

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

CIVIL APPEAL NO. ABU 39 OF 2018
(High Court HBC 172 of 2012)

BETWEEN : NEO (FIJI) LIMITED

Appellant

AND : AUSMECH SERVICES (AUSTRALIA) LIMITED

Respondent

Coram : Calanchini P

Counsel : Mr F Haniff for the Appellant
Mr G O'Driscoll for the Respondent

Date of Hearing : 30 August 2019

Date of Ruling : 11 September 2019

RULING

[1] This is a renewed application for stay pending appeal. On 17 May 2018 the High Court at Suva delivered judgment in favour of the respondent (Ausmech) in the amount of \$455,090.42 together with post judgment interest. There was no order for costs.

- [2] The dispute between the parties arises out of contractual arrangements for the provision of mechanical works for the construction of the Tappoo City complex and the Nadi International Airport renovation. There were four separate claims for payment none of which were paid by the appellant (Neo-Fiji). The learned Judge concluded that there was an enforceable contract between Ausmech and Neo-Fiji for the mechanical (air-conditioning) works and for the fit-out works at Tappoo City. The Judge also concluded that there was an enforceable contract between the same parties for the provision of mechanical works at the Duty Free Traders premises at Nadi Airport. The Judge found that Neo-Fiji was in breach of the contracts by not paying the amounts owed. The Judge noted that the defence was not a denial as to the amounts owing. The defence was concerned with the correct defendant company. The Judge awarded the amount claimed by Ausmech in the amended statement of claim.
- [3] Being dissatisfied with the Judgment the appellant filed and served a timely notice of appeal relying on grounds of appeal that challenge the finding of the trial Judge that Ausmech was the company that contracted with the appellant.
- [4] Under Rule 34 of the Court of Appeal Rules (the Rules) an appeal does not operate as a stay of execution unless the court below or this Court otherwise orders. Pursuant to Rule 26(3) whenever an application, such as an application for a stay pending appeal, may be made either to the court below or to the Court of Appeal, it is required to be made in the first instance to the court below. In a judgment delivered on 26 September 2018 the High Court refused the application for a stay pending appeal. It is as result of that refusal that Neo-Fiji renews its application for a stay pending appeal before the Court of Appeal. Section 20(1) of the Court of appeal Act 1949 (the Act) gives to a judge of the Court power to grant a stay pending appeal.
- [5] The application was made by summons filed on 28 September 2018 and was supported by an affidavit sworn on 28 September 2018 by Sampath Udaya. The application was opposed. The parties filed written submissions prior to the hearing. The appellant also filed an application for an interim stay and further affidavits were filed. The appeal is

now listed for hearing on Thursday 19 September 2019. Directions had been given on 16 October 2018 and again on 11 April 2019 for the respondent to file affidavit material, in default of which an interim stay would be granted.

- [6] The matters that should be considered by this Court in an application for stay pending appeal were considered in **Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU 11 of 2004, 18 March 2005. It is not always necessary to consider all seven matters as their relevance will often depend upon the nature of the proceedings and the orders made by the court below. A stay should not be granted unless the Court is satisfied that there are good grounds for doing so. Whether good grounds are established will be determined by reference to the principles set out by this Court in the **Natural Waters of Fiji** decision (supra).
- [7] It should be recalled that this is an appeal against a money judgment. Generally a successful litigant should not be deprived of the fruits of successful litigation by withholding funds to which he is otherwise entitled, pending an appeal. For this Court to interfere with that right the onus is on the appellant to establish that a stay should be granted. Since the decision of this Court in **Attorney-General of Fiji and Ministry of Health v Dre** [2011] FJCA 11; ;Misc. 13 of 2010, 17 February 2011, the ability of the appellant (defendant) to recover the judgment amount in the event that a stay is not granted is not decisive and is only one of a number of factors that must be considered. In my view the appellant has not established that the appeal will be rendered nugatory in the event that a stay is not granted. The balance of convenience is not necessarily decisive in this matter and both the public interest and the nature of the issues involved are not significant in this application.
- [8] The remaining issue is the bona fides of the appellant for bringing the appeal. This is often taken to be a reference to the chances of the appeal succeeding. This does require the Court to make some preliminary assessment about whether the appellant has an arguable case. The appellant claims that it had entered into an initial agreement with Ausmech Services (Australia) Pty Ltd for the works at Tappoo City. At that time the

plaintiff company and now the respondent in this appeal had not yet been incorporated in Fiji. It is submitted by the appellant that these facts were in evidence at the trial and accepted by the trial Judge.

- [9] Under the circumstances it appears that there is an arguable issue of some significance that is sufficiently compelling to conclude that a stay should be granted in this case.

Orders:

- 1). *Stay of execution pending appeal is granted.*
- 2). *No orders as to costs.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL