

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 58 of 2012
(High Court HBC 368 of 2007 at Lautoka)

BETWEEN : SHANAYA AND JAYESH HOLDINGS LIMITED
Appellant

AND : BP SOUTH-WEST PACIFIC LIMITED
Respondent

Coram : Calanchini P

Counsel : Mr R. P Singh for the Appellant
Ms S. Devan for the Respondent

Date of Hearing : 19 August 2014

Date of Judgment : 5 September 2014

JUDGMENT

- [1] This is an application by the Appellant for a stay of execution of the judgment of the Court of Appeal delivered on 26 March 2014 pending the determination of an appeal by the Appellants to the Supreme Court. There is also an application for an ancillary

order relating to appropriate security for the stay pending appeal to the Supreme Court.

[2] The application was made by summons filed on 15 May 2014 and was supported by an affidavit sworn on 13 May 2014 by Shiu Ram. The application was opposed. The Respondent filed an answering affidavit sworn on 5 June 2014 by Nemani Kobiti. The Appellant then filed on 13 June 2014 a reply affidavit sworn by Shiu Ram. The parties subsequently filed written submissions.

[3] The issue that must first be determined in this application is jurisdiction. Does a single judge sitting in the Court of Appeal have jurisdiction to stay a decision of the Court of Appeal pending an appeal to the Supreme Court. This is not an application for a stay of execution of the decision in the sense that the unsuccessful party seeks time to comply with the decision. In my judgment only the Court of Appeal itself could grant such a stay of execution which might ordinarily be granted upon an application having been made to the Court of Appeal upon pronouncement of the decision or very shortly afterwards.

[4] The starting point for determining the issue of jurisdiction of the Court of Appeal is the Constitution. Section 99(3) provides:

“The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as prescribed by written law, to hear and determine appeals from all judgments of the High Court and has such other jurisdiction as is conferred by written law.”

[5] It is also appropriate to make two obvious but necessary observations. The first is that a right of appeal is not a substantive right but one that is conferred by statute rather than common law (see: Attorney-General v Sillem (1864) 2 H & C 581 at 608-609 and Victoria Stevedoung and General Contracting Co. Pty Ltd -v- Dignan (1931) 46 C.L.R. 73 at 108). The second is that the jurisdiction which the Court of Appeal exercises in respect of any application must be a jurisdiction that is conferred by statute. In R v Jeffries [1969] 1 QB 120 the Court of Appeal stated at page 124:

“Whatever may be the powers of courts exercising a jurisdiction that does not derive from statute, the powers of this Court are derived from and confined to those given by the Criminal Appeal Act 1907.”

- [6] It follows that since the right to appeal is not a common law right but one derived from statute, the right to a stay of execution pending appeal is not a common law right but one that must be derived from statute. There is no provision in the Court of Appeal Act (the Act), the Court of Appeal Rules (the Rules) or any other written law that confers on the Court of Appeal a jurisdiction to grant a stay of execution of its judgment pending an appeal to the Supreme Court. If the Court of Appeal does not have that jurisdiction then it must follow that a single judge of the Court does not have that jurisdiction (see section 20(1) of the Act).
- [7] On the other hand, there is in the Court of Appeal Rules a jurisdiction given to the Court of Appeal to grant a stay of execution of a judgment of the High Court pending an appeal to the Court of Appeal (See Rule 34 of the Rules). That jurisdiction can be exercised by a single judge of the Court (Section 20 (1) of the Act). That jurisdiction is also exercised concurrently with the court below (the High Court) (see Rule 34) but a party is required to make the application for the stay pending appeal first to the court below (see Rule 26 of the Rules) and if the application is not successful it may then be renewed before a single Judge of the Court of Appeal.
- [8] However that is a jurisdiction given in relation to appeals to the Court of Appeal. It has no application to an appeal from the Court of Appeal to the Supreme Court. In my judgment no such jurisdiction can be said to have been conferred impliedly.
- [9] That being the case the remaining question is whether there is any provision in the Supreme Court Act or Rules that may be said to confer on the Court of Appeal a jurisdiction to stay one of its judgments pending an appeal to the Supreme Court.
- [10] Counsel for the Appellant relies upon section 8 of the Supreme Court Act and section 13 of the Court of Appeal Act as the basis of this application before a single judge of the Court of Appeal. However, before considering section 8 of the Supreme Court Act, it is necessary once again to refer to the Constitution to determine the nature of

the jurisdiction conferred on the Supreme Court. Section 98 (3) (b) provides that the Supreme Court:

“has exclusive jurisdiction, subject to such requirements as prescribed by written law to hear and determine appeals from all final judgments of the Court of Appeal;”

Section 98(5) provides:

“In the exercise of its appellate jurisdiction, the Supreme Court may

- (a) _____*
- (b) make any other order necessary for the administration of justice, including an order for a new trial or an order awarding costs.”*

[11] There is ample authority for the conclusion that a single judge of the Supreme may determine an application for a stay pending the determination of a petition for leave to appeal to the Supreme Court pursuant to section 11 of the Supreme Court Act: See **Stephen Patrick Ward –v- Yogesh Chandra** (unreported CBV 10 of 2010; 20 April 2011). It is expressly stated that the jurisdiction that is conferred under section 11 is applicable only to a single judge of the Supreme Court.

[12] That leaves section 8 of the Supreme Court Act which states:

“A single judge of the Court of Appeal may, in respect of any appeal pending before the Supreme Court make such orders and give such directions as he or she considers the interests of justice or the circumstances of the case require.”

[13] It must be recalled that the Supreme Court Act 1998 was enacted as consequential legislation upon the coming into force of the 1997 Constitution. Under section 128 of that Constitution the Supreme Court consisted of (a) the Chief Justice as President, (b) judges appointed as judges of the Supreme Court and (c) the Justices of Appeal. It is reasonable to infer that the intention of the legislature was to enable a single judge of the Court of Appeal when sitting as a single judge in the Supreme Court to exercise the same jurisdiction under section 8 as a single judge of the Supreme Court exercised

under section 11. The point to be made is that the single judge of the Court of Appeal exercised his jurisdiction as a judge of the Supreme Court by virtue of section 128 of the then 1997 Constitution.

[14] However it is doubtful whether the position is the same under the present Constitution. Under section 98(1) the Supreme Court consists of (a) the Chief Justice as President and (b) such other judges appointed as judges of the Supreme Court. Under section 98(2), if deemed necessary by the Chief Justice, a judge of the Court of Appeal “*may sit on a matter being heard by the Supreme Court.*” Clearly, the composition of the Supreme Court is not the same under the present Constitution. It seems to me that under the present Constitution the involvement of any justice of appeal in Supreme Court proceedings is restricted to being a member of the Supreme Court constituted by three judges to hear a matter before the Court. As a result it seems that the jurisdiction given to a single judge of appeal under section 8 of the Supreme Court Act has been rendered ineffective on account of section 98(2) of the 2013 Constitution. In any event, if I am mistaken on this point, I find that a single judge of the Court of Appeal exercises the jurisdiction given under section 8 as a judge of the Supreme Court and not as a judge of the Court of Appeal. Any application for any interlocutory relief pending the determination of any petition in the Supreme Court must be determined by a justice of appeal sitting as a Supreme Court judge under section 8 or by a substantive judge of the Supreme Court under section 11 of the Supreme Court Act. In either case the application may be re-heard by the Supreme Court constituted by three judges in accordance with section 98 of the Constitution.

[15] It is also necessary to note that as a result of section 98(4) of the Constitution, Part IV of the Court of Appeal Rules (Rules 65 and 66) headed “*Appeal to the Supreme Court*” are now of no effect. Section 98(4) provides that no appeal may be brought to the Supreme Court unless the Supreme Court grants leave to appeal. There is no longer any jurisdiction vested in the Court of Appeal to grant leave to appeal to the Supreme Court.

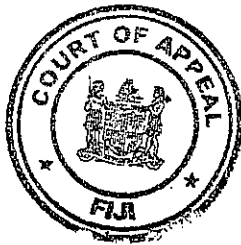
[16] As a result of the foregoing I have concluded that a single judge of the Court of Appeal sitting as a justice of appeal in the Court of Appeal has no jurisdiction to hear

and determine an application for a stay of execution of a Court of Appeal judgment pending an appeal to the Supreme Court.

[17] The application is dismissed. The Appellant is ordered to pay to the Respondent the sum of \$1800.00 costs within 28 days from the date of this judgment.

Orders:

- (1) *Applications are dismissed.*
- (2) *Appellant to pay costs of \$1800.00 to the Respondent within 28 days.*



W. Calanchini

HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL