

THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 057 of 2020
(HBC 262 of 2019)

BETWEEN : **LAND TRANSPORT AUTHORITY [LTA]**
Appellant

AND : **PASIFIKA ENTERPRISE**
Respondent

Coram : Almeida Guneratne, JA

Counsel : Mr. N. Chand and Mr. V. Chand for the Appellant
: Mr. R. P. Singh for the Respondent

Dates of Hearing : 19th January, 2021

Date of Ruling : 4th February, 2021

RULING

Some Prefatory Matters

[1] On 15th December, 2020 when the matter of the application for “interim stay” (on the basis of the Appellant’s summons for the same) was taken before me, Respondent’s Counsel submitted that he was opposing the same which made me to fix the matter for hearing on 19th January, 2021 (that is, inquiring into the application for “an interim stay.”

- [2] However, when the matter was taken on 19th January, 2021 I was able to prevail on Counsel for both parties to take on the substantive stay order application which would save the time of Court and obviate protracted proceedings.
- [3] I must express my appreciation of the response shown by both Mr. Chand and Mr. Singh in that regard.

Brief background to the present application for “a stay”

- [4] The application is for a stay pending appeal initiated by way of summons dated 23rd November, 2020 against the judgment of the High Court delivered on 6th July, 2020 which declared that the Traffic Infringement Notice No. 3589118 [TIN] issued on 5th March, 2019 is in breach of Sections 14 (2) and 15 of the Constitution of Fiji and therefore null and void,
- [5] There was also the issue whether in terms of Section 44 (7) and (8) of the Constitution the Attorney General ought to have been put on Notice by the Respondent (who was the original Plaintiff) who instituted proceedings in the High Court seeking the said declaration that the TIN was in breach of Section 14 (2) and 15 of the Constitution.
- [6] I thought to deal first with the Constitutional requirement contemplated in Sections 44 (7) and (8) of the Constitution, that is, the Attorney General being put on Notice.
- [7] Sections 44 (7) and (8) of the Constitution read thus:

“Section 44 (7):

The Attorney-General may, on behalf of the State, intervene in proceedings before the High Court that relate to a matter concerning a provision in this Chapter.

Section 44 (8):

If the proceedings before the High Court relate to a matter concerning a provision of this Chapter, the High Court must not proceed to hear and determine the matter until it is satisfied that notice of the matter has been given to the Attorney-General and a reasonable time has elapsed since the giving of the notice for consideration by the Attorney-General of the question of intervention in the proceedings.”

[8] In that regard I posed the question directed at Mr. Chand thus:

The Appellant being a state agent was it not expedient for it to liaise with the AG’s Office which would then have enabled the AG to enter an appearance on its behalf and intervened?

[9] At which point Mr. Singh, (taking a cue from that question) submitted that, in fact the Appellant had even got the security for costs waived at the inquiry before the Chief Registrar on the basis that it was an agent of “the State” but instead of taking any initiative to have the AG added to defend the action had even retained “private” Counsel.

[10] I must say that I saw merit in Mr. Singh’s said argument which was sought to be met by Mr. Chand on the basis that the said requirement imposed by the Constitution is a primary obligation imposed on a party.

[11] Mr. Singh’s counter to that was that the Appellant never took that point before the High Court and it is unfair to urge the same for the first time before this Court.

[12] Again I must say I saw merit in Mr. Singh’s said submission.

[13] However, having said that, I felt that the point made by Mr. Chand went to the root of the matter involving an application of the aforesaid Constitutional provisions as to the

maintainability of the Respondent's action which would be a matter for the Full Court to make a determination on when the Appeal is taken before it.

[14] The present application before me being for "a stay of execution" of the High Court Judgment my task as a Single Judge under Section 20 (1) (e) of the Court of Appeal Act (Cap. 12) was to see whether, in the light of applicable principles as judicially laid down, the Appellant is entitled to "a stay" pending its timely filed appeal in the background facts and circumstances of this matter.

What are those Background facts and Circumstances?

[15] In considering those background facts and circumstances I looked at:

- (a) the judgment of the High Court.
- (b) the grounds of appeal urged against it.
- (c) the application before me for "a stay" being a renewed application, the basis on which the High Court had refused "a stay."
- (d) the rival contentions advanced on behalf of parties.

[16] I shall now proceed to look at those facts and circumstances *seriatim*.

The Judgment of the High Court

[17] The learned High Court Judge in holding that the Land Transport TIN was in breach of Sections 14 (2) and 15 of the Constitution and in granting the declaration it did adduce his reasons, the distilled essence of which I summarise as follows viz:

- (i) Regulation 6 of the Land Transport (TIN) Regulations, 2017 which fixes a penalty for a traffic infringement has the effect of shifting the burden of proof to a person issued with a TIN to prove his innocence with the result that it violates the presumption of

innocence where a person (in this instance, the Respondent) “would be liable to be prosecuted in Court.”

- (ii) Furthermore, if the Notice is not disputed within the time limit imposed by it will take effect as a conviction which can only be entered by a Court but not otherwise.
- (iii) Accordingly, the conviction notice not only violates the right to a fair trial before a Court of law (Section 15 (1) of the Constitution) but also the right of presumption of innocence guaranteed under Section 14 (2) (a) of the Constitution.

The Grounds of Appeal urged against the said Judgment

- [18] “1. *The Learned Judge erred in law when he held that the Land Transport (Traffic Infringement Notice) Regulations 2017 has a reverse onus provision in that it shifts the burden of proof to the accused or applies a presumption of fact or it operates against the accused.*
2. *The Learned Judge erred in law when he held that Regulation 6 (c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 has the effect of a reverse onus in that it requires a person issued with the Traffic Infringement Notice to prove his innocence. On the contrary, the words “elect to dispute the fixed penalty in Court” simply mean that if a person issued with the Traffic Infringement Notice disagrees with the said notice, he or she has the option to dispute the notice in Court however, he or she retains the presumption of innocence as it is the Appellant’s responsibility to establish guilt.*
3. *The Learned Judge erred in law and in fact when he held that Regulation 6 (c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 violates the right to*

presumption of innocence guaranteed under Section 14 (2) of the Constitution without adopting a reasonable interpretation of the law which is consistent with the Constitution as required under Section 3 (2) of the Constitution.

4. *In applying Section 2 (2) of the Constitution which states that any law that is inconsistent with the Constitution of the Republic of Fiji (**'Constitution'**) is invalid to the extent of the inconsistency, the Learned Judge erred in law and in fact when he held that Regulation 6 (c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 is in violation of Section 14 (2) (a) of the Constitution.*
5. *The Learned Judge erred in law and in fact when he held that the deeming provision of a conviction under Regulation 9 of the Land Transport (Traffic Infringement Notice) Regulations 2017 violates the Respondent's rights under Section 14 (2) (a) and 15 (1) of the Constitution.*
6. *By determining that Regulation 6 of the Land Transport (Traffic Infringement Notice) Regulations 2017 has the effect of a reverse onus, the Learned Judge incorrectly held that the Appellant ought to have made submissions on the purpose of introducing a reverse onus in the said regulation.*
7. *The Learned Judge erred in law and in fact when he heard and determined the Respondent's Originating Summons dated 15 October 2020 which related to Section 14 (2) and 15 under the Bill of Rights Chapter of the Constitution, without firstly satisfying itself as to whether the Attorney-General was provided notice of the matter, and thereby denying the Attorney-General its constitutional right to consider intervening in the matter. Pursuant to Section 44 (7) and (8) of the Constitution. "*

Interim Reflections that needed to be made at this point

- [19] To begin with, the Appellant has invoked the jurisdiction of the Full Court in time in Appeal to access and deliver a judgment on the merits of the High Court Judgment as against the grounds of appeal urged against it.
- [20] Although my judicial appetite did tempt me to express my views on the same, I reminded myself of my role as a Single Judge exercising my statutorily conferred power under Section 20 (1) (f) read with Section 20 (1) (g) of the High Court of Appeal Act (Cap 12) in not to going beyond that which is to say that, my role in the present application is to see whether there is sufficient ground to grant a stay order pending appeal filed within time before the Full court.
- [21] It is from that perspective that I addressed my mind to the question as to whether “the stay” sought by the Appellant should be granted or not.

The Basis on which the High Court refused “a stay” of its Judgment

- [22] The High Court in that regard held thus:

“In the matter at hand, the Court made a declaratory judgment that the TIN issued against the Plaintiff violates the Constitution. It is not of coercive nature requiring execution like executory orders which are enforceable by execution. The appeal is lodged against the declaratory judgment. Since the judgment is only declaration which requires no execution, the question of stay pending appeal does not arise. In other words, the declaratory judgment cannot be stayed as there is nothing to stay. The application to stay can be refused on this ground alone. However, for completeness I consider other aspects as well” (referred to by the Appellant in its written submissions seeking “a stay” from this Court.)

The Rival Contentions (advanced on behalf of the parties)

- [23] Having placed the matter in that perspective, I took note of the Respondent's basic contention that, the judgment of the High Court being declaratory in nature, there was nothing to be executed and therefore there was nothing to be stayed.
- [24] That contention I found to be in consonance with the learned High Court Judge's order as well when he refused the first tier application made before him when the Appellant sought "a stay order."
- [25] However, I also took note of the Appellant's counter-submission that, although the said declaratory judgment, though not executory in nature *prime facie*, the impact it has had on the implementation and/or application of the TIN warrants consideration in the larger public interest, the matter not being merely regarded as a private interest matter involving the Respondent and the Appellant in which regard Mr. Chand advanced the somewhat innovative argument for this Court to consider, the concept of an executory (declaration) judgment as against what learned Counsel submitted as the judgment of the High Court having the effect of "a cohesive nature" (though not executory in nature) in having an impact in its application in which regard, Counsel referred to as many as 16 cases where the impugned judgment of the High Court had been cited and has been acted upon by the Magistrates' Courts.

Declaratory judgment not per se executory but having the effect of a cohesive nature in its application and continuing implementation

- [26] That I found to be an attractive argument advanced by Mr. Chand for the Appellant.
- [27] On the strength of the existing High Court Judgment, the Respondent will not be facing a conviction. Thus, should a stay order be granted on the Appellant's said contention of the cohesive nature of the said High Court Judgment as aforesaid, no prejudice would visit

on the Respondent pending the determination of the Appeal on the merits by the Full Court.

The Other Impacting Considerations

[28] While paying regard to Mr. Singh's argument on the concept of the presumption of innocence, the Woolmington principles and the High Court Judge's Judgment on a preponderance of considerations, I was mindful of the fact that, those matters no doubt the Full Court will address and make a final determination thereon in Appeal.

[29] That would include incidentally, a determination on the alleged constitutional right of the Respondent based on Section 14 (2) and 15 of the Constitution and the Application of Section 44 (7) and (8) of the Constitution as well.

The Form of the Summons seeking a "the stay"

[30] Mr. Singh took up the point as to the form of the summons seeking a stay drawing attention to "the summons" and submitting that, in the form and manner it has been sought, "the stay" the Appellant is seeking ought not and cannot be given.

[31] I did see some merit in that submission.

Form of the summons and the substantive content of the Application

[32] However, I choose to draw a distinction between "the form" of the said summons and "the content of the application" for "the stay" that has been sought on which:-

- (a) a preliminary objection to the said summons as requisite in law having not been taken (in which event) the Appellant would have had an opportunity to seek an amendment as to the said summons.

(b) in such absence, parties proceeded to inquiry before me and argued extensively on the substantive merits as to whether “a stay” ought to be granted or not.

Some Interim Remarks

[33] I wish to say that, the present application before me being a renewed application for a stay, it was not my statutory judicial task as a Single Judge to scrutinize the ruling of the learned High Court Judge where His Lordship had refused “a stay” of his judgment.

[34] As would be clear from my approach, for the reasons adduced above in this Ruling, it is on my own reasons that I reached my determination and conclusion.

[35] On the basis of my reasoning above, for which I say was guided by the principles enunciated in past precedents such as (*inter alia*) the cases of Natural Waters of Viti Ltd .v. Crystal Clear Material Water (Fiji) Ltd (ABU 11 of 2004) V, 2; Registration Officer v. Ah Khoy [1994] FJCA 1; Ward v. Chandra [2011] FJSC 8; Khan v. Chief Registrar [2014] FJCA 60 and Singh v. Prasad [2002] FJSC 7. In so far as the consideration of “exceptional circumstances” in granting “a stay” construed for the purposes of this case as being, though, the judgment itself was one of a declaratory nature that, in its application by “Magistrates Courts” it has frustrated the Appellant’s proceedings in terms of the TIN under the Regulations it has been so far conducting its functions.

The Rock and the Hard Space

[36] This is, what in idiomatic terms the Respondent’s case falls into. Just as much as the Respondent argues that, the High Court Judgment is “not executory” (the Rock) but, its “executable nature” stands testified in the way it has been applied by the Magistrates Courts subsequently (the Hard Space that the declaration granted has fallen into).

[37] That is the exception to the Rule in viewing the effect of a declaratory judgment.

- [38] I must acknowledge and place on record the valiant forensic efforts put in by both Mr. Singh and Mr. Chand which enabled me to carve out a determination which I managed to do. I also gave my best consideration to the written submissions tendered on behalf of the parties and the oral submissions made by learned Counsel along with extensive precedents cited by them.
- [39] Apart from the matters I have addressed specifically there were some matters such as the application of Regulation 9 of the TIN (among others) which I did not feel the need to address for the purpose of the present application before me, leaving a determination on it for the Full Court.
- [40] Staying in that same breath, I say the same in regard to the impact of Section 44 (9) of the Constitution and its interaction with Section 44 (7) and (8) thereof wherein Section 44 (9) goes on to decree thus:

“Section 44 (9):

A notice under subsection (8) is not required to be given to the Attorney General if the Attorney-General or the State is a party to the proceedings.”

- [41] Apart from those aspects, given the fact that the Respondent’s action rested on an allegation of a violation of a Constitutional right, without seeking Constitutional redress as decreed in the Constitution, could the Respondent have sought the remedy it sought?

Can a party seek a remedy indirectly and obtain relief when a particular mechanism is provided for directly in the Constitution itself?

- [42] This is another matter the Full Court may think appropriate to consider when the Appeal before it comes for hearing, while at the same time paying regard to the provisions of Section 44 (1) and (2) of the Constitution.

[43] “Section 44(1):

If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

Section 44(2):

The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.”

Resulting Position

[44] In the result, apart from the Constitutional and procedural intricacies involved in the case, the resulting effect of the judgment of the High Court is that several proceedings instituted against parties alleged to be in breach of the TIN have been frustrated, although the judgment is said to be merely declaratory that therefore “there was nothing to be stayed.”

Declaratory Judgments per se as opposed to their impact on lower Court

[45] The point I took note of is the impact of the judgment of the High Court has had on the Magistrates’ Courts in the way they had applied it as argued by Mr. Chand on behalf of the Appellant.

Summary

[46] I shall now summarise the factors that weighed with me in making the ensuing order.

Public Interest and Exceptional Circumstances

- [47] Given the “public interest” element involved as referred to earlier, I was convinced that the circumstances are exceptional in this matter. It must be remembered that this is not, a matter where a stay is being asked against an ordinary civil matter such as execution of a money decree (*vide: Ward .v. Chandra* (Supra). Here, the matter is concerned with the application of the High Court Judgment.

Matter for Judicial Notice

- [48] In that regard I took judicial notice of what the Appellant has submitted in paragraph 28 to 32 of its written submissions dated 19th January, 2021.

“28. We submit that since the Judgment of the High Court on 06 July 2020, and the same High Court Ruling on our Stay Applications on 16 October 2020 which was refused by the High Court, there are cases/matters before the Magistrate Courts all over Fiji raising preliminary objections before Trial to dismiss any TINs in Court based on the Pasifika Judgment that was made on 06 July 2020.

29. It is submitted that there are already 15 Traffic cases/matters dismissed by the Magistrates Courts in Fiji for being unconstitutional following and relying on the Pasifika Judgment, and there are 3 cases where hearings has already been conducted but are awaiting ruling on the preliminary objections on the Application of the Pasifika Judgment. [Annexed as “LTA 01” is the true copies Rulings which were dismissed based on Pasifika Judgment]

*30. We submit that in one recent very unusual Ruling at the Nadi Magistrate Court delivered on 29 December 2020, in the case of **Nands Civil Contractors Limited v Land Transport Authority. Traffic Case No. 4093 of 2017** where the Learned Magistrate bound by the Judgment in Pasifika (*supra*), held that the TIN issued against the Applicant by the Respondent is*

invalid for it breaches Sections 14 (2) and 15 of the Constitutions. [Annexed as "LTA 02" is the true copy of this Ruling]

31. *It is submitted that the learned Magistrate in the same Judgment also ruled that 11 other cases pending before his Court is bound by the Pasifika Judgment. Eight (8) of those cases were state bookings, and 3 were Appellant's overloading bookings, and in none of these 11 cases did the State nor Appellant were given opportunities to respond as none of the parties made an applications for these cases to be dismissed. It was a blanket and arbitrary applications of the ruling of Pasifika Judgment.*
32. *We submit that the numbers of dismissed cases will only increase as time goes on before the determination of the Appeal on this matter."*

Rule and Exception

- [49] While the fact that as the rule there can be no stay order against a declaratory order (Registration Officer for Suva City Fijian Urban Constituency .v. Ah Koy (supra)), "nevertheless every such order should be considered in the light of its own nature and the facts and circumstances surrounding it." (ibid)

Balance of Convenience and Status Quo

- [50] I have no hesitation in holding the view that balance of convenience requires that the *status quo* prior to the impugned declaratory order be maintained until the Full Court decides the appeal pending before it.

Important Arguable Constitutional (Public) Law Issues in Appeal

- [51] That view is reinforced by the fact that important arguable issues of Constitutional (Public) Law are contained in the Appellant's grounds of appeal.

- [52] For the aforesaid reasons I am satisfied that it is in the best interest of the administration of justice in this country if the Appellant's stay application is allowed.
- [53] At this point I must say that in arriving at my conclusion I was largely guided by the approach and thinking in the Supreme Court decision of Singh v. Prasad [2002] FJSCJ (per Gates, C.J.)
- [54] Before I proceed to my determination and conclusion I wish to refer to three other precedents where the scope and content of declaratory Orders have been gone into *viz*:
- (i) Re: Honourable Chief Justice Kennedy: Ex Parte West Australian Newspaper Ltd [2006] WASCA 172;
 - (ii) Centre for Policy Alternatives (Guarantec) Ltd & Others v. Commissioner of Elections [2003] 1 Sri Lanka Law Reports 277
 - (iii) Electoral Commission v. Supervisor of Elections [2016] FJCA 159.
- [55] These cases I cite (in addition to the qualification envisaged in the Ah Koy decision (*supra*) in support of the proposition that there could be further exceptions to the rule that "there is nothing to be stayed" in a declaratory order.
- [56] The instant case is another. It involves the application of the High Court Judgment by Magistrates' Courts in the future. Therefore it is very much "a live issue" (See: Ex Parte Salem [1999] 2 ALLER 42.

Determination and Conclusion

- [57] Before I proceed to pen my determination and conclusion, I wish to hark back to what I have said at paragraphs [39] and [40] above of this Ruling and in addition to what I said there, there are the arguments raised by Mr. Singh in the context of Section 2 of the Constitution as well in which regard I did give my mind to the Grund Norm (the supremacy of the Constitution provisions), the principle of subsidiarity (the "TIN" and the Regulations, being subordinate to those provisions) and yet, in the light of established principles of statutory interpretation I took the time to go through acknowledged and celebrated works of Maxwell, Craies, Bindra and Bennion, whether and how those

principles could be found to have impacted on the matter in issue, (which are also matters for the Final Court to determine in Appeal.)

[58] In so far as the present application seeking a stay of the application of the High Court Judgment in concerned, for the reasons I have adduced above, I reiterate my view that the Appellant has made out a case to my satisfaction in seeking and obtaining “a stay.”

[59] For the above reasons, I have no hesitation in granting the Appellant’s application for a stay of the judgment of the impugned judgment of the High Court pending appeal before the Full Court in the light of the judicially expounded principles such as the criteria of balance of convenience, prejudice to parties, the public interest and relative merits of the grounds of appeal urged.

[60] Accordingly, I proceed to make orders as follows;

Orders of Court

1. The application of the judgment of the High Court in issue is “stayed” until the determination of the appeal pending before the Full Court.
2. There shall be no costs in this application.
3. Given the nature of the public interest constitutional (law) issues involved in the matter, I prevail upon the Registrar to place the appeal pending before the Full Court for hearing on a priority basis.



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Almeida Guneratne
JUSTICE OF APPEAL