

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 148 of 2018
High Court No. HBC 14 of 2015

BETWEEN : RAJNEEL KARAN SINGH
SAMUEL K. RAM

Appellants

AND : NAINASO I RA HOLDINGS LIMITED
MATAQALI NAINASO HOLDINGS LIMITED
YASAWA PROJECTS COMPANY LIMITED
CAPITAL GROUP INVESTMENT (FIJI) LIMITED
ANWAR KHAN
KELEVI NABA
PATIMIO BACAIVALU
WAISEA RAUBUSA

Respondents

Coram : Almeida Guneratne, JA

Counsel : Mr V Singh for the 1st Appellant
Mr E Kumar for the 2nd Appellant
Mr A Rayawa for the 1st Respondent
No appearance for 2nd to 8th Respondents

Date of Hearing : 12 May, 2020

Date of Ruling : 2 June, 2020

RULING

- [1] This is an application on the part of the Appellants seeking leave to appeal and enlargement of time to appeal the judgment of the High Court dated 28 August, 2018.

The Judgment of the High Court

- [2] By that judgment the High Court made order:-
- (i) restraining the 2nd Appellant from continuing in the case on the basis that he was in a conflict of interest position having to protect his personal interest (as there were allegations of professional misconduct) and the interest of the first appellant.
 - (ii) the 2nd Appellant was a potential witness on contested matters.
- [3] It is not in dispute that, the 1st Appellant is the law clerk of the 2nd Appellant (lawyer).
- [4] It is also not in dispute that, the proceedings were commenced by the Respondents as plaintiffs against the Appellant as joint defendants on the allegations that (a) winding-up proceedings had been commenced by the Appellants on behalf of a Corporate entity (2nd Respondent) before its incorporation; (b) the 2nd Appellant instructed the 1st Appellant to swear an affidavit and file it in a winding-up proceeding.
- [5] It is in that backdrop that the learned High Court Judge had made his impugned order.

Consideration of rival contentions advanced by Counsel

- [6] Mr Krishna's written submissions dated 7 May, 2020 argue thus:
- "4.2 *The Second Appellant is not defending proceedings relating to professional misconduct. The allegations involve fraud and collusion. Professional misconduct or unsatisfactory professional conduct does not give rise to a cause of action in civil proceedings. It is a special jurisdiction exercisable exclusively under the Legal Practitioners Act 2009,*
 - 4.3 *The learned High Court Judge accepts this at paragraphs 25 and 26 of his decision. He says that the Independent Legal Services*

Commission deals with allegations of professional misconduct or unsatisfactory misconduct; and

'the most the Court can do is to grant an injunction forbidding the solicitor from continuing to act for the other party. ...'

- 4.4 *Neither the learned Judge nor the pleadings identified a reasonable cause of action showing any contested matters.*
- 4.5 *The High Court had to determine the First Appellant's application to strike out to determine if there was a reasonable cause of action giving rise to contested matters.*
- 4.6 *The inherent jurisdiction is exercised if required for the proper administration of justice, for the protection of the integrity of the judicial process and the due administration of justice including the appearance of justice.*
- 4.7 *The inherent jurisdiction is exceptional and has to be exercised with caution with do it being given to the public interest and to ensure that a litigant is not deprived of the lawyer of his or her choice without due cause."*

[7] To begin my analysis I shall first re-cap what I have noted in paragraphs [3] to [5] above, the off-shot of it being that it was the learned Judge who *suo sponte* made the restraining order.

[8] Next I shall recount and take note of the following factors and aspects:

- (a) what was filed by the Appellants (original defendants) was to strike out the Respondents' (original plaintiffs) action.
- (b) I shall not go into and discuss the background to that action or the basis on which the striking application was sought. Those matters have been urged as Grounds 2 and 5 of the Appellants' written submissions dated 24 January, 2019 and 7 May, 2020. I say I shall not go into those matters on account of the interlocutory matter that we are concerned with here, namely, the restraining order made by the High Court against the 2nd Appellant lawyer.

[9] It is that matter that is addressed in the Appellants' said two sets of written submissions headed as Grounds 1, 3, 4 and 5.

Consideration of the rival contentions of Counsel

- [10] Mr Krishna on behalf of the Appellants submitted that:
- (a) the learned Judge did not touch on the Defendants' (Appellants') defence and gave his impugned Order on 'a presumed conflict of interest' between the Appellants when there was no material (evidence) to show such a 'conflict of interest'.
 - (b) Consequently, a determination on 'a conflict of interest' could not have been determined on the face of the plaintiffs (respondents) pleadings.
- [11] Disagreeing with that Mr Rayawa for the 1st Respondent, he contended that the two volumes of material submitted to Court showed all the evidence necessary to show the conflict of interest to which Mr Krishna took strong exception in stating that, those two volumes touched not on 'the Conflict of interest issue' but on the substantive issue (referred to at paragraph [8](b) above).
- [12] Mr Krishna submitted further that, 'a conflict of interest situation' could not have been determined on surmise – that, the 2nd Appellant was a potential witness at the trial and that there was a likelihood of him being called as such. This is what the High Court did (Mr Krishna argued). He finally submitted that, (a) the High Court order restraining the 2nd Appellant as it did was an intrusion on a litigant's constitutional right to retain a lawyer of his choice and a lawyer's constitutional right to represent his client and (b) thus, the High Court was obliged to look at the cause of action of the 1st Respondent and determine whether the defences of the two Appellants would be conflicting. That was the test.
- [13] In conclusion Mr Krishna, (a) relying on the decision in **R C Manubhai and Company Limited & Ors -v- Herbert Construction Company (Fiji) Ltd** (Civil Appeal No. ABU 0002 of 2010 on the basis that his clients had 'a real prospect of success' urged that he be given leave to appeal and extension of time to appeal.
- (b) sought a stay of proceedings in the High Court "pending the determination of the Appeal. Alternatively that, the Orders made restraining the 2nd Appellant from representing the 1st Appellant be stayed pending determination of appeal".

- [14] Mr Rayawa for the 1st Respondent while submitting that he fully supported the learned Judge's view continued submitting that a dangerous situation could result if the view pursued by the High Court is not followed. Learned Counsel also submitted that, the Appeal pursued by the Appellants' is academic in as much as the main matter (that is, the striking out proceeding) is already being heard.

Determination

- [15] I have given my mind to the submissions made by Counsel. My own view in granting or not leave to appeal and extension of time to appeal (which I have expressed in a gamut of decisions) I have looked to see a *via media* between "prospects of success" and "arguable case". If I were to look for "prospects of success" I would in effect be deciding the matter for the full Court. On the other hand any case to my mind would be "arguable."
- [16] Viewing the matter thus and having regard to the relationship between the two appellants (specifically) and the lawyer-client connection (generally) while condoning the case of **Manubhai & Co. Ltd.** (supra) cited by Appellants' Counsel and deriving assistance from the case of **Chaudhry -v- Chief Registrar** [2015] FJCA 28 (particularly at paragraph 32 of that Full Court Judgment), I have no hesitation in granting the Appellants' application for leave to appeal and extension of time to appeal the impugned order of the High Court.
- [17] In my view, whether in the context of disciplinary proceedings against a lawyer for misconduct or unsatisfactory conduct heard before the Independent Legal Services Commission or in the context of a civil action where his professional role is restrained, the matter raises also a public interest issue. Therefore I cannot agree with Mr Rayawa on that score also when he argued that this Appeal has only academic value.

Re: The Application for Stay of Proceedings

- [18] From an examination of some of the leading cases on Stay of proceedings such as **Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005), **Prasad -v- Hamid** [2004] FJCA 10; ABU0059.2003 (19 March 2004), **New World Ltd -v- Vanualevu Hardware (Fiji) Ltd** [2015] FJCA

172; ABU76.2015 (17 December 2015) and the Supreme Court decision in **Stephen Patrick Ward –v- Yogesh Chandra** CBV 0010.10 (20 April 2011) per Gates P, the following principles can be extracted on the question of grant or refusal of an application for stay:

- “(a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA)*
- (b) *Whether the successful party will be injuriously affected by the stay.*
- (c) *The bona fides of the applicants as to the prosecution of the appeal.*
- (d) *The effect on third parties.*
- (e) *The novelty and importance of questions involved.*
- (f) *The public interest in the proceedings.*
- (g) *The overall balance of convenience and the status quo.”*

Application of those Principles to the instant case (a) to (g) above

- [19] (a) If no stay is granted it cannot be said that the Appellants’ right of appeal will be rendered nugatory. If they are successful in the appeal the principle or the public interest issue involved would stand vindicated. Of course, Mr Ram (2nd Appellant) would have been deprived of appearing as Counsel for the Appellants.
- (b) It cannot be said that this principle is applicable to the 1st Respondent (the contesting Respondent).
- (c) The bona fides of the Appellants as to the prosecution of the appeal cannot be questioned. It is the Appellants’ constitutional rights *inter se* that are in issue.
- (d) I looked at Grounds 2 and 5 urged in the Appellants written submissions in that regard. Those very grounds clearly show the negative impact or effect a Stay could have on the other Respondents on the main issue though not in the instant issue.

- (e) Though there is novelty in the question involved because the issue has arisen like a recurring decimal in the past but its importance is not to be denied.
- (f) The public interest in the matter is not in doubt. But, eventually in Appeal it will stand decided. If a stay is refused the 2nd Appellant would have been deprived of appearing in just one case only.
- (g) At the hearing it transpired that, the main matter was being heard in the High Court. Also that Mr Krishna himself was representing the Appellants. Apart from that, Mr Krishna himself revealed that some other interlocutory applications were also in the wings (which I did not think necessary to probe into but which could also be adversely affected should a stay be granted. Taking into consideration all those factors the overall balance of convenience and maintenance of the status quo clearly favour the refusal of a stay of the High Court proceedings.

[20] Consequently, on a consideration of a balance of the aforesaid factors, the matter stands tilted against the granting of a stay of proceedings of the High Court.

[21] Accordingly and in conclusion I proceed to make the following Orders:

Orders of Court

1. *Leave to appeal and extension of time to appeal the order of the High Court dated 28 August 2018 is allowed. The Appellants may advise themselves to take all consequential steps prescribed by law.*
2. *Application for a stay of proceedings of the High Court sought in paragraph 4 of the Summons dated 14 December, 2018 is refused.*
3. *The 1st Respondent is ordered to pay as costs of this application a sum of \$1,000.00 to each of the Appellants within 28 days of notice of this Ruling.*




Almeida Guneratne
JUSTICE OF APPEAL