

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION.

Civil Action No. HBC 338 of 2012

BETWEEN

ZELDA ROSLYN KISSUN of Lot 5 Kinoya Road, Nasinu, Fiji,
Self Employed.

PLAINTIFF

AND

SAMUELA NAITAU of Lot 50, Divula Road, Nadera, Nasinu, Fiji.

FIRST DEFENDANT

AND

BW HOLDINGS LTD a company duly incorporated in
Fiji having its registered office at Vishnu
Deo Road, Nakasi, Nasinu.

SECOND DEFENDANT

AND

ROCK TEC LIMITED a company duly incorporated in Fiji having its registered office at 50 Kaunitoni Street, Vatuwaqa, Suva, Fiji.

THIRD DEFENDANT

AND

RAVENDRA KUMAR c/c BW Holdings Ltd, Vishnu Deo Road, nakasi, Nasinu.

FOURTH DEFENDANT

Counsel : Mr Naidu R. for the Plaintiff
Mr. Tuifagalele N. for the 1st Defendant

Date of Hearing : 23rd November 2020

Date of Ruling : 27th November 2020

RULING

(On the application for stay the execution of Judgment)

- [1] The plaintiff instituted these proceedings claiming damages for the injuries caused to her against the 1st, 2nd and 3rd defendants and the 4th defendant was subsequently joined as a party to the proceedings.
- [2] The court on 13th February 2020 delivered its judgment ordering the 1st and 3rd defendants to pay the plaintiff \$188,000.00 as damages with costs of \$7500.00.
- [3] The defendant on 15th July 2020 filed an application seeking to have the execution of the judgment stayed.

[4] The application of the 1st defendant does not say under what provision of the High Court Rules 1988 or any other statute this application was made. The learned counsel in his submissions stated that the 1st defendant application for stay was made pursuant to inherent powers of the court. However, from the contents of the affidavit in support it appears that this application has been made prematurely. In paragraph 10 of the affidavit the 1st defendant states that he will be filing his application for extension of time to appeal to the Court of Appeal which should have his proposed grounds of appeal.

[5] The law relating to stay of execution of the judgment pending appeal has been discussed in the following decisions:

In **Natural Waters of Viti Ltd v Chrystal Clear Mineral Waters (Fiji) Ltd** ABU 0011.04s on the question whether stay of the judgment pending the appeal should be granted or not:

- (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative).
- (b) Whether the successful party will be injuriously affected by the stay.
- (c) The bona fides of the applicant 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.

In **Federal Commissioner of Taxation v Myer Emporium Ltd** (No. 1)(1986) 160 CLR 220; 4 April 1986 where it was observed:

It is well established by authority that the discretion which it confers to order a stay of proceedings is only to be exercised where special circumstances exist which justify departure from the ordinary rule that a successful litigant is entitled to the fruits of his litigation pending the determination of any appeal.

Generally that will occur when, because of the respondent's financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed.

Per Dawson J. - Whilst I was initially inclined to accept the taxpayer's submission, upon reflection I think that there is sufficient force in the argument advanced by the commissioner to cast doubt upon the power of this court to grant relief upon appeal as the taxpayer contends. I do not think that in these proceedings I have to go further than that; I do not have to conclude the issue. It is sufficient to say that in my view there is a real risk that if the judgment made by the Supreme Court is not stayed, the Commissioner may be prejudiced by the payment pursuant to a statutory obligation, of a substantial amount of money which will prove to be irrevocable notwithstanding the conclusion of the appeal in his favour.

In the case of **Linotype – Hell Finance Ltd v Baker** (1992) 4 All ER 887 it was held:

Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.

In **March v Bank of Hawaii** [2000] FJLawRp 6; [2000] 1 FLR 230 (10 October 2000) referring to the decision in **Linotype Hell Finance Ltd v Baker** [1992] 4 All ER 887 C.A., it was held:

When an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success".

[6] The questions that should be answered in granting or refusing an application for stay pending appeal as enunciated in the decisions cited above the court must have the grounds of appeal relied on by the appellant.

[7] I could not find any provision in the High Court Rules or in the Court of Appeal Rules that a party who is dissatisfied with a judgment could apply to stay the execution of the judgment before filing the notice and grounds of appeal.

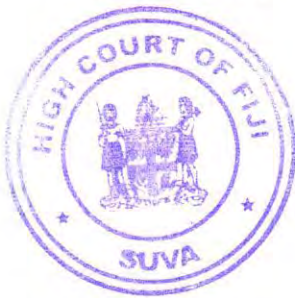
[8] In the case of **Prasad v Prasad [2016]** FJHC 358; HBC48.2014 (27 April 2016) Madam Justice Wati made the following observations:

I consider that since there are no proper grounds of appeal on foot, the stay application is prematurely filed or is rendered premature by the decision of the Chief Registrar to strike out the appeal for want of prosecution.

[9] This application, in my view, is frivolous and therefore the 1st defendant liable to pay costs to the plaintiff.

ORDERS

1. The application for stay the execution of the judgment is refused.
2. The 1st defendant is ordered to pay the plaintiff \$2000.00 as costs of this application within 30 days.




Lyone Seneviratne
JUDGE

27th November 2020