

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 306 OF 2007

BETWEEN : **JOSEVATA WAQALIVA VULUMA** of Regent Road, Narewa,
Nadi, Businessman.
1ST PLAINTIFF

AND : **J VULUMA & VATUNITU & COMPANY** of Narewa, Nadi.
2ND PLAINTIFF

AND : **MERCHANT FINANCE & INVESTMENT COMPANY**
LIMITED a limited liability company having its registered
office at Level 1, Ra Marama House, 91 Gordon Street, Suva.
1ST DEFENDANT

AND : **AUTOMART LIMITED** a limited liability company having its
registered office at 27 Sautamata Street, Lautoka.
2ND DEFENDANT

Appearances : Mr I. Fa for the plaintiffs
: Mrs J. Nair for the first defendant
: Mr N. Kumar for the second defendant

Date of Hearing : 08 March 2018

Date of Ruling : 08 March 2018

R U L I N G

[on stay pending appeal]

[01] This ruling concerns a summons for stay filed in conjunction with a supporting affidavit sworn by Rowena Fong, Acting Chief Executive Officer of the first defendant.

[02] By the summons for stay filed 28 February 2018 (*the application*), the defendant seeks an order that:

“all execution, assessment of damages and enforcement proceedings pursuant to the Judgment (my judgment) delivered on the 22 day of November 2017 be stayed until the hearing and determination of the Summons for Leave to Appeal filed in the Court of Appeal and in the event such leave is granted until delivery of the Judgment of the Court of Appeal and that costs of this application be costs in the cause.”

[03] The application is made pursuant to section 20 (1) (e) of the Court of Appeal (Amendment) Act 1998 (CAA); Rule 26 (3) and Rule 34 of the Court of Appeal Rules (CAR) and the inherent jurisdiction of this court.

[04] Section 20 CAA deals with the powers of a single Judge of appeal. Subsection (1) (e) of that section says:

“to stay execution or make an interim order to prevent prejudice to the claims of any party pending appeal.” [Emphasis added]

[05] Rule 26 (3) states:

“(3) Wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below.”

[06] Rule 34 CAR states:

“(34) (1) Except so far as the court below or the Court of Appeal may otherwise direct –

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal.

(2) On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court of Appeal otherwise orders."

[07] Counsel for the defendant Mrs Nair, without properly supporting the application, submits that the first defendant is willing to pay certain money under the judgment other than that first defendant is not willing to pay.

[08] Mr Fa, counsel for the plaintiff contends that the application is bad in law. There is no appeal pending in the Court of Appeal. What is in the Court of Appeal is the application to seek leave to appeal out of time.

[09] By CAR, rule 34 (1), an appeal will operate a stay of any order or decision of the lower court only if the appeal court or the lower court so orders.

[10] The court is empowered to stay of execution pending appeal (see s.20 (1) (e), CAA). It will be noted that the precondition for seeking a stay of execution is a pending appeal.

[11] The basic rule is that a litigant is entitled to enjoy the fruits of its success (*BMW AG v Commissioners of HM Revenue and Customs* [2008] EWCA Civ 1028, LTL 7/10/2008).

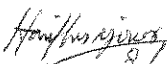
[12] There is no appeal pending in the Court of Appeal. The defendant has filed an application for leave to appeal in the Court of Appeal but not appeal against the judgment which the execution is sought under. In order to obtain a stay the

defendant must establish that they have sufficiently exceptional circumstances as stated in *Ward v Chandra* [2011] FJSC 8; CBV0010 (20 April 2011).

[13] The application has not been supported before me. There is no appeal against the judgment pending in the Court of Appeal. The defendant is not entitled to seek a stay of enforcement of the judgment under section 20 (1) (e) of the CAA. In these circumstances, I strike out the application for stay pending appeal. The defendant will pay summarily assessed costs of \$600.00 to the plaintiff.

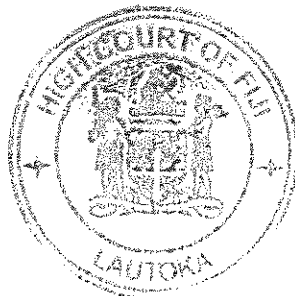
Final outcome

1. Application for stay pending appeal is refused.
2. The first defendant will pay summarily assessed cost of \$600.00 to the plaintiff.


..... 8/3/18.

M.H. Mohamed Ajmeer

JUDGE



At Lautoka

8 March 2018

Solicitors:

For the first plaintiff: M/s Fa & Company, Barristers & Solicitors

For the first defendant: M/s Lateef & Lateef Lawyers

For the second defendant: M/s Krishna & Co, Barristers & Solicitors