

**IN THE SUPREME COURT OF FIJI**  
**CIVIL APPELLATE JURISDICTION**

**CIVIL PETITION CBV 6 OF 2017**  
(Court of Appeal ABU 50 of 2014)  
(High Court HBC 2 of 2006)

**BETWEEN:** MOHAMMED ALAM

*Petitioner*

**AND:** COLONIAL NATIONAL BANK

*First Respondent*

**AND:** REGISTRAR OF TITLES

*Second Respondent*

**AND:** MOHAMMED SHAHEEM AIRUD KHAN

*Third Respondent*

**Coram:** Calanchini J

**Counsel:** Mr G O'Driscoll for the Petitioner  
Ms S Dewan for the First Respondent  
Ms S Ali for the Second Respondent  
Third Respondent in person

**Date of Hearing:** 28 September 2017

**Date of Ruling:** 15 December 2017

## RULING

- [1] This is an application by the petitioner for a stay of the judgment of the Court of Appeal pending the hearing of the petition for leave to appeal.
- [2] The petitioner filed on 22 June 2017 a timely petition for leave to appeal the judgment of the Court of Appeal pronounced on 26 May 2017. The application for a stay was made by motion filed also on 22 June 2017 and was supported by an affidavit sworn on 21 June 2017 by Mohammed Alam. The application was opposed by both the first and third Respondents. The second Respondent was granted leave to withdraw from the stay proceedings on the basis that it was a nominal respondent and will abide the decision of the Court. The first Respondent filed an answering affidavit sworn on 4 August 2017 by Rosanne Amato-Ali. The third Respondent also filed an answering affidavit sworn by Mohammed Shaheem Airud Khan on 4 August 2017. The Petitioner filed a brief reply affidavit sworn on 4 September 2017 by Mohammed Alam. The parties filed written submissions prior to the hearing on 28 September 2017.
- [3] Pursuant to section 14 of the Supreme Court Act 1998 (the Act) the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal which may be exercised with necessary modification as the circumstances of the case demand. Pursuant to section 11 of the same Act a single judge of the Court may hear and determine interlocutory matters that do not involve deciding the appeal or the reference. An application for stay pending the hearing of a petition for leave is clearly within the power of a single judge to grant in an appropriate case.
- [4] The interlocutory relief sought by the petitioner is for orders that:
- “(i) *the execution of the decision or order made on 26 May 2017 in the Court of Appeal and the High Court on 2 June 2014 be stayed pending the hearing and determination of the application for special leave to appeal by this Honourable Court.*

(ii) *the interim injunction granted by His Lordship Honourable Justice Winter on 30 March 2006 restraining the Registrar of Titles from registering a transfer of Native Lease No.20503 by way of mortgage sale from the 1<sup>st</sup> respondent to the 3<sup>rd</sup> respondent be extended by this Honourable Court until the application for special leave to appeal is determined.*"

- [5] The motion, however, did not seek a stay pending the outcome of the stay application. Such relief was asked for orally by Mr O'Driscoll at the hearing. Reluctantly an interim stay was granted.
- [6] To put the application into context it is necessary to set out the background facts in some detail. In the exercise of a mortgagee's right to sell the National Bank of Fiji trading as Colonial National Bank (CNB) entered into agreement with Mohammed Shameem Airud Khan (Khan) for the sale and purchase of Native Lease No.20503 (the property) for the sum of \$33,333.00. The terms and conditions of the agreement were set out in a document headed "*Memorandum of Terms of Sale*" which was signed by the parties and dated 9 May 2005.
- [7] In February 1994 Mohammed Alam (the petitioner) was registered as proprietor of the property and on which was constructed in the same year a building which consisted of a grocery store on the ground floor, a billiard hall on the first floor and a residence on the second floor. It was thus used for both commercial (predominantly) and residential purposes. The construction was financed by a loan from the ANZ Bank.
- [8] For reasons that are not directly relevant to the present application the mortgage with the ANZ Bank was cancelled and taken over by CNB on 29 March 2000. Pursuant to the mortgage agreement between the Petitioner and CNB, CNB arranged for the property, but not the contents, to be insured with Queensland Insurance (the Insurance Company) with maximum cover of \$240,000.00. The petitioner almost immediately fell behind in his obligations to meet monthly mortgage payments. Two default notices under section 80 of the Consumer Credit Act 1999 were issued on 4 December 2000 and 5 February 2002

respectively. By 5 February 2002 the total amount due and payable was \$154,852.74. That amount also included a sum owed pursuant to a credit agreement for a motor car. On 26 October 2003 the building was damaged by fire that originated from a neighbouring property. The petitioner reported the fire and damage to CNB. He was told by the Bank's employees that a claim would be lodged by CNB with the insurance company.

- [9] The Petitioner, at the request of the insurance broker, obtained quotations to repair the damage. The preferred quotation was in the sum of \$149,000.00 less depreciation value resulting in an indemnifiable loss of \$145,000.00. Although the brokers had made a recommendation to the insurance company that the claim be settled for \$145,000.00, CNB settled the claim for \$79,000.00. As at 30 October 2003 the debt owed to CNB under the mortgage was \$180,580.09.
- [10] CNB received the settlement from the insurer on 28 February 2005. Between the date of the fire on 26 October 2003 and 28 February 2005 CNB continued to charge bank fees and interest and as a result the amount due as at 28 February 2005 was \$205,192.52. However of that amount \$10,000.00 had been advanced as a car loan which meant that the principle plus interest accrued on that debt totaling \$11,150.00 was to be deducted. The debt owing under the mortgage was \$194,042.52. At the trial in the High Court the learned Judge had calculated that even if CNB had settled the insurance claim for \$149,000.00 the petitioner would be left with a debt of \$45,042.52.
- [11] However there was no evidence that the petitioner was in a position to pay that amount. He had been prepared to pay \$20,000.00 to CNB which would not have cleared the debt. As a result CNB entered into the mortgage sale agreement with Khan, having advertised the property for sale by tender.
- [12] The petitioner commenced proceedings in early 2006 in the High Court by writ claiming relief against CNB, the insurance company, Khan and the Registrar of Titles. CNB counterclaimed for the balance of the mortgage debt. The High Court granted an interim

injunction on 30 June 2006 restraining the Registrar of Titles from registering the transfer of Native Lease No.20503 by way of mortgage sale by CNB to Khan which was extended on 2 May 2006 as an interlocutory injunction until trial.

[13] Included in the final orders made on 2 June 2014 by the learned trial Judge was an order to the effect that the injunction against the mortgage sale be discharged and that CNB proceed to finalise the mortgage sale. The Court allowed the counterclaim and awarded CNB \$20,681.15 inclusive of pre-judgment interest. The petitioner sought to challenge those orders, amongst others, in the Court of Appeal. On this point the Court accepted the calculations of the trial Judge and agreed that the petitioner was not in a position to pay the amount owing under the mortgage in order to redeem the debt and prevent CNB from exercising its right to sell the property. The Court of Appeal dismissed the petitioner's appeal.

[14] The petitioner has applied for leave to appeal the decision of the Court of Appeal on substantially the same grounds that were raised in his notice of appeal to the Court of Appeal. The petitioner relies on the following grounds in this Court:

*"a. THAT the Court of Appeal erred in law and in fact in failing to hold that the Petitioner was entitled to equity of redemption after the Trial Court had found that –*

*"I however do find that if the Bank opted to settle without reference to the mortgagor, it should have waited for the mortgagor to make a separate claim and suspended its rights of mortgagee sale until finalization of the claim or accepted a proper value of the loss. After having accepted a proper value of loss, if the monies were outstanding and the mortgagor was not able to pay up the entire monies outstanding then it could have proceeded to conduct mortgagee sale and apply the proceeds to reduce the debt. The shortfall could have been subject to a claim from the mortgagor personally."*

*And further erred in failing to hold that there was a misconduct by the 1<sup>st</sup> respondent; sufficient for the Petitioner to be discharged of all his obligation to the 1<sup>st</sup> respondent.*

- b. *THAT the Court of Appeal erred in law and in fact in holding that the Petitioner was not entitled for equity of redemption as he has not come to the court with clear hands when such allegations were not made in the Trial Court, nor on the basis upon which the Trial Court had refused the equity of redemption and further erred in failing to apply correct principles when considering the rights of the petitioner to his equity of redemption.*
- c. *THAT the Court of Appeal erred in law and in fact in considering the dealings of the Petitioner with the 1<sup>st</sup> respondent prior to the fire which occurred on 26<sup>th</sup> October 2003, when in fact consideration should have been made in respect of conduct of the parties after the fire and, in particular, after the 1<sup>st</sup> respondent and received a sum of \$79,000.00 from QBE – 1<sup>st</sup> respondent's nominated insurance company before determining if the petitioner was entitled for equity of redemption.*
- d. *THAT the Court of Appeal erred in law and in fact in holding that Section 80 of Consumer Credit Act 1999 had been complied with which was a pre-requisite of any mortgagee sale when in fact the 1<sup>st</sup> respondent had not given any notice under the said section after the fire on 26<sup>th</sup> October 2003 and further the breach alleged in the earlier notice had been rectified after the 1<sup>st</sup> respondent had received a sum of \$79,000.00 from QBE – the 1<sup>st</sup> respondents nominated insurance company.”*

[15] The principles that should be considered by the Court in an application for stay pending appeal were considered by the Court of Appeal in **Natural Waters of Viti Ltd –v- Crystal Clear Mineral Waters (Fiji Ltd)** (ABU11 of 2004; 18 March 2005). Generally a successful party is entitled to the fruits of the judgment which has been obtained in the Court below. In this case the Third Respondent, Khan, has been successful in both the High Court and in the intermediate appeal before the Court of Appeal. For this Court to interfere with that entitlement the onus is on the Petitioner to establish that there are special circumstances that would justify any interference by granting a stay. 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.

[16] So far as the first factor is concerned Khan has entered into a contract with CNB for the purchase of the property pursuant to CNB exercising its right to sell under the mortgage

between CNB and the petitioner. If the stay is not granted and the appeal is successful then the petitioner will be deprived of his property. To that extent a successful appeal would be rendered nugatory. However that consideration alone is not decisive. In the event that a stay is not granted then Khan would become registered proprietor and the petitioner subsequently evicted from the property. It is apparent that in one sense the balance of convenience and the status quo point in favour of a stay.

[17] However the Court is also required to consider the bona fides of the petitioner in the prosecution of the petition and whether the petition involves a novel question of some importance. In my judgment it is also appropriate to consider whether the petitioner's case prior to the hearing of the petition is sufficiently exceptional to allow for some interlocutory relief by way of a stay. This is even more so an issue in this case when the obstacles to obtaining leave are considerable.

[18] I accept that the Petitioner is pursuing his petition for good reason and that it will proceed in accordance with the Rules in a timely manner. He is anxious to retain the property which is used partly as his residence.

[19] There is some novelty in the principal issue raised by the petitioner. The issue is concerned with the application of Section 80 of the Consumer Credit Act 1999. Although two notices were served in compliance with Section 80 the Petitioner claims that a third notice should have been given prior to CNB entering into the sale agreement with Khan, thereby giving him the opportunity to exercise his right of redemption. However this must be considered in the context of the two previous notices and the petitioner's offer to pay an amount considerably less than the amount owing under the mortgage in order to "*buy time.*"

[20] However the real issue is whether the petitioner has demonstrated that the petition is sufficiently exceptional to warrant a stay prior to the hearing of the application for leave to appeal. The issue was put another way in **Tuck -v- Southern Grantles Deport Bank** (1889) 42 Ch D 471 al 47 per Kay J:

*“If a stay was not granted by the Court at the time of making the order now appealed against, the applicant must show that special circumstances exist as to why a stay should now be imposed and the successful litigant in effect held back from his remedy.”*

- [21] Interestingly not only was a stay not granted in either the final judgment of the High Court or the judgment of the Court of Appeal but also the order of the Court at first instance was to the effect that CNB was to proceed to finalize the mortgagee sale.
- [22] It is appropriate at this stage to comment on the position of the Third Respondent Khan. He is in fact the innocent party in these proceedings. On 4 May 2005 Khan entered into an agreement with CNB for the purchase of the petitioner’s property pursuant to a tender advertisement. He subsequently paid the deposit amount and then the balance of the purchase price to his solicitors. An interlocutory injunction was subsequently granted by the High Court and then discharged in the final judgment. Since then the transfer of the property to Khan has been delayed by an appeal to the Court of Appeal that upheld the validity of the mortgagee’s exercising its right of sale. Now Alam is seeking an interlocutory order from this Court to further delay the completion of the mortgagee’s sale pending the determination of his petition for leave to appeal.
- [23] The proposition set out in **Tuck** (supra) was cited with approval by this Court in **Prem Singh v. Krishna Prasad and Others** ([2002] FJSC 7; CBU 1 of 2002; 25 April 2002). One of the matters that this Court considered in **Prem Singh** (supra) was whether there was a substantial prospect that leave to appeal would be granted. Whether leave to appeal is granted to the petitioner will depend upon whether his petition comes with one of the threshold conditions specified in Section 7(3) of the Act. To obtain leave the petitioner is required to establish that his case raises (1) a far-reaching question of law; or (2) a matter of great general or public importance; or (3) a matter that is otherwise of substantial general interest to the administration of civil justice.



- [24] The petitioner relies on two main grounds for stay that also form the principal basis of the petition for leave to appeal. The first is non-compliance with Section 80 of the Consumer Credit Act and the second is the exercise of the right of sale by CNB prior to the completion of the litigation commenced by him against the insurance company.
- [25] In my judgment these two grounds are unlikely to satisfy any one of the threshold conditions prescribed by Section 7(3) of the Supreme Court Act.
- [26] Considering first Section 80 of the Consumer Credit Act. This section requires a default notice setting out certain specified information to be given to the mortgagor by the credit provider. However a matter that has not previously been considered is relevant to the present application. Under Section 11 the Consumer Credit Act is presumed to apply to all credit contracts unless the creditor can show that it falls into one of the exempt categories. Section 6(1) of the Act specifies four requirements all of which must be satisfied before the Act will apply to a credit contract. One of those requirements is set out in Section 6(1)(b) and Section 6(5) which when read together provide that more than half of the credit must be provided or must be intended to be provided for the purpose of personal, domestic or household purposes.
- [27] In the present case, putting aside any issue relating to non-disclosure of the real purpose for which the credit was required, it appears not to have been disputed that the credit was provided for the purpose of constructing a building of three levels. The first level was a store, the second level a commercial pool room and the third level a residence. It would appear that the Act does not apply if more than half of the borrower's purpose is for business or investment.
- [28] In relation to the litigation by the petitioner claiming further indemnity from the insurance company under the fire policy, it is my view that the circumstances of this case fall within the principles set out by the Court of Appeal in **Strategic Nominees Limited (in receivership) -v- Gulf Investments Fiji Limited** (ABU 39 of 2009; 10 March 2011). In my judgment this decision is authority for the proposition that a Court will not restrain

a mortgagee from its remedy of sale pending litigation that may or may not provide additional funds to a mortgagor. The only way that a mortgagor “*can buy time*” is by immediately paying to the mortgagee the full amount owing under the mortgage or by at the very least demonstrating that he is immediately able to pay the full amount claimed by the mortgagee. That was never the position in this case.

[29] For all of the above reasons I refuse the application for a stay pending the hearing of the petition for leave to appeal. The interim injunction granted by the High Court on 30 March 2006 was discharged by the High Court in the final judgment delivered on 2 June 2014. I am not convinced that this Court can extend an interim or interlocutory injunction once it has been discharged by the High Court and which was not the subject of any comment by the Court of Appeal. Even if such a power does exist then the application is refused for the same reasons, apart from any procedural reasons that exist for refusing the application.

Orders:

1. *Application for stay pending the hearing of the petition for leave to appeal is refused.*
2. *The application to extend the interim injunction discharged by the High Court is refused.*
3. *Costs in the petition.*



*W. D. Calanchini*

**W. D. CALANCHINI**  
**JUDGE OF THE SUPREME COURT**