern about the

actions of the applicant, in particular the fact that the permanent appointment of the principal had been made while the judicial review claim was in the court, and specifically, was made subsequent to the hearing of the matter and while awaiting the decision of the learned trial judge. He deposed that the applicant was fully aware of the consequences of making the appointment and the effect it would have on him if the court ruled in his favour. In his view, the appointment was effected solely to prejudice his position and to ensure that he could not resume the position as principal. Additionally, he stated that "there was an understanding with the attorney for the Board that neither side would take action to prejudice the other while awaiting the decision of the court".

[10] He deposed further that with his knowledge and familiarity of the operations of the College, he did not agree that the acting appointments in respect of the position of principal, in the interim, would have negatively impacted the administration of the College, as policies could have been implemented if required. He made it clear that having been appointed by the applicant, and not being a civil servant, he was not entitled to any position in the educational system. He also made it plain that having been without a regular job since December of 2008, he had had to "find creative ways to ensure that my family and I are fed, sheltered and clothed".

[11] He testified that the actions of the applicant were calculated to discredit him at all costs and he referred specifically to a finding of the learned trial judge with regard to bias on the part of the members of the personnel committee. The appeal, he stated,

was a further act to prejudice his situation and was "malicious as the appeal was without merit".

[12] The affidavit of Mrs Mayhew sworn to on 16 July 2012 specifically addressed the question as to whether there could have been any "understanding" between counsel with regard to the permanent appointment of a principal for the College while the matter was pending in the court. She testified that that issue had been raised by counsel for the 1st respondent on the adjournment of the matter in December 2010, and she had indicated that she had no instructions which would enable her to give any assurances in that regard. Subsequently, she had received a letter from counsel representing the 1st respondent, requesting an agreement that a principal would not be appointed while the matter was pending, but although her instructions remained the same, through inadvertence, she had not communicated the position to opposing counsel. In fact, the letter went unanswered.

Judgment of Daye J

[13] The learned trial judge set out in detail the complaints of the 1st respondent (the claimant below), commencing with the question of whether the decision of the personnel committee was time-barred, pursuant to sections 56 and 58 of the Education Code 1980. The complaint was that those provisions of the Code required that once the applicant had received a complaint in writing, which was "of such" that the applicant thought that disciplinary action ought to be taken, it should as soon as possible refer the matter to its personnel committee, which must hear the complaint and hand down

its decision within nine months of the lodging of the complaint, failing which the complaint would have lapsed.

[14] Having concluded, after much argument, that the discretionary power to suspend a person in order to facilitate investigation was different from the power to suspend an individual pending the hearing of the personnel committee, the learned trial judge found that time began to run from 26 March 2008 when the applicant had made its decision to suspend the 1st respondent under section 60(1) of the Education Regulations (and not from 27 December 2007, as argued by counsel for the 1st respondent, which was the date of the first suspension of the 1st respondent when investigations commenced). The learned trial judge found that the decision was handed down within the nine month period and was therefore not time-barred.

[15] The next main issue was the question of apparent bias. The learned judge set out in his reasons for judgment, the contention of the 1st respondent, which was that the decision of the personnel committee was affected by bias on two grounds:

> "(1) The chairman's two reports circulated to the Board on the 26th March, 2008 contained prejudicial material which the Personnel committee was exposed to before they even decided the preliminary issue that the allegations were trivial or serious; and
>
> (2) Pre-hearing prejudicial material was e-mailed to one member of the Board by the Chairman. Thus Dr. Paul Thompson could not get a fair hearing."

[16] The learned trial judge canvassed all the authorities over the last two decades showing the development in the law in respect of the test of bias, and finally decided,

having also comprehensively addressed the facts of the case, that the fair-minded or informed observer having knowledge of those facts, would have concluded that there was a real danger, or possibility of bias, in the minds of the members of the personnel committee of the applicant against the 1st respondent.

[17] There was a further complaint that the affidavit of Andrea Miranda, which was relevant to a sexual misconduct charge made against the 1st respondent, had been ruled as inadmissible at the hearing before the personnel committee and the evidence disallowed. The learned judge found that although the 2nd respondent had no difficulty with this finding as, inter alia, the affiant was not available to give evidence and the affidavit was not admissible under the specific conditions of the Evidence Act, credibility was a serious issue in the case, and the evidence of Miss Miranda was relevant in the interest of a fair hearing where she was named as a party. The matter, he found, should have been adjourned to permit the issue of a summons to endeavour to obtain her attendance, or failing that, to have the affidavit admitted into evidence with a specific direction given to the members of the personnel committee, as to how to treat such untested evidence, when the maker of the statement was unavailable to be cross-examined. In his judgment:

> "[the] statement was more probative than prejudicial and should have been received looking at fairness of the proceeding as a whole. This course would not have infringed neither that [sic] letter or the spirit of the law governing the rule of evidence. To allow the tribunal to be exposed to material which is more prejudicial then [sic] probative and then disallow a statement which is more probative than prejudicial breached the requirement of fairness. The Principal was deprived of the opportunity, by the exclusion

> of the affidavit, to rely on some material to show his innocence. The ruling of the Personnel Committee and the decision by the Teacher's [sic] Appeal Tribunal cannot be sustained."

[18] A further challenge by the 1st respondent was that there was no clear indication from the reasoning of the members of the personnel committee and the Teachers Appeals Tribunal that they had applied the criminal standard of proof, that is, proof beyond reasonable doubt, which is applicable in matters of this kind, where a principal is facing serious charges of professional misconduct (in this case, of a sexual nature).

The submissions

[19] Learned Queen's Counsel for the applicant (whose submissions were adopted fully by counsel for 2nd respondent) referred to the CAR and the power of a single judge to grant a stay of execution of a judgment pending appeal. He also adverted my attention to several authorities including cases from this court, which have laid down the criteria for the grant of a stay. He submitted that he was relying on two limbs: the fact that the applicant in this case has real prospects of success on appeal, and that there is a risk of injustice if the stay is not granted. Queen's Counsel submitted that the stronger the prospects of success of the appeal, the greater should be the chance for the grant of a stay, as the risk of injustice in those circumstances may be less.

[20] Counsel contended that there were three core issues, viz:

(i) Whether the personnel committee was tainted by bias because of its exposure to prejudicial pre-hearing material;

(ii) Whether the personnel committee in conducting the hearing followed the rules of evidence when it excluded the affidavit of Andrea Miranda; and

(iii) Whether the committee in conducting the hearing applied the appropriate standard of proof beyond a reasonable doubt.

[21] Queen's Counsel submitted that the chairman had circulated to members of the applicant two reports entitled: "Professional Misconduct - Dr Thompson the Sequence of Events" and "The Factors which Influenced the Decision to Send the Principal and Plant Manager on Leave with Pay". Counsel submitted that pursuant to the Education Regulations, members of the personnel committee were also members of the applicant and steps were taken to ensure that the chairman and another member of the applicant who was a witness at the hearing did not sit to deliberate on the charges. It was the applicant's contention that because of the structure of the applicant and its personnel committee, the pre-hearing disclosure was inevitable, and that that alone ought not to taint the members of the personnel committee. The decision to refer the matter to the personnel committee, he argued, was not an adjudicatory function, and a fair-minded reasonable observer should not think that having seen the complaint, as a member of the applicant, before the hearing, that there would be a real danger of bias, such that one would not be able to adjudicate fairly and make findings based on the evidence heard. With regard to the e-mail (second report), counsel submitted that there had been no response from the member of the applicant to whom it was sent who was a member of the personnel committee, nor had he conducted himself in a manner from which one could have concluded that there was any danger of bias against the 1st

respondent. There was also no evidence that he had pre-judged the matter. Counsel referred to **Roald Henriques v Tyndall and Others** [2012] JMCA Civ 18 and the dictum of Harris JA, to the effect that if the allegation is that one is coloured by a previous view and that despite any evidence and/or arguments advanced, one is unlikely to depart from those views, there must be proof substantiating those allegations.

[22] With regard to the learned trial judge's concerns that there had been no direction to the personnel committee as to how to treat with these pre-trial prejudicial comments, counsel referred to **Jody Ann Blackwell and Others** (1995) 2 Cr App R 625 and **John Paul Thomas and Others** (1991) 92 Cr App R 239, which cases the judge had referred to and relied on in his judgment, and distinguished the same by adverting to the fact that as the prejudicial statements arose during the hearing in those cases, it was necessary for directions to be given, but in the instant case the information was provided before disciplinary proceedings had even been contemplated, and so a fair minded person having those facts ought not to conclude that there was any real danger of bias.

[23] Counsel submitted that the affidavit of Miss Miranda was inadmissible and ought to have been excluded. There was no power in the personnel committee to issue any summons to obtain the attendance of anyone and no adjournment had been sought in the hearing to do so. Additionally, because of the time constraints under which the personnel committee was operating, in that, the decision had to be produced within a

nine month period, the hearing of the charges would not have been prolonged unnecessarily.

[24] It was submitted that there was no evidence that the personnel committee did not appreciate the gravity of the offences that were before them and that they had not applied the requisite standard of proof.

[25] In the arguments dealing with the risk of injustice, Queen's Counsel submitted that if the stay was not granted, the 1st respondent would be entitled to be placed in a comparable position in the educational system from which he would have to be removed if the appeal was successful, and such a result would have meant that he was not a fit and proper person to have been in such a responsible position in an institution, which therefore should be avoided in the interim. The 1st respondent would not be able to be reinstated, he submitted, as no such order had been made by the court, and the post in any event had been filled, but he would be entitled to his emoluments from the day his services with the applicant had been terminated and could potentially claim emoluments payable to him until retirement. Essentially, counsel submitted, "the matter therefore becomes almost akin to a money judgment".

[26] Counsel submitted that in the exercise of the discretion of whether to grant the stay, I should not be persuaded by the position taken by the 1st respondent that the applicant's actions were motivated by malice and an intent to "steal a march" on the 1st respondent, as the process for the appointment of the new principal was transparent,

and was ongoing many months before the hearing and conclusion of the matter by Daye J.

[27] Counsel for the 1st respondent accepted the submissions of Queen's Counsel on the principles relative to the grant of a stay of execution pending appeal and the criteria therefor. However, he submitted that it was an equitable remedy and the applicant should have approached the court with clean hands, which it had not. He referred to the chronology of events and stated that when the matter was first adjourned in December of 2010, the applicant had taken no actions to fill the 1st respondent's post, which was why there was discussion between counsel on the point, which he followed up with a letter subsequently. Despite the fact that there was no response to his letter from the attorney representing the applicant, still no action had been taken up until the hearing before Daye J in March 2011. Yet the appointment of the new principal was made two weeks before the learned judge gave his ruling on the matter. It was his contention that no application to restrain any permanent appointment of a principal, had been made in the interim, as when the matter was adjourned *cur adv vult* the learned trial judge had promised his decision shortly, which regrettably did not occur, despite repeated requests for the same. The appointment of the new principal, counsel submitted, was therefore only to pre-empt the decision of the court, and the applicant had thus acted to its peril, and ought not to derive any benefit from that behavior in the face of the court proceedings.

[28] Counsel asked the rhetorical question: "Why was the applicant asking for a stay?" The court had not ordered reinstatement, and the person holding the post could

not be asked to relinquish the same, so a reinstatement process would have to commence with the intervention of the Ministry of Education called on for guidance in the matter. This difficult situation had been brought about by the actions of the applicant, and the process would, he argued, simply have to take its course. He had not commenced the process as the applicant had appealed the decision of the court and no reinstatement would be made pending the appeal, and, in his view, no money would be paid to the 1st respondent until the appeal process had been completed. The application was being opposed, however, as counsel contended that there was no basis for it, and in the circumstances, it was entirely unnecessary.

[29] Counsel submitted further that the appeal was entirely without merit. He argued that the material placed before the members of the applicant was seriously prejudicial, not even relevant to the charges and should not have been put before the members at all. The information in the e-mail, he submitted, was so prejudicial that even if submitted years before the proceedings had commenced, it would have affected the member who sat on the personnel committee to hear the charges. He maintained that the learned judge was correct that a fair-minded person with the facts would have concluded that the members were tainted with bias against the 1st respondent. Counsel said that it was important to note that there were six charges which had been laid against the 1st respondent, and the personnel committee, without any proper information before it, had found that all six charges had been proven, while the Teachers Appeals Tribunal found that five of the said charges had not been proven. Counsel submitted that in spite of the Education Regulations, the learned judge was

correct when he found that the personnel committee could have been so constituted that it was not tainted by the pre-trial prejudicial material which had been disclosed.

[30] Counsel argued that the learned judge's approach to the admission of the Miranda affidavit was correct. The focus, he said, should have been on the fairness of the proceedings and the 1st respondent should not have been denied the use of an affidavit which could have assisted in the proof of his innocence.

[31] With regard to the standard of proof, counsel submitted vehemently, that it was for the tribunal to demonstrate that it had applied the correct standard; it was not for the person charged to show that the tribunal had not. The standard was the criminal standard of proof, and if there was no evidence that the correct standard of proof had not been applied, one could not assume that it had been so applied. Counsel therefore reiterated that the appeal had no chance of success and in all the circumstances of this case the application for the stay of execution should be refused with costs.

Discussion and Analysis

[32] It was not disputed, and rule 2.11 (1) (b) of the CAR does permit a single judge of this court to order a stay of execution of a judgment pending the hearing of an appeal. Both counsel agreed that the traditional test for the grant of a stay enunciated in **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887, which required the appellant to show that the appeal had some prospect of success and that without a stay he would be ruined, has been varied, and the court has now adopted a more liberalized approach in that it now seeks to impose the interests of justice as the essential factor in

exercising its discretion whether to grant or refuse a stay of execution of a judgment (per Harris JA in **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service et al** [2011] JMCA App 1. The court pursues a balancing exercise within the context of the interests of justice and looks at the risk of injustice to one or other of the parties on the grant or refusal of a stay and to whether any irremediable harm could result to one or other of the parties (**Hammond Suddard Solicitors v Agrichem International Holdings** [2001] EWCA Civ 2065).

[33] In my view, however, the real question on this application is whether in the circumstances of this case, bearing in mind the specific type of matter which was before the learned trial judge and the decision made by him, I can make an order for a stay of execution of the judgment. This aspect of the matter was not dealt with by either counsel.

[34] In addressing the issue of the necessity for the enforcement of judgments and judgments not requiring the same, the leading text of Halsbury's Laws of England, 4th edn, Reissue, Volume 17(1), at para. 1 puts it this way:

> "Many judgments and orders given or made in civil proceedings do not require to be enforced because the judgment or order itself is all that the party obtaining it requires. Thus, a judgment which determines status does not call for specific enforcement. It not only declares the status of the particular person or thing adjudicated upon but renders it such as it is declared. A decree of divorce dissolves the marriage and makes the parties single persons; an adjudication in bankruptcy not only declares the debtor a bankrupt, but clothes him and his trustee with the consequences of that status; a sentence in a prize court not only decrees the vessel to be prize, but vests her in the

> captor. Such a judgment does not order recovery or payment of money, delivery or transfer of property, or any specific act or abstinence which may be subject to any of the various methods of enforcement. Similarly, an order appointing new trustees which also vests the trust property in them requires no further step to be taken. A declaratory judgment is complete in itself, since the relief is the declaration."

[35] Additionally, para. 2 continues, "The majority of judgments and orders given or made in civil proceedings require one or more of the parties to do or abstain from doing some act, and, if such a judgment is not obeyed, some further legal process is required to ensure compliance." In this case the court made an order of certiorari quashing the decision of an inferior tribunal. There were no accompanying orders of prohibition and/or mandamus. In the case of the latter orders, the court either directs an order to an inferior court, tribunal or public authority, forbidding that court, tribunal or authority to act in excess of its jurisdiction or contrary to law or makes an order requiring someone to do some particular act specified, or some particular thing which is in the nature of a public duty. In the matter before me, the finding of professional misconduct on the part of the 1st respondent which grounded the decision to terminate his services was quashed, the court having found that the decision had been tainted by bias.

[36] The court therefore determined the rights of the parties, that is, the status of the 1st respondent but has not made any order containing any direction for the parties to act in a certain way, that is with regard to his reinstatement, for the payment of any money to be made to him, or for the applicant to be restrained from interfering with his rights which would have been enforceable if not obeyed. In my view, the court has not

made any order which can be enforced by execution, if disobeyed, for example by levying on one's goods, or by obtaining attachment or charging orders or by imprisoning one for contempt of the court's order. The effect of the order is to render the situation between the parties as being one that had been declared. It is therefore in substance a judgment which is declaratory rather than executory. The decision to terminate the 1st respondent's services with the applicant having been quashed by the court, the consequence of that ruling is that his services with the applicant remain extant.

[37] In **Norman Washington Manley Bowen v Shahine Robinson & Neville Willliams** [2010] JMCA App 27, Morrison JA in dealing with a similar application for a stay of the judgment of Jones J pending the hearing of the appeal, who had on the hearing of an election petition declared a seat vacant but had not declared the applicant the duly elected member of parliament for the constituency of North Eastern Saint Ann, refused the stay of the judgment, which was asked for so that no election could be held to fill the vacancy, on the basis that the court had no power to stay execution of a purely declaratory order. In doing so, he relied on the following passage by the learned authors Zamir & Woolf in The Declaratory Judgment 2nd edn para. 1.02, which is relevant to the matter before me and which I adopt entirely:

> "A declaratory judgment is a formal statement by a court pronouncing upon the existence or non–existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for

> example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."

[37] Queen's Counsel submitted that in the absence of a stay the 1st respondent would have to be paid millions of dollars in arrears of salary since he was removed from his post firstly by interdiction, and then as a result of his termination, and that therefore the order of Daye J was "essentially" or "akin to" a money judgment. I do not agree, and in any event, as indicated, the learned judge did not make any such order. It appears that the practical approach of counsel for the 1st respondent may be more realistic in the circumstances, in that the parties will have to enter into dialogue as to how they will resolve the current situation, the post of principal having been filled. I also do not think it necessary to make any comment on the timing of the appointment, save to say that it was unfortunate, as it has encouraged a claim by the 1st respondent that the College has not acted with clean hands which in all the circumstances relative to this matter, could have been avoided.

[38] From what I have said, it is clear that I am of the view that an order for the stay of execution of the judgment of Daye J is not appropriate in the circumstances.

However, as the parties addressed me on the real chance of success of this appeal, I will make a few comments in that regard. Firstly, with regard to core issue (i) and the question of whether the members of the personnel committee were tainted by bias having been exposed to prejudicial material before the hearing, I would only wish to say that none of the reports which were placed before the trial judge were put before me, and so it would have been extremely difficult to review for these purposes, in the exercise of my discretion, the likely effect of the material on a fair-minded informed observer. However, I cannot say that a similar difficulty arises in relation to whether the personnel committee in an effort to avoid being tainted by the so-called prejudicial material (found to be so by the court) could not have been differently constituted. The fact that having a differently constituted committee may have been difficult does not mean that it could not have been achieved. In respect of core issue (ii), as the Miranda affidavit was also not put before me, I could not therefore comment on whether the fact that it was not allowed in evidence seriously affected the fairness of the trial. In my view, as both counsel seemed to agree that there was no evidence that the members of the personnel committee adhered to the criminal standard of proof, that being a burden on the applicant, core issue (iii) appears in all the circumstances of this case to be the most difficult hurdle to the applicant on appeal.

Conclusion

[39] In the light of the above, the application for a stay of execution of the judgment is refused. The applicant should pay to the 1st respondent the costs of the application to be taxed if not agreed.