

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0045 OF 1996  
(Original Lautoka High Court Action No.  
HBC0214 of 1996/L)

IN CHAMBERS

BETWEEN:

WESTPAC BANKING CORPORATION a body  
corporate having its registered office  
in Suva and carrying on business as  
Bankers

Applicant/Appellant  
(Original Defendant)

and

FIJI FOREST SAWMILLING COMPANY LIMITED

Respondent  
(Original Plaintiff)

Mr Paul Cowey for the Applicant/Appellant  
Mr Anand Singh for the Respondent

Date and Place of Hearing: 16 September 1996, Suva  
Date of Decision: 30 September 1996

DECISION

(Stay Application)

This is an application for an Order staying all further proceedings on the decisions of Sadal J. given on 30 August 1996 and on 5 September 1996, pending determination of the appeal filed by the Applicant on 5 September 1996.

The Orders of 30/8/96 in respect of which a stay is sought are as follows:

- "2. Westpac Banking Corporation discharge and release assignment of Fire Policy No. 922622/1111/10778/92 issued by the New India Assurance Company Limited.
3. (a) One Sixth of the proceeds of the Fire Policy (\$125,000.00) after deduction of all expenses and costs be paid into Court.
- (b) One Sixth of \$13,143.91 now held by Westpac Banking Corporation be paid into Court. The balance is to be paid to the Plaintiff Fiji Forest Sawmilling Company Limited.
- (c) The money as Ordered in (a) and (b) above be held in Court until the final hearing and determination of action between Brij Ram and Michael Ban Deo concerning the validity of the two Wills or until further Order of this Court.
4. Fiji Forest Sawmilling Company Limited is entitled to take any action if it has any complaint regarding the statement of account provided by the Westpac Banking Corporation regarding the mortgagee sale.
5. The costs of this action is to be paid by Westpac Banking Corporation, Jack's Holding Limited and Michael Ban Deo"

The Orders which Sadal J. made on 5/9/96 and which the Applicant seeks to also stay are as follows:

- "1. Akanisi Bainivonu commonly known as Akanisi Wati's whole application be dismissed.
2. The application for stay by the Defendant Westpac Banking Corporation be dismissed.
3. The costs of the application is to be paid by Westpac Banking Corporation and Akanisi Bainivonu commonly known as Akanisi Wati
4. IT IS FURTHER ORDERED that paragraph 2 of the Order of this Honourable Court dated 30th August, 1996 be amended to read as follows :-

*Westpac Banking Corporation discharge and release assignment of Fire Policy No. 922622/1111/10778/92 issued by the New India Assurance Company Limited and which is hereby deemed to be discharged."*

The above Orders were made by Sadal J. on an Originating Summons in Civil Action No. HBC0214 of 1996/L (in Expedited Form) issued by the Respondent (Original Plaintiff) whereby it asked that Westpac Bank "forthwith discharge and release assignment of Fire Policy No. 922622/1111/10778/92 issued by New India Assurance Co. Limited on the grounds that the Respondent's debts have been fully paid".

The Grounds of Appeal filed by the Applicant read as follows:

- "1. *The Honourable Judge erred in law and in fact when he made an order on the Respondent's (Original Plaintiff's) Originating Summons dated 18 June, 1996 at the hearing on 7th day of August, 1996 when:-*
  - (i) *The hearing on 7th day of August, 1996 was of two Summons only viz. Michael Bari Deo's Summons to be joined as an intervener dated 23rd day of July, 1996 and Jacks Holdings Summons to be joined as an intervener dated 24th day of July, 1996.*
  - (ii) *The Respondent's (Original Plaintiff's) Originating Summons dated 18th day of June, 1996 was not heard on 7th day of August, 1996 and no submissions for either party were addressed to the Honourable Court on the said Originating Summons.*
- 2. *Natural justice was denied to the Appellant (Original Defendant) in that a final determination was made on the Respondent's (Original Plaintiff's) Originating Summons dated 7th day of August, 1996 without the Appellant (Original Defendant) having an opportunity to be heard on the said Originating Summons.*

AND the Grounds of Appeal in regard to the Order made by His Lordship Mr. Justice Sadal on the 5th day of September, 1996 amending paragraph 2 of the Order dated 30th day of August, 1996 are as follows:-

- (i) His Lordship erred in law in allowing the Respondent (Original Plaintiff) by their Counsel to make an oral application to amend without an Affidavit in support despite objection from Counsel for the Appellant (Original Defendant)
- (ii) His Lordship erred in law in not considering requirements of the High Court Rules regarding amendments of the court orders already sealed.
- (iii) His Lordship erred in law under the circumstances in allowing the amendment of the Court Order in the absence of Counsel for one of the intervening parties, namely, Jacks Holdings Limited and Michael Ban Deo."

Respondent was the owner of Sigatoka Hotel which it mortgaged to Westpac Bank. The Hotel was insured with New India Assurance Co. The Insurance Policy was assigned to the Bank as additional security. The Hotel was burnt down. The Respondent defaulted. The Bank then proceeded to dispose of the Hotel property by way of a mortgagee sale.

There is an action pending between the Respondent and the Bank wherein the Respondent has sued the Bank for misrepresentation under the mortgagee sale.

The basic reason for the Applicant seeking a stay is to ensure that funds are available to pay the Applicant any costs that might be ordered against the Respondent in respect of pending litigation. It is not in dispute that the mortgage

debt has been fully paid and in fact there is a surplus of \$13,143.91 which the Applicant is holding in a trust account with the ANZ Bank. (See Accounts filed by Westpac dated 1 August 1996 and annexed as item (d) to Ganga Ram Dayal's affidavit of 12 September 1996.) The Applicant says this sum is not sufficient to indemnify it against any legal costs that might be awarded in its favour.

On 5 July 1996 the Respondent obtained a consent judgment whereby New India Assurance Company was to pay to the Respondent or its nominee the sum of \$125,000.00 inclusive of costs upon release of assignment of the insurance policy by Westpac.

The net effect of a stay order (if granted) would be to freeze a total sum of \$138,143.91 (\$13,143.91 + \$125,000.00). In fact it is a novel way to obtain security for costs not yet ordered or ascertained. But costs have been awarded against the Applicant on 2 occasions.

It is the Applicant's contention that if a stay is not granted the Bank will have to discharge the additional security and hand it over to New India Assurance Co. which will then be obliged to pay out \$125,000.00 to the Respondent or its nominee. Thus the appeal if successful will be rendered nugatory because the Respondent has no other assets

and is a non-operating Company. The Applicant relies on the provisions of the mortgage as to contingent liability.

With regard to Orders made by Sadal J. on 30/8/96 the Applicant claims that its Counsel was not given an opportunity to make submissions on the substantive issue. This is not borne out either by Sadal J.'s decision of 5/9/96 nor by Ganga Ram Dayal's affidavit filed in these proceedings on 13/9/96. Prima facie the Applicant does not appear to have any prospect of success with respect to the Orders made on 30/8/96. It was clear that not only had the mortgage debt been paid in full but there was indeed a surplus of \$13,000 odd which the Applicant was holding on to.

The judge was obviously not satisfied there was any contingent liability either.

As to the appeal against the amended Order made on 5/9/96 the Applicant appears to be on a firmer ground on the basis that the judge was res judicata. But from a practical point of view there will be little or no difference if the Orders of 30/8/96 were to stand and the Orders of 5/9/96 were to be set aside. The Applicant would still be obliged to discharge the additional security and hand over fire policy to the Respondent to enable it to receive the proceeds (less 1/6th) directly or indirectly.

In my view the Applicant's basis for asking for a stay order is, in the circumstances of this case, wholly unreasonable and unfair. There can be no doubt that if the stay is granted the Respondent will be greatly prejudiced whereas if it is refused the Applicant is not likely to suffer any real prejudice. Certainly the Applicant will not be ruined. If any party is likely to be ruined it will be the Respondent which has been waiting for the insurance proceeds, and the surplus funds since 1994.

It is open to the Applicant to apply to the High Court for cash or other suitable security for costs to be provided by the Respondent before the pending litigation proceeds any further.

The Applicant has not complied with a Court Order made on 13 December 1994 "That any surplus funds remaining after the debt is paid it shall be deposited into this Honourable Court pending the determination of this Action." (See annexure (F) to Ganga Ram Dayal's affidavit already referred to above.) The least the Applicant (or its Counsel) could have done is to explain to me on its own motion why it has failed to comply with the Court Order.

Having read the affidavits filed and having considered the submissions made I see no cogent reasons why I should

order that the whole of the funds of the Respondent's successful litigation be locked up pending appeal.

The application for a stay order is refused, the interim stay discharged and the Applicant is ordered to pay the Respondent the costs of the proceedings before me.



*Moti Tikaram*

Sir Moti Tikaram  
President, Fiji Court of Appeal