

**IN THE HIGH COURT OF FIJI AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 332 of 2019**

**BETWEEN**

**BIJU INVESTMENTS PTE LIMITED** a duly incorporated company

having its registered office at 1 Valetia Street, Lautoka.

**PLAINTIFF**

**AND**

**TRANSFIELD BUILDING SOLUTIONS (FIJI) LTD** a duly incorporated

company having its registered office at Lot 19,

Wilfred Sugrim Road, Lautoka.

**DEFENDANT**

**Counsel** : Mr. Stanton S. J. & Ms. Ravai S. for the Plaintiff  
Mr. Narayan A. (Jnr.) for the defendant

**Date of Hearing** : 29<sup>th</sup> March 2023

**Date of Ruling** : 20<sup>th</sup> April 2023

## RULING

*(On Stay Pending Appeal)*

[1] The defendant on 16<sup>th</sup> December 2019 served a statutory demand on the plaintiff claiming \$115,073.80 and the plaintiff made an application to have the same set aside.

[2] The ruling was delivered on 29<sup>th</sup> January 2021 declining the application with costs of \$2,000.00. The plaintiff appealed the said decision which is still pending before the Court of Appeal and on 25<sup>th</sup> February 2021 filed summons seeking the following orders:

1. That a stay of the decision of this Honourable Court delivered on 29<sup>th</sup> January 2021 pending the determination of the appeal in Civil Appeal No. ABU 14 of 2021.
2. Any further steps following the judgment of this Honourable Court in relation to the winding up of the plaintiff company be stayed also pending the determination of the appeal in Civil Appeal No. ABU 14 of 2021.
3. An interim stay pending the determination of this application.
4. Costs of this application.

[3] The law relating the stay pending appeal has been discussed in detail in the following decisions:

In **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005) it was held that the following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from **Dymoocks 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.”

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.

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".

- [4] It is common ground that the plaintiff has paid the defendant the amount claimed in the statutory demand which is \$115,073.80. Since the amount has been settled in full there is no possibility of instituting winding up proceedings by the defendant.
- [5] In the decision sought to be challenged before the Court of Appeal the only executable order is the order for costs. The order made declining the application to set aside the statutory demand is not an executable order and the only order that can be stayed is the order for costs.
- [6] Therefore, the only issue remaining for consideration is whether the award of costs should be stayed. I see no reason why the order for costs should be stayed. Paying the costs of \$2,000.00 awarded by the court cannot be in any way prejudicial to the plaintiff because even if the plaintiff is successful in appeal it won't be difficult to recover it since the defendant is a corporate body.
- [7] The learned counsel for the defendant raised an objection as to the validity of the affidavit in support of Marica Tavakuru who was the solicitor who represented the plaintiff company in this matter.
- [8] In **Mishra Prakash & Associates v. Nagan Engineering (Fiji) Ltd** [2018] FJHC 198; HBA 001.2010 (9 March 2018) it was held;

It is trite law that a lawyer's clerk may not affirm an affidavit intended to be used in a contentious matter in Court. This is indeed a contentious matter where the Respondents are strongly resisting the application for extension of time. The Affidavit should have been affirmed by the Solicitor having personal knowledge of the pertinent matters. More precisely, the deponent should have been the Solicitor who had the conduct and the management of the cause.

In **Paul v Director of Lands** [2020] FJSC 3; CBV0018.2019 (9 June 2020) Justice Kamal Kumar as the president of the Supreme Court held;

When Third Party (including Law Clerks/Legal Executives/Litigation Clerks) depose Affidavit on behalf of a party to the proceedings then he/she:-

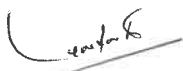
- i. must be authorised in writing by that party to depose such Affidavits;

[9] It is clear from the above decisions that the solicitor of a party is qualified to swear an affidavit on the facts within his or her personal knowledge. However, the solicitor must have the authority in writing from the person or company on whose behalf he or she intends to swear an affidavit.

[10] In this matter there is no letter of authority attached to the affidavit in support of Marica Tavakuru. Hence, the application for stay is defective and is liable to be struck out.

#### **ORDERS**

1. The summons for stay filed on 25<sup>th</sup> February 2021 is struck out.
2. The plaintiff is ordered to pay \$2,000.00 to the defendant as costs.

  
Lyone Seneviratne

**JUDGE**



20<sup>th</sup> April 2023.