

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 313 of 2018**

**BETWEEN:**                   **ATTORNEY-GENERAL OF FIJI**

**APPLICANT/RESPONDENT**

**AND:**                         **MR RAJENDRA CHAUDHRY**

**RESPONDENT/APPLICANT**

**BEFORE:**                   **Hon. Acting Chief Justice Kamal Kumar**

**COUNSELS:**               **Ms P. Prasad, Ms O. Solimailagi and Ms M. Ali for  
Respondent**

**Mr A. K. Singh for Applicant**

**DATE OF JUDGMENT:**   **28 May 2020**

**RULING**  
**(Application for Stay of Execution)**

## **1.0 Introduction**

1.1 The Applicant (Respondent in Substantive Proceeding) made Application by Summons dated 11 June 2019, sought following Orders:-

“1. The judgment dated 4 April 2019 and sentence dated 30 May 2019 respectively in this matter be stayed pending the determination of the appeal as filed in the Court of Appeal on:

a. the preliminary issue of jurisdiction; and thereafter

b. the substantive issue of the committal proceedings as issued by the Applicant/Respondent (as the case may be).

2. Any other orders that the Court may deem just and expedient in the circumstances.

3. Costs in the cause.” ***(“the Application”)***

1.2 On 2 July 2019, parties were directed to file Affidavits and Application was adjourned to 6 August 2019, to fix hearing date.

1.3 On 16 August 2019, there was no appearance for the Applicant when Court directed to file Submissions and Registry and Respondents Counsel were directed to inform Applicants Counsel of the outcome of the proceedings on that day.

1.4 On 19 September 2019, the Application was adjourned to 30 October 2019, at 2.30pm for hearing.

1.5 On 30 October 2019, parties handed in Submissions and made Oral Submissions relying mostly on Submissions filed.

1.6 The Application was then adjourned for Ruling on Notice.

1.7 Following Affidavits were filed on behalf of the parties:-

For Applicant:

- (i) Affidavit in Support of Applicant sworn on 13 June 2019 and filed on 19 June 2019 (hereinafter referred to as **“Applicant’s 1<sup>st</sup> Affidavit”**);
- (ii) Affidavit in Reply of Applicant sworn on 31 July 2019 and filed on 1 August 2019 (hereinafter referred to as **“Applicant’s 2<sup>nd</sup> Affidavit”**).

For Respondent:

Affidavit in Response of Aiyaz Sayed Khaiyum sworn on 11 July 2019 and filed on 12 July 2019 (hereinafter referred to as **“Respondent’s Affidavit”**)

1.8 Parties also filed Submissions.

## **2.0 Application for Stay**

2.1 Order 45 Rule 10 of the High Court Rules provides:-

***“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 be order grant such relief, and on such terms, as it thinks just.”***

2.2 It is well established and undisputed that the Courts have unfettered discretion to either grant or refuse stay of execution.

2.3 However, discretion should be exercised judicially and in the interest of justice depending on circumstances of each case.

2.4 Courts have over number of years identified various factors that need to be considered in determining application for stay of execution of judgment.

2.5 In **Chand v. Lata** [2008] FJHC; Civil Action No. 38 of 2011 (18 July 2008) identified the principles governing stay of execution as follows:-

- “1. *The grant or refusal of a stay is a discretionary matter for the Court: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **AG v. Emberson** (1889) 24 QBVC, at 58, 59*
2. *The Court does not make a practice of depriving a successful litigant of the fruits of litigation by locking up funds to which prima facie the litigant is entitled, pending an appeal: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing *Supreme Court Practice 1979, p. 909; **The Annot Lyle** (1886) 11 PD, at 116 (CA); **Monk v. Bartram** (1891) 1 QBV 346**
3. *When a party is appealing, exercising an undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **Wilson v. Church** (No. 2)(1879) 12 ChD, at 456, 459 (CA)*
4. *If there is a risk that the appeal will prove abortive if successful and a stay is not granted the Court will ordinarily exercise its discretion in favour of granting a stay: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **Scarborough v. Lew’s Junction Stores Pty Ltd** (1963) VR 129, at 130*

5. *In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **AG v. Emberson***
  
6. *A stay will be granted where the special circumstances of the case so require, that is, they justify departure from the ordinary rule that a successful litigant is entitled to the fruits of the litigation pending the determination of any appeal: **Prasad v. Prasad** [1997] FJHC 30; HBC0307d.96s (6 March 1997), citing **Annot Lyle** (1886) 11 PD 114, at 116; **Scarborough v. Lew's Junction Stores Pty Ltd** (1963) VR 129, at 130; and see also **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union***
  
7. *In exercising its discretion the Court will weigh consideration such as balance of convenience and the competing rights of the parties before it: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **AG v. Emberson***
  
8. *As a general rule, the only ground for a stay of execution is an Affidavit showing that if the damages and the costs were paid there is not reasonable probability of getting them back if the appeal succeeds: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Atkins v. GW Ry** (1886) 2 TLW 400*
  
9. *Where there is a risk that is a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion, refuse the application: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**"*

2.6 In **Natural Water of Fiji Limited v. Crystal Clear Mineral Water (Fiji) Limited** [2005] FJCA 13 ABU0011.2004S (18 March 2005) Fiji Court of Appeal stated as follows:-

*“The following non-comprehensive list of factors conventionally taken into account by a court in considering a stay emerge from **Dymocks Franchise Systems (SW) Pty Ltd v. Bilgola Enterprises Ltd** (1999) 13PRNZ 48, at p.50 and **Area One Consortium Ltd v. Treaty of Waitangi Fisheries Commission** (12993) 7PRNZ 2000:*

- (a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). **Phillip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co (NZ) Ltd** [1977] 2NZLR 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.”*

2.7 In **Murthi v. Patel** [2000] FJCA 17; ABU0014.2000S (5 May 2000) his Lordship Justice Ian Thomson JA (as he then was) stated as follows:-

*“A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if an appellant shows that he has a good arguable case to present on the hearing of the appeal and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favour.”*

2.8 His Lordship Justice Calanchini (as he then was) in **New World Ltd v. Vanualevu Hardware (Fiji) Ltd** ABU0076.2015 (17 December 2015) stated as follows:-

“The factors that should be exercised by this Court in an application such as is presently before the Court were identified in Natural Waters of Viti Ltd v. Crystal Clear Mineral Water (Fiji) Ltd (ABU 11 of 2004 delivered on 18 March 2005). Generally a successful party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay.”

2.9 In view of what is stated in New World case, the Court when dealing with Stay Application for Stay of Execution should:-

- (i) Consider whether appeal if successful will be rendered nugatory; and
- (ii) The balance of convenience.

2.10 In assessing balance of convenience Counsel would take factors stated in Natural Waters case which factors are not exclusive.

2.11 It must be understood that when Court is empowered to exercise discretion, it should do so judicially and in the interest of justice.

2.12 The factors provided by Courts when dealing with certain Applications are to guide Court to reach a decision which is fair and just under the circumstances of each case and to ensure the decisions are consistent on such Applications based on similar set of facts.

2.13 In exercising the discretion, the Court should consider the factors highlighted by superior Courts in addition to any other factors they think necessary before reaching a decision which they consider will serve interest of justice in a particular case.

**Whether Appeal If Successful Will Be Nugatory**

2.14 Applicant has failed to depose in his Affidavits as to how the appeal will be rendered nugatory if Applicant is successful in his appeal.

2.15 The basis of Applicant's Application for Stay of Execution as stated in the Affidavit and Submissions filed/made by the Applicant are:-

- (i) Applicant has good grounds of appeal on issue of courts jurisdiction and the sentence which has real chance of success;
- (ii) If stay is granted appeal will be rendered nugatory;
- (iii) Applicant will be prejudiced.

2.16 Respondent on the other hand claims that:-

- (i) Applicant's appeal has no merits and has no likelihood of success;



(ii) Applicant's appeal will not be rendered nugatory if Applicant is successful in his Appeal if stay is not granted.

(iii) Applicant will not be prejudiced.

2.17 Applicant at paragraph 29 of Applicant's 1<sup>st</sup> Affidavit states that he has strong ground for success of appeal given the glaring errors of procedure fact and law by this Court.

2.18 It is well established that when matters are filed by in High Court and placed before a Judge then the Court in liaison with Counsel for the parties has the power to set out the procedure for dealing with the matter even if it means the procedure does not strictly comply with the Rules of the Court.

2.19 In this instant:-

(i) With consent of Counsel for Applicant and Respondent the Court was to hear the jurisdiction issue and substantive matter at the same time.

(ii) This Court very clearly informed the Counsel that if this Court finds that it does not have jurisdiction then it will not deal with the substantive matter and will not write judgment on the substantive matter.

(iii) The procedure in 3.18(ii) was accepted by Counsel for Applicant.

2.20 At no point in time Applicant's Counsel objected to the procedure agreed upon and raised provision of Order 12 of High Court Rules.

2.21 At paragraph 30 of Applicant's 1<sup>st</sup> Affidavit he states that preliminary issue is that he is not subject to the jurisdiction of Fijian Courts.

2.22 This Court at paragraphs 40 to 42 of the Judgment had very clearly stated the reason as to why this Court has jurisdiction and relied on various case

authorities which even though not binding on this Court was quite persuasive on issue of jurisdiction.

2.23 At paragraph 31 of Applicant's 1<sup>st</sup> Affidavit he states that there was no evidence nor did any admission that he posted Facebook post complained of.

2.24 At paragraph 34 to 36 of Applicants 1<sup>st</sup> Affidavit he stated as follows:-

“34. I am a lawyer by profession and the negative publicity arising out of the judgment and sentence will affect me personally and professionally if it is not stayed pending appeal and if I were to subsequently succeed on appeal.

35. If a stay were refused then it would be some time before my appeal proper was to be heard and which I anticipate to in the not too near future. If this were so the damage to my professional and personal standing would all not be compensated by a subsequent award of damages.

36. There would be not prejudice to the Applicant if stay pending appeal was to be granted as it would preserve the status quo till the appeal is determined.”

2.25 Order for contempt and sentence obviously affects Applicant personally as he has been ordered to pay fine and sentenced to eighteen months imprisonment.

2.26 Applicant has failed to provide any evidence as to how he will be prejudicially affected if stay is not granted.

### **Whether Applicant is Entitled to Stay of Fine and Imprisonment Term**

2.27 Even though the contempt Application is dealt in a Civil Court, the principles applied for conviction and sentence are those that are applicable in criminal cases.

2.28 In a criminal case if the person's conviction and imprisonment term is subject to appeal then he/she should make an Application for bail pending appeal, notably applying for Stay of the Sentence.

2.29 Same principle should apply when a person is sentenced to a prison term after being conviction or charged of contempt of court.

2.30 Applicant should have paid the fine as ordered by the Court and if his appeal would be successful then State would have to refund the fine to him.

### **3.0 Conclusion**

3.1 After considering Affidavit evidence and Submissions made by Counsel for the parties and what is stated at paragraph 2.14 to 2.26 of this Ruling, this Court finds that:-

- (i) If stay is not granted Applicant's appeal if successful will not be rendered nugatory;
- (ii) Chance of Applicant's appeal succeeding is very minimal as it lacks merit;
- (iii) Applicant will not be prejudiced in any way if stay is not granted.

3.2 Even if what is stated at paragraph 4.1(i)(ii)(iii) were held to be in Applicant's favour stay application will be refused on the grounds stated at paragraph 2.27 to 2.29 of this Ruling.

### **4.0 Costs**


This Court takes into consideration that both parties filed Affidavits, Submissions and made oral submissions.

## **5.0 Orders**

I make following Orders:-

- (i) Applicant's Application for Stay filed on 19 June 2019, is dismissed and struck out;
- (ii) Applicant do pay Respondent's costs assessed in the sum of \$1,000.00 within twenty-one (21) days from date of this Ruling.



  
**Kamal Kumar**  
**JUDGE**

**At Suva**  
**28 May 2020**

**OFFICE OF THE ATTORNEY-GENERAL for the Applicant**  
**SINGH AND SINGH LAWYERS for the Respondent**