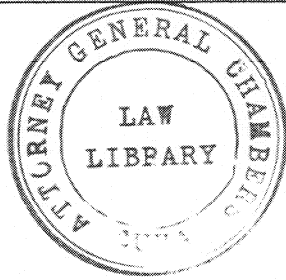


IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI



CIVIL APPEAL NO.ABU0070 OF 2005
(High Court Civil Appeal N0.HBC300/9)

BETWEEN:

MOHAMMED SHAHIM f/n Imam Mohammed

APPELLANT

AND:

RAKESH CHAND f/n Jagiwandas

RESPONDENT

S. Maharaj for applicant
S.C. Parshotam for respondent

Hearing: 18 January and 14 February 2006

Ruling: 17 February 2006

RULING

On 26 August 2005 the present respondent obtained judgment in a claim for damages for injuries sustained by him in a road traffic accident in April 2001. He was awarded \$72,484.00 damages and \$2,000.00 costs. The judgment was sealed on 31 August 2005.

On 7 September 2005, the applicant filed a notice and grounds of appeal. Security for costs was fixed on 29 September 2005 and, on 13 October 2005, an application for a stay of execution pending appeal was filed in the High Court. This application was heard by the trial judge on 3 November 2005 and a ruling made the same day. He concluded:

“The plaintiff in his submissions says that he is not opposed to a conditional stay, that is a stay requiring payment into court. In the circumstances and for the reasons that I have given, I am of the opinion therefore that a stay should be granted and that stay should be conditioned upon the total amount of the judgment debt and costs being paid into court within 28 days.”

The present applicant is the other driver. It is clear this application is made by his insurer and the order of the learned judge was based on his opinion of the financial state of the insurance company.

That order was sealed on 14 November 2005.

By notice of motion filed in the High Court on 1 December 2005, the applicant sought leave to appeal that decision and made further application for an unconditional stay. It appears that was heard on 2 December 2005 and, although there is no Order in the papers before me the affidavit of Jainendra Prakash Govind sworn on 9 December 2005 states that the learned judge “ruled that there was no need for Leave to Appeal as the Order made on 3rd November 2005 was a Final Order and thus the application was refused and the appellant herein was ordered to pay costs of \$500.00”

On 9 December 2005, the applicant filed, in this Court, notice of motion and grounds of appeal against the decision of 3 November 2005 together with a summons for stay of execution. The latter seeks:

“... an Order made by this Honourable Court revoking the Order made by his Lordship Mr Justice Connors on 3rd November, 2005 wherein his Lordship granted conditional stay to the Appellant and that this Honourable [sic] grant to the Appellant unconditional Stay of Execution of the Judgment/Ruling delivered on 26 August, 2005 and 3 November, 2005
...”

The grounds of appeal do not challenge the grant of the stay as such. What is sought is the removal of the order that the stay is conditional on payment of the full sum into court.

By section 20(1)(e) and (k) of the Act, a single judge of the Court may stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal or make any order or give any direction that is incidental to an appeal or intended appeal.

At the hearing on 14 February 2005, I refused the application for a stay and stated I would give my reasons in writing. I now do so.

It must be borne in mind that this is an appeal against the order of a conditional stay of execution. When the learned judge ordered the conditional stay, he had to consider the relevant aspects of the appeal from the judgment the applicant sought to stay i.e. the appeal from his judgment of 26 August 2005. Had this been a further application for a stay to this Court, I would have needed to look at those as well. It is clear that the principal ground of appeal in this second appeal suggests the learned judge took into account matters which were unsupported by any evidence to support it and Mr Maharaj explains to the Court that is a reference to the judge's questioning of the insurance company's financial reliability.

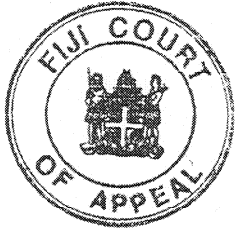
Counsel's objection to the conditional order is not based on any doubt about the company's ability to pay the full judgment sum into Court but on the fact that such an order locks up funds unnecessarily. It establishes, he suggests, an unfortunate precedent in cases where a commercial entity is involved in an appeal. Previous decisions in the High Court relating to such an order are not consistent and what his company requires is clear guidance from the Court of Appeal on the manner in which such a discretion should be exercised.

I can appreciate his concern but the problem this Court faces is that this is an application for an order which is the very foundation of the appeal. If the order is granted, it will render the present appeal irrelevant because, by the time the principal appeal is heard, any consideration of the conditional stay will be otiose and the issue moot. I accept that the

company has the means to pay the sum into court and, should the appeal succeed in relation to liability or quantum, will receive interest on any relevant sum.

I am satisfied that the proper order is to refuse the application for an unconditional stay of execution of the original judgment and to consolidate this second appeal with the first.

The application is refused and the applicant shall pay the full judgment sum into court within 7 days of this Order or the consolidated appeal will be struck out. For the avoidance of any doubt, the Registrar is directed to pay the sum into an interest bearing account with a commercial bank as soon as practicable.



A handwritten signature in cursive script, appearing to read "Gordon Ward".

[GORDON WARD]
President
FIJI COURT OF APPEAL

17TH FEBRUARY, 2006