

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

CIVIL ACTION NO. HBC 67 OF 2016

BETWEEN : **BHAGWATI** of Varavu, Ba, Domestic Duties as the Executrix and
Trustee of the **ESTATE OF JAI RAM SHARMA** late of Varavu, Ba.

PLAINTIFF

AND : **SUSHILA DEVI SINGH** of Namosau, Ba, Fiji, Domestic Duties and
RITA SINGH now of Waiwake Terrace, Merrilands, New Zealand,
Bank Officer as the Executrices and Trustees of the **ESTATE OF**
DEWENDRA SINGH of Namosau, Ba, Fiji, Businessman, Deceased,
Testate trading as **FIJI TRANSPORT COMPANY** at Namosau, Ba
and **FIJI TRANSPORT COMPANY LIMITED** a limited liability
company having its registered office in Ba, Fiji and carrying on its
business from 47 Namosau Road, Ba.

FIRST DEFENDANT

AND : **AL JAMEER ALI** of Rarawai, Ba, Driver.

SECOND DEFENDANT

AND : **BA TOWN COUNCIL** a statutory body duly constituted under the
provisions of the Local Government Act Cap 125.

THIRD DEFENDANT

Appearances : Mr F. Hanif for the defendants/applicants
: Mr A.K. Narayan (Jnr) for the plaintiff/respondent
Date of Hearing : 16 May 2019
Date of Ruling : 01 July 2019

R U L I N G

[on stay pending appeal]

Introduction

- [01] This is an application for a stay pending appeal.
- [02] By a summons supported with an affidavit of AL Jameer Ali and Anil Prakash Singh filed on 8 March 2019 (*the application*), the first and the second defendants/applicants (*the defendants*) apply for stay of execution of judgment of Justice Mackie (as he then was) delivered on 6 February 2019, pending appeal. An appeal against the judgment is now pending before the Court of Appeal.
- [03] The plaintiff opposes the application. She filed on an affidavit in reply.
- [04] Justice Mackie had granted a limited interim stay and I extended it until determination of the stay pending appeal application.
- [05] At the hearing before me, both counsel made oral argument and filed their respective written submissions.

Background

- [06] The claim arose out of a motor vehicle accident between the deceased, Jai Ram Sharma and the first defendant's bus registration number FD 004.
- [07] On 6 February 2019, after trial Justice Mackie delivered a judgment in favour of the plaintiff and held that the second defendant was 90% liable for the death of the deceased, Jai Ram Sharma and awarded a total sum of \$84,763.00 including interest and costs of \$10,000.00.
- [08] The claim against Ba Town Council, the third defendant was dismissed.
- [09] The defendants have appealed the judgment to the Court of Appeal on several grounds. The appeal challenges both the finding of liability and/or alternatively the assessment of damages. The appeal awaits determination by the Court of Appeal. In the meantime, the defendants apply to this Court for a stay of execution of the judgment, pending appeal.

Grounds of appeal

- [10] The defendants have appeal the judgment on the following grounds of appeal:

On liability

1. *The Learned Judge erred in law in holding that the admittance of a collision between the Bus Registration No. FD 004 with the Deceased in the defence and an agreed fact in the Pre-Trial Conference minutes "absolved" the respondent from establishing negligence on the part of the appellants. In so holding, the learned Judge failed to objectively analyse the evidence on the issue of liability for the collision.*
2. *The Learned Judge erred in law by relying on the principle of 'adverse inference' formulated in James v Dunkel (1959) 101 CLR 298 despite the Learned Judge finding as a fact that none of the Plaintiff's witnesses saw the actual collision between Bus registration FD 004 and the deceased. The principle in Jones v Dunkel had no application in the circumstances and more so given that the Learned Judge accepted the appellants' witnesses as being eyes witnesses to the collision.*
3. *The Learned Judge erred by holding the collision would not have happened had the second appellant driven bus registration No. FD 004 at 50km per hour:*
 - (i) *when the evidence accepted by the Learned Judge was the deceased was standing on side of the road where Bus Registration NO. FD 004 was approaching from.*
 - (ii) *when the evidence of the eye witness to the actual collision was that the deceased was crossing the road from the side where Bus Registration NO. FD 004 was approaching from;*
 - (iii) *when the Learned Judge drew an inference that since the deceased was carrying a sack on his right shoulder, he could not have been in a position to turn his head to the right to look out for approaching traffic;*
 - (iv) *when the Learned Judge has found that he deceased had when crossing the road did not follow the basic rule of looking at both sides of the road;*
 - (v) *when the Learned Judge found that the plaintiff led no evidence that the deceased had taken sufficient precaution for his own safety.*
4. *That Learned Judge focused on the speed at which the second appellant was traveling and led himself I error by failing to analyse all the evidence that lead to the collision. Had the Learned Judge focused on all the evidence at the trial, the only conclusion available was that the deceased was wholly responsible for the tragedy that befell on him.*

Alternatively on liability

5. *The learned Judge erred in assessing contributory negligence of the deceased at 10%:*
 - i. *when the evidence accepted by the Learned Judge was that the deceased was standing on the side of the road where Bus Registration No. FD 004 was approaching from.*

- ii. *when the evidence of the eye witness to the actual collision was that the deceased was crossing the road from the sides where Bus Registration No. FD 004 was approaching from.*
- iii. *when the Learned Judge drew an inference that since the deceased was carrying a sack on his right shoulder, he could not have been in a position to turn his head to the right to look out for approaching traffic;*
- iv. *when the Learned Judge has found that the deceased had when crossing the road did not follow the basic rule of looking at both sides of the road;*
- v. *when the Learned Judge found that the plaintiff led no evidence that the deceased had taken sufficient precaution for his own safety.*

On Quantum

- 6. *The Learned Judge failed to assess damages under the recognized heads of damages in the Compensation to Relatives Act and the Law Reform (Miscellaneous Provisions), (Death & Interest) Act.*
- 7. *The Learned Judge erred in law by failing to deduct \$24,000.00 from the final assessment of damages pursuant to section 24(2) of the Workmen's Compensation Act when the evidence was that the respondent had received \$24,000.00 arising from the same accident therefore leading to double payment of the respondent.*
- 8. *The Learned Judge failed in law to make the appropriate allowance for contingencies of the deceased given that established case precedent allows contingency for 33% from net earnings.*
- 9. *The Learned Judge erred in using a multiplier of approximately 15 when a more appropriate multiplier for a 45 year old is between 7 & 8 established through case law precedent.*
- 10. *The Learned Judge erred in awarding general damages given the evidence was that the deceased died constantly.*
- 11. *The award costs of \$10,000.00 was excessive in the circumstances.*

The law

[10] The application is made under Order 45, Rule 10 of the High Court Rules 1988, as amended which provides:

"Matters occurring after judgment: stay of execution etc (O 45, R 10)

10 Without prejudice to Order 47, Rule 1, a party against whom a judgment has

been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”

Governing principles on stay pending appeal

[11] The Court of Appeal in *Natural Water of Fiji Ltd v Crystal Clear Mineral Water of Fiji Ltd* [2005] FJCA 15 ABU0011.2004S (18 March 2005) set out the test for granting a stay pending appeal that [at Para 7]:

“[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, *McGechan on Procedure* (2005):

“On a stay application the Court’s task is “carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful”: **Duncan v Osborne Building Ltd** (1992) 6 PRNZ 85 (CA), at p 87.

The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from **Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd** (1999) 13 PRNZ 48, at p 50 and **Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission** (1993) 7 PRNZ 200:

(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 proceeding.*

(g) *The overall balance of convenience and the status quo.”*

[12] The court must ask the following questions when considering an application for stay of execution pending appeal:

(a) *If a stay is refused, what are the risks of the appeal being stifled?*

(b) *If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?*

(c) *If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*

(See *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 1915, LTL 18/12/2001)

[13] In *Manager, FNPF v Wati* [2017] FJHC 253; HBM33.2014 (23 March 2017, I said [at para 8] that:

“[8] *The basic rule is that a litigant is entitled to enjoy the fruits of its success. The court has unfettered discretion to impose a stay of execution if the justice of the case so demands (BMW AG v Commissioner of HM Revenue and Customs [2008] EWCA Civ 1028, LTL 7/10/2008).*”

[14] Hon. Justice Callanchini, President of the Court of Appeal in *Singh v Chief Registrar* [2013] FJCA 141; ABU 58.2013 (20 December 2013) referring to the principles in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* at paragraph 13 and 14 said:

“[13] *These principles have evolved from cases that have usually involved money judgments. It is therefore not surprising that in such cases the factor of the public interest is not one that usually calls for any substantive consideration or analysis. However as Marshall JA noted in Naidu –v- The Chief Registrar (unreported ABU 38 of 2010; 2 March 2011) the situation is different where a regulator in the person of the Chief Registrar representing the public interest has been successful in proceedings before a disciplinary tribunal. The Chief Registrar is the regulator of the legal profession and in opposing an application for stay of execution pending appeal as the successful party at first instance he is representing the public interest.*

[14] *In money judgments a reference to special circumstances standing in the way of the successful party enjoying “the fruits of the judgment” is usually taken to mean situations where (1) possible non-payment by an impoverished plaintiff should the*

appellant's appeal be successful and (2) where the plaintiff is a foreigner living overseas. These factors do not apply in this case ...” [Emphasis provided]

Discussion and determination

[15] The defendants make an application to this court for a stay of execution of a monetary judgment pending appeal.

[16] An appeal will not operate as a stay of execution or of proceedings under the decision of the court below unless the court below or the Court of Appeal may otherwise direct (see the Court of Appeal Rules, Rule 34 (1)).

[17] The application need to be considered in light of the basic rule that a litigant is entitled to enjoy the fruits of its success.

[18] Since the application relates to a monetary judgment, I would apply the governing principles enunciated above as are relevant to that application.

Whether the appeal will be rendered nugatory if the stay is not granted

[19] The relevant question to be asked is that: *If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*

[20] The evidence at the trial was that the plaintiff was entirely dependent on the earnings of her deceased husband and that she did not have any independent source of income. Further, the plaintiff in her affidavit in reply at para 9 says her children have grown up and she struggles to provide for them.

[21] The second defendant in his supporting affidavit states that: he is of sound financial standing and has indemnity from compulsory third-party insurance from New India Assurance Company Ltd. The first defendant confirms the same in his affidavit in support. In addition, the first defendant in his affidavit in response says that the first defendants have money to pay the judgment sum and they are exercising their right of appeal.

[22] Evidence before the court demonstrates that the plaintiff is facing some financial difficulty.

[23] On the evidence, I find that there are risks of the defendants being able to recover what has been paid to the plaintiff, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime. On the other hand, there are no risks that the plaintiff will be unable to enforce the judgment if a stay is granted and the appeal fails, as the defendants have demonstrated their ability to pay out the judgment sum to the plaintiff if the appeal were unsuccessful.

Prospect of success on appeal

[24] I have had a cursory look at the grounds of appeal. At this stage, I need not determine as to whether the appeal ground will succeed, but whether there is prospect of success. In my opinion, the grounds of appeal have some prospect of success, especially the appeal ground that admission of a collision in the Pre-Trial Conference minutes absolved the plaintiff from proving negligence of the defendant, and that the fact that the second defendant did not give evidence does not lead to the inference that he was suppression evidence.

Overall balance of convenience

[25] I have decided that the appeal has prospect of success and that the defendant will be unable to recover what was paid if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime. On the other hand, the plaintiff will be able to enforce the judgment if a stay is granted and appeal fails. Therefore, the balance of convenience favours the defendants. Any delay that would be caused by appeal could be compensated by award of interest.

Conditional stay

[26] Counsel for the plaintiff alternatively submits that the court may consider a stay on the condition that the defendants pay a certain percentage of the judgment sum.

[27] The court would consider conditional stay of execution if the appeal is only against the assessment of damages. In this instance, the appeal is against the liability as well as the assessment of damages. In the circumstances, the court cannot order part payment of the judgment sum pending appeal.

Preliminary issues

- [28] The preliminary issue raised by the plaintiff was that the affidavits in support contain legal points and arguments and they are in breach of Order 41 Rule 5 of the HCR.
- [19] An affidavit should contain only such facts as the deponent is able of his or her own knowledge to prove (see O 41, R 5).
- [20] I accept that some of the statements in the supporting affidavits of the defendant contain legal argument like submission and some of the statements are not within their own knowledge. I would, therefore, disregard the statements that are legal submissions and not within the deponent's own knowledge.
- [21] Another preliminary issue raised by the plaintiff is that the deponent, Anil Prakash has no locus to swear an affidavit on behalf of the first defendant.
- [22] In the affidavit in response, the deponent, Anil Prakash says he is in control of the business of the first defendant as the trustee and is duly authorised to swear this affidavit on its behalf. He further says the description of the first defendant in these proceedings is incorrect. The certificate of registration of a business name annexed to the affidavit in response of Anil Prakash ('APS1'). That document clearly demonstrates that Mr Anil Prakash is the trustee of the first defendant.
- [23] As the trustee of the first defendant, the deponent, Anil Prakash is entitled to swear an affidavit on behalf of the first defendant. As such, I reject the preliminary issue that the deponent, Anil prakash has no locus to swear an affidavit on behalf of the first defendant.

Conclusion

- [24] For the reasons I have set out above, I am satisfied that I should grant a stay of execution of the judgment dated 6 February 2019. I would order the costs of this application to abide by the result of the appeal.

The result

1. There will be a stay of execution of the judgment dated 2 February 2019 pending the determination of the appeal.
2. The costs of this application to abide by the result of the appeal.

M. H. Mohamed Ajmeer
1/7/19

.....
M. H. Mohamed Ajmeer

JUDGE



At Lautoka

01 July 2019

Solicitors

For the plaintiff: AK Lawyers, Barristers 7 & Solicitors

For the defendants: Faiz Khan Lawyers, Barristers & Solicitors