

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2016] NZEmpC 64
ARC 54/14**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application by the defendant for stay
of execution of the Court's judgment

BETWEEN GARY MCIVOR
Plaintiff

AND SAMIR SAAD TRADING AS PITA
HOUSE
Defendant

EMPC 15/2016

IN THE MATTER OF applications for a compliance order and an
order for security for costs.

AND BETWEEN GARY MCIVOR
Applicant

AND SAMIR SAAD TRADING AS PITA
HOUSE
Respondent

Hearing: 30 May 2016
(Heard at Auckland)

Appearances: M Moncur, advocate for Gary McIvor
M Hanif, counsel for Samir Saad

Judgment: 30 May 2016

ORAL JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] Before turning to the substance of the case, I should give my reasons for declining Samir Saad's application for adjournment made on his behalf today by his counsel, Mr Hanif.

[2] The interlocutory applications the subject of today's hearing were filed as long ago as 13 November 2015 (in respect of Mr Saad's application for an order for stay of proceedings); 26 January 2016 (in respect of Gary McIvor's application for a compliance order); and 14 March 2016 (in respect of Mr McIvor's application for security for costs). Affidavits in support of those applications have now been filed, as have notices of opposition (and affidavits in support of opposition) to them. In all respects, therefore, those three interlocutory applications were ready for hearing today.

[3] Mr Hanif filed a notice of change of representation and of address for service on the morning of 26 May 2016, last Thursday. Although Mr Hanif has appeared today in court to renew Mr Saad's application for adjournment, Mr Saad is not here as the Court would have expected.

[4] The judgment from which these various applications emanate was delivered on 19 August 2015.¹ Mr Saad is attempting to appeal that judgment but was initially out of time to do so and must therefore seek the leave of the Court of Appeal.

[5] Ms Moncur has advised me today that, although she is not entitled to appear for Mr McIvor as she has in this Court as an advocate, the Court of Appeal is to hear that application for leave to appeal out of time by a video conference call to be held on 20 June 2016. The result of that will determine whether Mr Saad is entitled to appeal against the Court's judgment of 19 August 2015.

[6] Mr Saad was represented by another lawyer at the substantive hearing before this Court but, until late last week, so far as the Court is concerned, Mr Saad was representing himself.

¹ *McIvor v Saad* [2015] NZEmpC 145.

[7] Early last Friday afternoon, 27 May 2016, an application by Mr Hanif was filed with the Court, seeking an adjournment of today's hearing on the basis that he had only just been instructed and required more time (14 days) to familiarise himself with the case. It appeared that this application had neither been discussed with Mr McIvor's advocate nor served on Ms Moncur, although I accept from Mr Hanif that he attempted to do so as soon as he was able but, because of Ms Moncur's commitments, the application for adjournment was not able to be brought to her notice until this morning. In those circumstances, by a Minute issued last Friday afternoon, I directed service of the application for adjournment on Ms Moncur and indicated that it would have to be dealt with at the start of today's hearing. It appears that Ms Moncur may not have received that Minute either. I made it clear that Mr Saad could not expect necessarily to be granted the adjournment that he very belatedly sought, at least of those applications by Mr McIvor which Mr Saad opposes.

[8] The history of today's fixture goes back to a Minute issued on 12 April 2016 in which the Court directed the Registrar to set down a 90-minute hearing in early to mid-May to determine Mr McIvor's applications for compliance and for security for costs. Mr Saad was invited to file, within seven days of that date, a notice of opposition to Mr McIvor's application for security for costs, together with any supporting evidence in those proceedings.

[9] On 20 April 2016 Mr Saad filed what he described as an "Application for Leave" in which he sought a "short extension of time to file the requisite affidavits and have legal counsel". Nothing further was heard from him by the Court for almost a month.

[10] On 6 May 2016, in response to the Registrar's request of Mr Saad for an update about his legal representation, Mr Saad advised the Registrar that he was to meet with a lawyer on 11 May 2016, following which date he wrote again to the Registrar, advising that his lawyer would contact the Registry soon. The Registrar emailed Mr Saad on 12 May 2016, asking for the lawyer's contact details but there was no response to this request and Mr Saad was unable to be contacted by phone.

[11] In the circumstances of Ms Moncur's absence on leave at that time until 20 May 2016, the Court gave Mr Saad a final short extension to its 12 April 2016 timetable which would allow Ms Moncur to consider the position when she returned from her leave on 20 May 2016. Paragraph 7 of the Court's Minute reads:

Mr Saad must comply with those directions given to him in the Court's Minute of 12 April 2016 by **12 noon on Monday 23 May 2016**. In the absence of compliance with those directions, he will not be entitled, without special leave, to oppose Mr McIvor's application for a compliance order and for an order for security for costs when this comes on for hearing.

[12] The Minute then set today's hearing down as well as Mr Saad's application for an order for stay of proceedings.

[13] It is tempting to conclude, as Ms Moncur invites me to in effect, that Mr Saad is trifling with the Court and seeking to delay unmeritoriously the consideration of these matters. I will stop short of doing so, in part because of Mr Saad's absence today, but I think that he should now have the very clear message that court timetables are to be adhered to and the orders I will make will have consequences if they are not.

[14] This judgment concludes three applications, all of which have been made following the Court's substantive judgment but, as I understand it, during the period in which Mr Saad's application for leave to appeal to the Court of Appeal is before that Court.

[15] I will deal, first, with Mr Saad's application for an order staying execution of the judgment of this Court; then, with Mr McIvor's application for a compliance order requiring Mr Saad to pay him the monetary remedies awarded to him; and finally, with Mr McIvor's application for security for costs.

[16] The total sum of the orders of the Authority and this Court, including costs, none of which I am told has been paid by Mr Saad, is \$32,373.49. In attempting to balance the parties' competing considerations and to not cut off Mr Saad's application for leave to appeal out of time, I consider that the appropriate course of action now is to grant a stay of execution of this Court's judgments on condition that Mr Saad pays to the Registrar of this Court the disputed sum of \$32,373.49 within 21

days of the date of issue of this judgment. Upon payment, the Registrar shall place that sum on interest bearing deposit, to be paid out by consent between the parties or on the direction of a Judge. Allowing Mr Saad 21 days within which to do so will give Mr Hanif the 14 days' opportunity that he seeks to take instructions. One of the options may be that if that is warranted, Mr Saad can apply, within those 21 days, to vary the order for stay that I am going to make, or to apply to set it aside. But failing Mr Saad's payment to the Registrar of this sum within that 21-day period, the order for stay will lapse and Mr McIvor will be entitled to pursue his remedies for enforcement as he sees fit. Ms Moncur tells me that efforts made through a bailiff, following registration of the judgment in the District Court, have been thwarted by Mr Saad; and in these circumstances, Mr McIvor seeks a compliance order, including a fine, sequestration of assets and imprisonment of Mr Saad for up to three months. Each of those options, and the option of further pursuing the matter through the District Court,² will be open to Mr McIvor if Mr Saad does not satisfy the condition on which the judgment of this Court will be stayed.

[17] Assuming that Mr Saad will satisfy the conditions attaching to the order for stay of execution, I move next to Mr McIvor's application for a compliance order. In light of the conditional orders I have just made, I adjourn that application for a compliance order but will allow Mr McIvor to bring that on for hearing on 48 hours' notice to Mr Saad if he wishes to do so at the expiry of the 21-day period.

[18] Finally, as regards Mr McIvor's application for security for costs, I propose also to adjourn that but sine die. Questions of security for ongoing costs in the Court of Appeal will be for that Court to deal with if leave is granted to appeal out of time. The other orders that I have made should hopefully see an end to interlocutory litigation in this Court. I will not make any other orders relating to security for costs at this stage.

[19] I think justice does require that Mr McIvor have an order for costs in respect of today's hearing and that must be paid by Mr Saad irrespective of the outcome of

² Or by an application for Mr Saad's bankruptcy, which I omitted to say in open court.

other matters before this Court and before the Court of Appeal. I set that award of costs in the sum of \$750.

GL Colgan
Chief Judge

Judgment delivered orally at 10.38 am on Monday 30 May 2016