

SUPREME COURT OF QUEENSLAND

CITATION: *Atia v Nusbaum* [2011] QCA 177

PARTIES: **AARON ATIA**
(appellant)
v
VIOLET NUSBAUM
(respondent)

FILE NO/S: Appeal No 3456 of 2011
SC No 7194 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Security for Costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 28 July 2011

DELIVERED AT: Brisbane

HEARING DATE: 28 July 2011

JUDGES: Fraser JA

ORDERS: **Delivered ex tempore on 28 July 2011:**

- 1. The appellant provide security for costs of the appeal in a form approved by the Registrar in an amount of \$23,980 by 4 pm on 12 September 2011;**
- 2. Until the security is provided the appeal is stayed so far as it concerns steps to be taken by the respondent;**
- 3. The costs of and incidental to the application for security including reserved costs are reserved.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – SECURITY FOR COSTS – where the appellant is at risk of becoming bankrupt but is in a position to provide security for costs by using the cash flow of a company over which he has some control – where the trial judge’s reasons are a careful and detailed analysis of the facts based upon the reliability of oral evidence – whether security for costs ought to be ordered

COUNSEL: The appellant appeared on his own behalf
P J Davis SC for the respondent

SOLICITORS: The appellant appeared on his own behalf
Adamson Bernays Kyle and Jones for the respondent

FRASER JA: The respondent applies for an order for security for costs of the appellant's appeal.

In the course of debate before me today, the appellant made two things plain. The first is that he is at risk of being made bankrupt upon an act of bankruptcy which will accrue very soon unless he succeeds in an application in the Federal Court to extend the time for compliance with a bankruptcy notice served on him pursuant to the Judgment.

The second is that he is in a position to provide the security for costs which is sought by the respondent by using the cash flow of a company over which he, evidently, has some control.

As to the appellant's financial position it is therefore not necessary to say much except to note that the balance sheet of the company attached to his outline of submissions does not give one confidence that the respondent would be in a position to execute upon a Judgment for costs against the appellant.

It seems to me that the circumstances that I have outlined, briefly, are themselves sufficient to justify an order for security for costs of an appeal.

Dr Atia opposes it on a number of grounds. One of the grounds upon which he opposes it is that the Judgment was wrong for reasons which he has detailed in his written outline and, in some respects, expanded upon it in the hearing before me.

The Judgment is, on its face, a careful and detailed analysis of the facts. It is, of course, ordinarily difficult to challenge findings of facts which are based, in substantial part, upon the trial Judge's assessment of the reliability of oral evidence. Nevertheless, it's simply not practicable for me today to determine whether the appellant has an arguable appeal and, if so, what substance it has. That will have to await the hearing of the appeal.

I'm not persuaded, however, that he has demonstrated that his appeal is so obviously a strong one that security ought not to be ordered.

Dr Atia also referred to the fact that during the trial there was an adjournment which he submitted was made necessary by a lack of preparation on the respondent's side. Again, I haven't been given enough detail about the events to make any judgment about that but if it were so it would not seem to me to be material on the application for security for costs.

He argued that the Judge's order against him for the recovery of a secured debt - or partly secured debt in favour of the respondent included a component for interest which ran during the period of the adjournment which was not his fault. Again, I have not been persuaded and I've not been shown anything which might persuade me that this was a wrong decision or, in any way, bears upon the application for security for trial.

In my view, this is a strong, indeed, irresistible application for security for costs. It is, therefore, unnecessary to refer to the other arguments advanced in support of it so I will order that the appellant furnish security.

...

FRASER JA: In relation to the form of the order there is no dispute as to the amount of the security or otherwise as to the order I now pronounce.

I order that the appellant provide security for costs of the appeal in a form approved by the Registrar in an amount of \$23,980 by 4 pm on 12 September 2011.

I order that until the security is provided the appeal is stayed so far as it concerns steps to be taken by the respondent.

I reserve the costs of and incidental to the application for security including reserved costs.