

IN THE FIJI COURT OF APPEAL  
(APPELLATE JURISDICTION)

FIJI COURT OF APPEAL  
CIVIL APPEAL NO. 23 OF 1992  
(Civil Action No. 53 of 1992)

BETWEEN: THE REGISTRATION OFFICER FOR THE SUVA CITY FIJIAN  
URBAN CONSTITUENCY

Applicant/Appellant

AND

JAMES MICHAEL AH KOY

Respondent

*Mr A. Rabo Matebalavu for the Applicant*  
*Mr B. Sweetman for the Respondent*

D E C I S I O N  
(Chamber Application)

Nature of application

This is an application for "an order that execution and all further proceedings of the judgment of the Fiji Court of Appeal delivered ----- on 20th of August, 1993 be stayed until the appeal therefrom of which the Registration Officer for the Suva City Fijian Urban Constituency has given notice by Notice of Appeal dated 30th September, 1993 shall have been heard and decided."

Supporting affidavit by Mr Tabu

This application is supported by an affidavit sworn by Mr Taniela Tabu presently the General Secretary of the Viti Civil Servants Association. He was at the material time in 1991 and 1992 the Registration Officer in respect of Suva City Fijian Urban Constituency. He had become the Registration Officer by virtue of holding the substantive post of Commissioner Central, the appointment by office having been made by the Supervisor of Elections. However, Mr Tabu is no longer the Registration Officer having resigned from the Public Service from January, 1993.

Background

One of his functions as Registration Officer for the 1992 General Elections was to determine objections 'regarding whether a person may be registered on the electoral roll of voters who are Fijians in respect of the constituency'. An objection was indeed lodged against the inclusion of the name of Mr James Ah Koy (the Respondent in this application) on the ground that the said Mr James Ah Koy was not a Fijian. Mr Tabu upheld the objection and this led to the deletion of Mr Ah Koy's name from the roll.

The Registration Officer's decision was challenged by Mr Ah Koy in the High Court whereby he sought relief pursuant to the

provisions of Section 113 of the Constitution. He sought 2 declarations, the first that he was entitled to be registered on the roll of voters who are Fijians established by Section 41(2)(a) of the Constitution and secondly that he is entitled to be registered on the roll for the Suva City Fijian Urban Constituency.

The High Court gave an interim judgment on 16th April, 1992 and the reasons for its judgment on 24th April, 1992. Both the declarations were refused.

Mr Ah Koy then appealed to the Fiji Court of Appeal which on 20th August, 1992 upheld the appeal and declared -

( i) The Appellant (Mr James Ah Koy) is entitled to be registered on the roll for Fijians established under S.41(2) of the Constitution.

(ii) That he is entitled to be registered on the electoral roll for the Suva City Fijian Urban Constituency.

The Supervisor of Elections took cognisance of the Court of Appeal judgment and restored the name Mr Ah Koy on the electoral roll.

Mr Taniela Tabu's attempt to be joined as a party to an appeal to the Supreme Court by the Registration Officer for the

Suva City Fijian Urban Constituency failed and on 28.10.93 he withdrew his application. Consequently his request for a stay order that he had made, also became redundant.

Objection to Mr Tabu's affidavit

Before I proceed to deal with the merits of the application before me I feel I ought to refer to the contents of Mr Taniela Tabu's affidavit objection to which was taken by Mr Barry Sweetman counsel for Mr Ah Koy in the following terms -

*"The parties to this appeal are the Registration Officer for the Suva City Fijian Urban Constituency as appellant and James Michael Ah Koy as Respondent. Taniela Tabu, the person who previously performed the duties of the Appellant is not a party. His application to be joined as a party did not succeed. He has no locus standi in these proceedings. His Affidavit, now filed in support of the Application for a Stay does not state that he is authorised by the Appellant to make the Affidavit on his behalf nor does it state that it is filed on behalf of the appellant. The Affidavit is part of the continuing attempt by Taniela Tabu to assert his own personal views on the matter of the identification of the Respondent as a Fijian in terms of S.156 of the Constitution and to challenge the decision of the Fiji Court of appeal----"*

Mr Sweetman also referred me to the provisions of Order 41 of the High Court Rules dealing with affidavits.

In addition Mr Nainendra Nand the Deputy Solicitor-General who appeared as amicus curiae drew my attention to the attack made by Mr Tabu on the integrity of the Supervisor of Elections Mr John Apted who is not a party to these proceedings. He questioned whether those attacks should be allowed to stand. In

reply Mr Matebalavu asked that Mr Tabu be treated as an aggrieved interested person and that Mr Apted be joined as a party to these proceedings and given an opportunity to file an affidavit in reply.

The concerns raised by Mr Sweetman and Mr Nand are justified.

Mr Tabu is obviously aggrieved that his decision has been upset by the Fiji Court of Appeal. But he is no longer a party to these proceedings. He does not say that the Applicant has authorised him to file his affidavit. Nor does he say on whose behalf he has filed the affidavit. In an obvious endeavour to justify his decision he has delved into legal arguments and also into his thought processes as to how he came to reach the decision he did as the Registration Officer at the material time.

Bearing in mind that Mr Tabu is not a party to these proceedings a substantial part of his affidavit is, in my view, either irrelevant, inappropriate or objectionable. I, therefore, propose to ignore all those paragraphs dealing with legal arguments, his thought processes and his attacks on the Supervisor of Elections. Indeed I order paragraphs Nos. 11, 12, 13 and 15 all of which in one way or other question Mr Apted's integrity, to be struck out. I shall, however, take cognisance of only those parts which are factual in nature and at the same time relevant to these proceedings.

Written submissions

Both parties have filed written submissions and have also tendered oral arguments.

Some of Mr Matebalavu's submissions which merit or require consideration can be summarised as follows -

- (a) That the appeal pending before the Supreme Court is of great public importance to the Fijians and other races in Fiji.
- (b) That the appeal process ends only on final adjudication by the Supreme Court, and therefore effect should not in the meantime be given to the Court of Appeal judgment.
- (c) That although the appeal does not operate as a stay, several factors militate against the execution of the FCA judgment (he enumerates 14 such alleged factors).
- (d) That the appeal, if successful, will be rendered nugatory if the stay is not granted (Wilson v Church(2) (1879), 12Ch.D. 458, 459 (Court of Appeal)). On the other hand no prejudice or irreparable harm will be suffered by Mr Ah Koy if the stay is granted.

(e) Execution would destroy the subject-matter of the appeal - Emerson and Ind Coope(1886)55 L.J. Ch 905.

Mr Matebalavu further submitted that whilst it is true that Mr Ah Koy's name has been restored to the Fijian roll he contends that it has been done unlawfully. He further submits and that it is within this Court's power to have Mr Ah Koy's name removed pending the decision of the Supreme Court.

#### Respondent's preliminary contention

Mr Sweetman in his written submission has dealt with each of Mr Matebalavu's arguments seriatim. It is his preliminary contention that there can be no stay order in respect of declaratory judgments. He deals with the effect of the Court of Appeal judgment as follows -

*' The Judgment of the Fiji Court of Appeal consists of two declaratory Orders. The judgment is not of a coercive nature and accordingly the Rules relating to Stay of Execution have no bearing on it. In his work "Declaratory Orders" Young states at p.216 of the effect of a declaratory Order:-*

*"The effect of the Court's Order is not to create rights but merely to indicate what they have always been, see the decision in Chapter 1. Because of this, if an appeal is lodged against a declaratory Order, conceptually there can be no stay of proceedings. Thus, if it is held that the decision of a licensing authority is void and accordingly the licenses issued are null and void, there is no precedence whereby the Court can validate those licences pending the hearing of an appeal."*

*In Chapter 1 he states;"The word "declaratory" is used in opposition to the word "executory", executory orders being court orders which are enforceable by execution.*

*In the present appeal the Court has made two declaratory orders stating what are the rights of the Respondent. Those rights cannot be removed, or disregarded, pending an appeal to the Supreme Court by the other party. There is nothing to stay. The Respondent is already on the electoral roll of Fijians established under S 41 (2) of the Constitution and is entitled to be there unless and until the only Supreme Court, the Supreme Court, holds otherwise. There is no power on the present application to make an Order removing the name of the Respondent from the Fijian Roll.'*

I agree that in general a stay order cannot be made in respect of a declaratory order because there is, so to speak, nothing to stay.

Whilst, therefore, it is true that conceptually there can be no stay order against a declaratory order nevertheless every such order should be considered in the light of its own nature and the facts and circumstances surrounding it. Traditionally it has been the invariable practice for the state, public officers and public authorities to take cognisance of declaratory orders and act accordingly without the necessity of any additional coercive orders. For the present purposes it is important to note that Regulation 5(d) of the Electoral (Registration) Regulations 1991, places a duty on the Supervisor of Elections to "take all necessary steps to ensure that all qualified applicants are placed on the appropriate roll." Regulation 29 of the Electoral (Registration) Regulations, 1991 adequately cover the Supervisor's powers to revise the electoral roll and reinstate a name on the appropriate roll. The Supervisor was, therefore, perfectly justified in taking cognisance of the Court's declaratory orders and giving effect to them by placing Mr Ah



Koy's name on the Fijian roll. Similarly the undertaking given to the High Court by the Solicitor-General that the Supervisor of Elections will take cognisance of the Court's declarations is also understandable. One could argue with some justification that there was an implied coercive element in the declaratory orders if they are viewed in the light of the Electoral Regulations and the traditional practice. In these circumstances I do not think it would be appropriate for me to dismiss this application on the preliminary point raised by Mr Sweetman.

#### Consideration on merit

I, therefore, propose to deal with the application on merits.

#### Questions of public importance

Whilst the pending appeal undoubtedly involves a question of great public importance of a constitutional nature, the fact is that unless and until the Supreme Court overturns the Court of Appeal decision, that decision must stand and it binds the parties to the proceedings. Furthermore, no new questions of law appear to have been raised in the appeal. Orderly functioning of democracy depends on the relevant authorities taking cognisance of and giving effect to Court Orders be they executive or declaratory in nature. Unless a case is made out to the contrary (and the onus is on the Applicant to show that

exceptional grounds exist) the successful party must be allowed to enjoy the fruits of his success. (See: The Annot Lyle (1886) 11 P.D. 114, p116, C.A.; Monk v Bartram [1897] 1 Q.B.346.)

### Process of appeal

As pointed by Mr Sweetman the process of appeal ends at each stage and I would add that it is for this reason that Rule 34(1)(a) of the Court of Appeal Rules states -

*"34,-(1) Except so far as the court below or the Court of Appeal may otherwise direct-*

*(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;"*

### Competing considerations

I agree with Mr Matebalavu that Section 12(b) of the Supreme Court Decree 1991 gives wide powers to a Court of Appeal judge to make orders and give directions in the interests of justice in respect of any appeal pending before the Supreme Court.

Likewise Section 20(f) of the Court of Appeal Act gives power to a single judge "to stay execution or make any interim order to prevent prejudice to the claims of any party pending appeal." The test here is a determination of which of the two parties will suffer the greater harm or prejudice from the granting or refusal of an interim stay pending determination of the appeal on merits. A balancing of conflicting considerations

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is required, between the underlying principle that a litigant is entitled forthwith to the fruits of the judgment in his favour and any obvious injustice to the other party in refusing a stay where such refusal will render his appeal nugatory. A similar test can be applied here by a single judge when dealing with any application under Section 12 of the Supreme Court Decree 1991.

Mr Matebalavu's contention that the appeal will be rendered nugatory has no validity. The Respondent is now on notice and if the appeal is successful he will have to bear all the consequences that flow from the Supreme Court's decision. In the meantime his basic constitutional rights ought not to be denied him by entering into the realm of speculation and ignoring what is certain. What is certain is that 3 Court of Appeal judges have unanimously ruled in his favour. The balance of convenience clearly dictates that the Respondent's basic constitutional rights should not be interfered with albeit temporary. Indeed any such interference can and may render the exercise of his constitutional rights nugatory. Clearly, therefore, the Respondent will suffer the greater harm or prejudice if this application is granted. On the other hand there will be no obvious injustice to the Applicant if this application is refused.

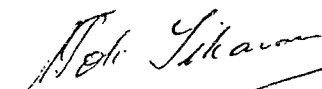
#### Destruction of subject-matter of appeal

The submission that unless a stay is granted the subject-matter of the appeal will be destroyed is clearly misconceived.

The subject-matter of the appeal is the issue relating to the Respondent's status and his right to be on the Fijian roll. This subject-matter will not disappear or be destroyed if the stay is not granted. As pointed out by Respondent's counsel all the cases on this topic deal with coercive judgments where money or property would pass from one party to another and possibly be lost or become irrecoverable on a successful appeal. Such is not the case here.

### Conclusion

Having considered all the material before me and bearing in mind the submissions made, I have no hesitation in holding that a case for a stay order has not been made out. Indeed the interests of justice require that no such order be made. Consequently this application is dismissed with costs to the Respondent.



Sir Moti Tikaram  
Acting President, Fiji Court of Appeal

Suva  
5th January, 1994.