

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 188 of 2017

BETWEEN: **HEMENDRA NATH SHARMA** of Tamavua Village, Suva,
Driver.
PLAINTIFF(Respondent)

AND: **EXPORT FREIGHT SERVICES LIMITED** a limited liability
company having its registered office at Tamavua-i-wai,
Suva.
DEFENDANT(Appellant)

Counsel: Mr. D Singh for the Plaintiff (Respondent)
Ms. Kumar N for the Defendant (Appellant)

Date of Hearing: 24.11.2025 at 9.00 am

Date of Judgment 24.11.2025 at 3 .00 pm

Stay of Judgment

INTRODUCTION

[1] Plaintiff obtained judgment against Defendant for \$160,922 and for cost of \$3,000. The award was relating to injury at the Defendant's premises by an employee of Defendant while loading a consignment. Defendant had appealed against the judgment and now seeking stay of the judgment. Plaintiff had suffered injuries on 28.8.2014 and this matter was allocated for hearing on 27.6.2022 and heard on 25.8.2023. The injury had affected his self-employment of Plaintiff and judgment was delivered after hearing and submissions filed by parties.

[2] Both parties informed me today that they will not be making any oral submissions and rely on written submissions already filed . Accordingly, the hearing was concluded and fixed for judgment considering circumstances.

[3] Plaintiff has been waiting for compensation for a long period, and he is in his mid-sixties. It will be futile to receive compensation after death as compensation is awarded to Plaintiff for the loss he suffered while he is alive and he should receive it without delay. This compensation is not awarded to his dependents, and delay can reduce the Plaintiff will have to enjoy fruits of judgment. The overall balance of convenience lies with Plaintiff to enjoy the fruits of judgment. Stay of the judgment is refused.

ANALYSIS

[4] The law on stay pending appeal was stated in *Native Land Trust Board v Shanti Lal*, (2012) FJSC 1; CBV0009.11 (20.01.2012) as follows:

" The court considering a stay should take into account the following questions. They were the principles set out by the Court of Appeal and approved subsequently and applied frequently in this court. They were summarised in Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd, Civil Appeal ABU0011.04S 18th March 2005. They are:

- a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Phillip 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 bond 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. (emphasis added)*

[5] In *Chandrika Prasad v Republic of Fiji, (No 5)*, (2000) 2 FLR 115, Gates J (as he then was) referred to the following cases:

"It is well known that the litigant once successful should not lightly be deprived of the fruits of his successful litigation: The Annot Lyle [\[1886\] UKLawRpPro 31](#); [\(1886\) 11 P D 114](#) at 116CA; Monk v. Bartram, (1891) 1 OB 346. The power of the Court to grant a stay is discretionary: The Attorney-General v. Emerson & Others (1890) 24 OBD 56; and it is all unfettered discretion Winchester Cigarette Machinery Ltd. v. Payne and Anor. (No. 2) (1993) TLR-64-at648.

The phrase "nugatory" was used by the Court of Appeal in Wilson v. Church [\[1879\] UKLawRpCh 233](#); [\[1879\] 12 Ch. D 454](#). The head note summarises the position taken by Cotton and Brett LJJs:

"Where an unsuccessful party is exercising an unrestricted right to appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances". (emphasis added)

The Court of Appeal in *Attorney-General of Fiji and Minister of Health v Loraine Die* (unreported Misc. No 13 of 2010 delivered on 17 February, 2011) stated:

"The most important consideration in respect of whether a stay of execution should be granted is whether there are strong grounds of the proposed appeal:.. That hurdle is higher than that of chances of success."

[6] The appellant has raised the following grounds in his notice of appeal, and they are dealt briefly below each appeal ground for brevity and convenience.

- i. That the learned Trial Judge erred in law and in fact by awarding 20% contributory negligence (as per paragraph 13 of the judgment) when the injury was caused by absolute failure of the Respondent to take any regard of his safety and placing his hand under the forklift load to pull timber from the truck bed.

It will be in rare circumstances that an injury of this nature will be caused by complete negligence of one party. Defendant was negligent in more than one way, and this is discussed in judgment and self-explanatory. The cause of injury is directly linked to breach of duty by Defendant as outlined in judgment.

- ii. That the learned trial judge erred in law and fact by considering that the Respondent (as per paragraph 18 and 77 of the

Judgment) owed a duty to ensure that his truck rear bed was free of any obstructions when taking delivery of consignment and deliberately trying to pull the construction (wooden part) whilst the forklift was in operation to load onto the truck.

Safe loading of consignment is required so that the good can be transported without damage and this can be done only when the bed of the truck is free from objects that can affect the balance of the consignment while travelling. It is futile to load a consignment in dangerous or manner that can cause damage to the items as well as others. So this is a thing that should be done by the Defendant or its employees as the Plaintiff cannot move the heavy items if landed in an unsafe manner to his truck. Defendant cannot unload any manner it desired and safe loading to allow transport is a requirement. If not the purpose of the transport is lost as items can get damaged.

- iii. That the Learned trial judge erred in law and fact by considering the forklift driver lowered the pallet without warning (as per paragraph 20 of the judgment) thereby crushing the Respondent's left thumb when in all fact the Respondent should not have been at the rear of the truck bed knowing full well that consignment was loaded onto the truck.

This fact is discussed in the judgment .Driver of forklift knew about Plaintiff being near and had this is a fact established at hearing. These are facts that were established on evidence.

- iv. That the Learned trial judge erred in law and fact by failing to consider that the Respondent has a truck assistant and whilst the consignment was loaded the said assistant failed to assist the forklift driver (as per paragraph 60 of the judgment) or sound warning to the Respondent who was doing act which was dangerous in all circumstances by pulling wooden part from the rear of his truck bed.

This is irrelevant as negligence is against Defendant and its employee not truck assistant

- v. That the Learned trial judge erred in law and fact by accepting that the Respondent had asked the forklift driver to stop loading (as per paragraph 62 of the judgment) so he could pull the wooden part from the rear of the truck bed when in fact there was no evidence submitted by the truck assistant collaborating this version of events.

This was a fact proven at hearing from evidence. The reasons for that are also given in analyzing evidence. Truck assistance also corroborated on vital aspects of this incident. People always do not remember all facts in identical manner.

- vi. That the Learned trial judge erred in law and acted by stating that the forklift driver did not meet the Respondent after the accident (as per paragraph 64, 68, 69 & 70) of the judgment) is an indication of some fault when judgment must be based on evidence and facts and not assumptions.

Pre and post conduct of a person after an incident also shed light on the evidence analysis and these are accepted tools to assess the evidence.

- vii. That the Learned trial judge erred in law and fact by considering the Respondent did not willingly accepted risk (as per paragraph 79 of the Judgment) by pulling the wooden part from the rear of the Truck bed when in paragraph 13 of the Judgment the learned trial Judge accepted Respondent using his hand underneath the consignment thus contradicting evidence.

On the evidence it was clear that forklift driver had stopped lowering the consignment when Plaintiff tried to remove the wooden part from the bed of the truck. There is a percentage allocated for contributory negligence and there is no conflict .

- viii. That the Learned trial Judge erred in law and fact by considering evidence (as per paragraph 86 of the judgment) that three forklifts were operated on the day of accident when there was no evidence that the operations of these forklifts contributed to the accident. In fact, the accident was caused solely by the Respondent's failure to take due regard for his safety.

The evidence was that Defendant was operating more than one forklift and this brings obligation on the part of Defendant to monitor operations of such dangerous operations without being harm to outsiders who frequent premises for business including Plaintiff. So having more than one forklift is relevant to show that forklifts are operated without supervision of any person other than the driver. This shows the negligence of Defendant.

- ix. That the Learned trial judge erred in law and fact by awarding 20% contributory negligence (as per paragraph 88 of the judgment) without any analysis of foreseeability of harm, the failure to exercise reasonable care of own safety and degree of fault, causation, when in all fact

contributory negligence ought to have been assessed at 100% and then upon analysis of the factors herein stated which the Learned Judge failed to do.

This is already dealt before and needs no repetition.

- x. That the Learned trial Judge erred in law and fact by considering that the pellet was defective (as per paragraph 100 of the judgment) when there was no evidence that the defect pellet caused the injury to the Respondent.

Forklift driver admitted that loose part of wooden pallet and said he could place without tilting. There was evidence to this fact at hearing.

- xi. That the Learned trial judge erred in law and fact by considering (as per paragraph 117 and 125 of the judgment) that the Respondent could not drive heavy vehicles after the amputation of the left thumb when there was no medical or expert evidence to say that the Respondent was not able to drive heavy trucks.

This is self-evident fact and can be inferred from the evidence and not challenged by Defendant in cross examination.

- xii. That the Learned trial judge erred in law and fact by accepting that the Respondent was earning \$3000.00 per month as income (as per paragraph 121 of the judgment) by only having the bank statement for the months of August, September and October 2014 which showed only one deposit of \$2, 811.78 and without seeking any evidence such as Financial Statements of the Respondent Company, Income tax return filed at FRCS to actually determine the actual earning capacity.

The income of a self-employed person has to be approximately calculated from the evidence, and this was done to arrive at \$3,000 p.m. income.

- xiii. That the Learned trial judge erred in law and fact by considering that the Respondent's income was \$30.00 to \$40.00 per week (as per paragraph 124 of the judgment) and therefore loss of income from previous carting business when there was no evidence submitted to show the actual loss of income with FRCS returns or evidence whether Respondent was driving taxi for as an employee or owner operator and actual income earned.

This is not a requirement for assessment.

- xiv. That the Learned trial judge erred in law and fact assessing loss of income at \$2000.00 per month for 5 years (as per paragraph 125 of the judgment) when there was no evidence tendered to state that the Respondent will never gainfully be able to operate his catering business or employ driver to drive for his business thus the Leard trial judge based its calculations wrongly.

The permanent impairment was assessed.

- xv. That the Learned trial judge erred in law and fact by awarding \$5,000.00 for future medical contingencies (as per paragraph 126 of the judgment) when there was no expert evidence to state that the Respondent will continue to require lifelong medical care due to the injuries sustained.

From evidence such contingencies need to be taken into account.

- xvi. That the Learned trial judge erred in law and fact by awarding \$500.00 for nursing care, \$500.00 for medicine and \$300.00 for travelling which falls under the head Special Damages and despite accepting (as per paragraph 127 and 128 of the judgment) there was no evidence submitted yet went ahead and award this sum when special damages must be specially proven with evidence as of law.

Nursing care in Fiji will not get receipts and medicine also can be granted .

- xvii. That the Learned trial judge erred in law and fact by awarding \$50,000.00 as general damages at first instance (as per paragraph 129 of the judgment) before reducing by 20% contributing negligence without any justification on how he calculated general damages on a 13% permanent incapacity such as expert evidence on long term prognosis, impact on daily life with only amputation of left thumb and current driving employment with earning capacity.

This amount was awarded from general damages awards given for severe pain and suffering from the injury of the Plaintiff from his evidence which was not challenged.

- xviii. That the learned trial judge erred in law by awarding \$160,922.00 as detailed in paragraph 12 to 17 herein.

This ground is not a separate ground so no need to deal separately.

[7] Other considerations for stay:

(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative).

Appeal will not be rendered nugatory by not granting stay . There was no evidence that Plaintiff could not repay if there was such an order in Appeal.

(b) Whether the successful party will be injuriously affected by the stay.

Plaintiff's earning capacity is severely affected by injury and if a stay is granted, he is further deprived of compensation due to him. Since he is elderly person, he may not get the fruits of judgment if stay is granted.

(c) The bond fides of the applicants as to the prosecution of the appeal.

Application for stay is a right for any appellant due process but that does not guarantee stay in every case.

(d) The effect on third parties.

There are no effects on third parties from the evidence.

(e) The novelty and importance of questions involved.

Plaintiff was injured from negligence of Defendant as well as its employee and this happens any person who visit the premises of commercial premises that lacks supervision of visitors to the premises. There is no novelty.

(f) The public interest in the proceeding.

There is no public interest in the proceedings.

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

Overall balance of convenience lies with Plaintiff. There was proof of negligence on the part of Defendant and or its employee. So, there are no meritorious grounds for appeal. The appeal grounds were deal earlier. Plaintiff had lost his self employment due to the injury and he had waited long to obtain compensation. He is old and if stay is granted, he is further suffering from injury caused by Defendant and or its employee. Defendant is commercial organization and payment of compensation to Plaintiff is less inconvenient. So overall balance of convenience lies with refusal of stay.

[8] Supreme Court of Fiji in Ward v Chandra [2011] FJSC 8; CBV0010 (20 April 2011) cited a previous decision of Supreme Court with authority as follows;

[21] In *Iftakhar Iqbal Khan v Michael Fenech* CBV0002.05S (4 May 2005) Ward JA in this court said (at p.4) in relation to stay:

"Execution in this case is payment of a sum of money. Only in the rarest of cases is that sufficient to justify a stay as subsequent success in the appeal will be implemented by repayment to the appellant. This is not a case of performance or restraint of some action or destruction of property which will irreversibly change the status quo and render a successful appeal nugatory. The description in the petitioner's affidavit of the consequence of having to pay before the application for special leave is heard is insufficient to meet that test."

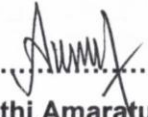
CONCLUSION

[9] Overall balance of convenience favours Plaintiff. It is rare to stay a money judgment. Plaintiff will injuriously affect if the stay is granted considering his self employment was lost due to the injury to his hand that deprived him driving heavy vehicles. Cost of this application is summarily assessed at \$1,000 to be paid within 21 days.

FINAL ORDERS

- a. Application for stay is refused
- b. Cost of this application is summarily assessed at \$1,000 to be paid within 21 days.




.....
Deepthi Amaratunga
Judge

At Suva this 24th day of November, 2025.

Solicitors

Daniel Singh Lawyers

Diven Prasad Lawyers