

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

CIVIL APPEAL NO. ABU 0130 of 2018
(High Court Action No. HBJ 5 of 2018)

BETWEEN : **TIMOTHY JOHN JOYCE**

Appellant

AND : **CIVIL AVIATION AUTHORITY OF FIJI**
AJAI KUMAR

Respondents

Coram : **Chandra, RJA**

Counsel : **Mr A Narayan for the Appellant**
Mr R P Singh for the Respondents

Date of Hearing : **25 July, 2019**

Date of Ruling : **5 November, 2019**

R U L I N G

- [1] Pursuant to Rule 20(f) and (g), Rule 26(3), Rule 34 and Rule 6 of the Court of Appeal Rules the Appellants filed an inter partes summons for stay pending appeal and injunctive reliefs on 26th February 2019.
- [2] The Summons was accompanied by an affidavit in support sworn by Timothy John Joyce Chief Executive Officer, Director and Shareholder of the Appellants on 26th February 2019.
- [3] The 1st Respondent filed an affidavit in reply sworn on 1st March 2019 by Ajai Kumar, Active Chief Executive of the 1st Respondent.
- [4] On 13th March 2019 an interim stay order was made by the President of the Court of Appeal upon hearing Counsel for both parties, until the determination of the substantive stay application or until further Orders of this Court.
- [5] The Appellants filed an affidavit in response to the affidavit of Ajai Kumar, sworn by Timothy John Joyce on 18th March 2019.

Background Facts

- [6] The Appellants instituted proceedings for a Judicial Review in the High Court at Lautoka by an Inter-Partes summons.
- [7] By that action the Appellants claimed the following Reliefs:
 - (a) An Order of Certiorari
 - (b) An order of Prohibition
 - (c) Further or in the alternative, a Declaration
 - (d) The Respondents pay damages to the Applicants to be assessed;
 - (e) Costs on a full Solicitor/Client indemnity basis;
 - (f) Any further declarations or other relief as the Honourable Court may see fit;
 - (g) That time for service of the Originating Motion be abridged.

[8] Leave to apply for Judicial Review was granted on 5th July 2018 together with a stay of the Respondents' decision dated 27th December 2017. The substantive application for Judicial Review was heard on 20th September, 2018.

[9] The High Court delivered its judgment on 26th October 2018 as follows:

1. That Writ of Certiorari issued quashing the respondents' decision of 27th December 2017.
2. That Respondents are directed to go through the decision making process again and to reconsider and reach a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested in the judgment.
3. That the Applicants' claim for damages is dismissed.
4. That the Respondents shall pay summarily assessed costs of \$4,000.00 to the Applicants.

[10] The Appellants filed a notice of appeal on 13th November 2018 appealing against part of the Judgment of the High Court. They filed a supplementary Notice of Appeal with additional grounds of appeal on 14th February 2019.

[11] The Appellants filed an ex-parte application for stay to the High Court and an interim stay was granted pending the hearing of the inter-parte application for stay. After hearing the inter-partes application the application for stay was dismissed on 24th January 2019.

[12] Thereafter the Appellants have made the present application for stay.

Appeal to the Court of Appeal

[13] The Appellants in their notice of appeal against the judgment of the Court of Appeal set out the following grounds of appeal:

- “1. *The Learned Judge erred in law and in fact in rejecting the application of Section 14(1) of the Constitution and the rule of double jeopardy generally to the Respondent dealing with the*

infringement of Regulation 70(1) of the Air Navigation Regulations 1981 and/or penalizing the First named Appellant again in the circumstances where:

- 1. The Respondents had already prosecuted the First named Appellant for contravention of Regulation 70(1) for the act or omission of flying an aircraft with an expired Commercial Pilots Licence;*
 - 2. The Respondents were dealing with the First named Appellant for breach of the same Regulations and the same acts or omissions to impose a further penalty internally;*
 - 3. The Respondents had already determined the First named Appellant's fit and proper status after the infringement having initially refused to permit any further renewal of the Appellant's Commercial Pilots Licence and subsequently reviewing the same during the course of the prosecution in the Magistrate's Court and after a plea of guilty thus rendering the issue under Regulation 53 a non-issue; and*
 - 4. The Respondents had abdicated their right to deal further with the First named Appellant internally having opted to follow the process of prosecuting him in the Magistrate's Court.*
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- 2. The Learned Judge erred in law and exceeded his jurisdiction in having allowed the Judicial Review and thereafter proceeding to give directions/recommendations as to how the Respondents should deal with the First named appellant thereby usurping the role of the Respondents and causing prejudice to the First named appellant.*
 - 3. The Learned Judge failed to consider the further grounds, other than those which he allowed, relied on by the Appellants for the Judicial Review and in particular that section 12F of the Civil Aviation Authority Act 1979 was unconstitutional being in breach of Section 16(1) of the Constitution which was a relevant matter and ground in the circumstances where the Learned Judge had given directions/recommendations for the Respondents to deal with the First named Appellant thereby potentially depriving him of a remedy for challenge arising from any further decision.*
 - 4. The Learned Judge erroneously held that no affidavit in reply was filed on behalf of the Appellants which resulted in:*

- a) *him failing to read and consider relevant evidence before him;*
 - b) *deprived the Appellants of a fair hearing;*
 - c) *led him to issue prejudicial and erroneous directions/ recommendations for the Respondents to deal with the First named Appellant; and*
 - d) *caused serious prejudice to the Appellants.*
5. *The Learned Judge erred in finding that the Appellants were not entitled to damages.*
6. *The Learned Judge erred in law and in fact in not awarding indemnity cost or costs on another basis to the Appellants rather than on a summary assessment in view of all the circumstances.”*

And sought the following orders:

That the judgment of the High Court be in part set aside, reversed and/or varied as follows:

1. The directions to the Respondents to go through the decision making process again and to reconsider and reach a decision on the issue of the first named applicant’s conviction in accordance with the findings and guidelines suggested in the judgment be wholly set aside;
2. The Respondents be ordered to pay damages to the Appellants to be assessed;
3. The Respondents be ordered to pay indemnity costs to the Appellants in the High Court to be assessed; and
4. An order of prohibition/permanent stay preventing the Respondents from going through the decision making process again and/or to reconsider and reach a decision on the issue of the First named Appellant’s conviction in accordance with the findings and guidelines suggested in the judgment of the High Court or at all.

[14] The Appellants filed a supplementary notice of appeal on 14th February 2019 setting out the following additional grounds of appeal:

“1. The Learned Judge erred in law when directing the Respondents to go through the decision making process again and further directing the Respondents [page 28] to consider only the penalty prescribed by Regulation 151 (1) in view of the First Named Appellant’s conviction of the 29 contraventions of the ANR and in doing so further erred in that:

- (i) The direction overlooked that Regulation 151(1) was not limited to consideration of the penalty only;*
- (ii) The direction overlooked that the penalties provided under Regulation 151(1) were to be imposed only where reasonable doubt exists as to the safety of the operation in question;*
- (iii) The direction assumed that the issue of doubt need not be considered;*
- (iv) The direction assumed the Court had found that a reasonable doubt existed; and*
- (v) The assumptions in (iii) and (iv) above were findings that the Respondents had to make.*

2. The Learned Judge erred in law in finding that the First named appellant’s conviction entered in the Nadi Magistrate’s Court was a relevant factor [paragraphs 73, 74 and 75] in determining a person’s fit and proper status to hold an aviation document under Regulation 53(2) of the Air Navigation Regulations and in giving direction 2 [paragraph 99(2)] by overlooking or failing to direct that:

- (i) The conviction was not automatically a factor and/or not the sole factor in determining the issues under Regulation 53(2);*
- (ii) The Respondents had to determine whether the conviction was relevant in terms of contravention charged to the issue for consideration of fit and proper status.*
- (iii) The Respondents had to consider other factors to determine the issue of fit and proper status;*
- (iv) The decision on the matters in (ii) and (iii) above were for the Respondents to determine.*

- (vi) *The Learned Judge assumed the findings in (i) and (ii) above and thereby usurped the functions of the Respondents; and*
 - (vii) *The penalty was not the only consideration.*
3. *The Learned Judge erred in law by holding that the First named appellant's conviction entered in the Nadi Magistrate's Court was relevant [paragraph 74] when the Respondents considered the issuance of any aviation documents under Regulation 151(1) when the issuance was not a matter under Regulation 151 (1) and he thereby elevated the conviction to a status not accorded by Regulation 53(2) and accordingly his directions to the Respondents were erroneous.*
 4. *The Learned Judge erred in law in failing to consider when remitting the matter to the Respondents that in view of the suspensions and refusals to renew the First named appellant's license and fit and proper status during investigation's, subsequently, pending the Nadi Magistrate's Court hearing and thereafter that it would be unreasonable to impose any further penalties tantamount to being double punishment that such imposition would provide a ground for judicial review.*
 5. *The Learned Judge erred in law in issuing Direction 6 [page 29] and his findings that the 29 breaches summarized in the charges were so serious as to undermine public confidence in the aviation industry, and that a signal needed to be sent to the first appellant, the profession, and the public that the behavior in question is unacceptable, and to make a decision to mark the seriousness of the matter, and to send an appropriate signal to the aviation industry and the public, were made in the absence of any evidence that the public confidence had been undermined or that the breaches involved safety of the operation in question all being matters calling for the decision by the Respondents."*

[15] The principles upon which a stay is granted in the Supreme Court were set out in **Stephen Patrick Ward v. Yogesh Chandra** CBV0010 (20 April 2010) by Gates P:

"[4] The issue for determination is whether the Petitioner's case prior to the hearing is sufficiently exceptional to allow for some interlocutory relief. For at the Supreme Court, that is at final Court of Appeal stage, the hurdles to be overcome for a petitioner seeking special leave are formidable. Sufficiently exceptional may be a

stronger test than that favoured in New South Wales where the hurdle was said to be overcome if “the applicant could demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour”: **Alexander v. Cambridge Credit Corporation Ltd** (1985) 2 NSWLR 685 at p.694; applied in **Penrith Whitwater Stadium Ltd & Anor v. Lesvos Pty Ltd & Anor** [2007] NSWCA 103.”

- [16] In arriving at a decision as to whether the Appellant’s circumstances are sufficiently exceptional for the grant of stay pending appeal, it is necessary to consider the relevant principles set out in the Court of Appeal in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** Civil Appeal ABU 0011.04S, 18th March 2005. They were:

*“(a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See **Philip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co. (NZ) Ltd** [1972] 2 NZLR 41(CA) l.*
(b) Whether the successful party will be injuriously affected by the stay.
(c) The bona 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.”

- [17] The background to the application of the Appellants to the High Court for Judicial Review as set out in the written submissions of the Appellant reveals:

- i. That on 8th December 2017 the first named Appellant was convicted, following a private prosecution by the First Respondent in the Nadi Magistrate’s Court for 29 counts of contravention of S.70(1) of the Air Navigation Regulations 1981 (ANR) in flying an aeroplane with an expired commercial pilots licence.*
- ii. On 17th December 2017 the Respondents issued a letter advising the 1st named Appellant that based on his conviction he was deemed no longer a fit and proper person to hold or be issued any aviation document under Regulation 53 of the ANR and revoking Fiji Commercial Pilots Licences for aeroplanes and helicopters; deeming him no longer a fit and proper person to hold any nominated post hold position under the provisions of the*

CAAF Standards Document and revoking the same; that he was no longer be deemed to be a fit and proper person to hold any aviation document for a period of 10 years to commence from the date of the First named Appellant's conviction by the Nadi Magistrate's Court.

- iii. *The right of appeal under section 12F of the Civil Aviation Authority of Fiji Act 1979 lodged by the first named Appellant could not proceed due to the absence of the position of the Chief Executive and aborted attempts by consent to appoint an independent tribunal to hear the appeal.*
- iv. *The Appellants then instituted the action in the Lautoka High Court for Judicial Review as stated at paragraph 7above.*
- v. *Following the judgment of the High Court, the1st named Appellant was served with a notice to appear on 12th November 2018 purporting to be pursuant to S.151 of the ANR requiring him to provide his response within 21 days to the 1st Respondent.*
- vi. *Whilst the interim stay was in place, the1st named Appellant's commercial pilot licenses for aeroplane and helicopter had expired on 12thJanaury 2019. On 9th January 2019he had applied for a renewal of both licences. The application had been refused by the Respondents. He had appealed the refusal of the application under S.12F of the Civil Aviation Authority of Fiji Act to the 2nd Respondent and is pending.*
- vii. *The Respondents have removed the first Appellant's nominated post holder positions of an Accountable Manager and Chief Pilot for the Appellant Companies by letter dated 25th February 2019.*
- viii. *The conviction related to the First Appellant flying on 29 occasions with an expired licence. The 29 flights were over a 3 month period between 11th April 2015 and 20th July 2015. Until the decision of 27th December 2017 his licences and accountable positions had not been revoked. He started flying again around July 2018 when an interim stay was granted by the High Court. He had flown for another 6 months before his licenses expired sometime in January 2019. Since the granting of the interim by this Court, he has been flying."*

[18] In considering the exercise of discretion by this Court in granting a stay it is necessary to consider whether the Appellant's circumstances are sufficiently exceptional for the exercise of the discretion to grant a stay.

- [19] Therefore it is necessary to consider the relevant principles set out in Natural Waters decision. (Supra).

That if a stay is not granted whether the appeal of the Appeal would be rendered nugatory

- [20] The Appellant filed a notice of appeal and a supplementary notice of appeal. The appeal is not from the whole of the judgment but a part of the judgment remitting the matter back to the Respondents to go through the decision making process and reconsidering the issue of conviction in terms of the findings and guidelines given by the High Court.
- [21] The grounds of appeal in the notice of appeal and the supplementary notice of appeal would be considered by the Full Court of the Court of Appeal and the question to be considered would be whether the appeal would be rendered nugatory if a stay is not granted.
- [22] If a stay is not granted the Respondents would be able to proceed against the first named Appellant as directed by the High Court on the guidelines set out in the said judgment.
- [23] The Appellant has in the grounds of appeal advanced questions regarding the validity of orders of the learned High Court Judge firstly, remitting the matter back to the Respondents to reconsider it and secondly, regarding the guidelines to be followed in proceeding with the matter.
- [24] Though it may be argued that it was permissible for the High Court to remit the case back to the Respondents to reconsider, it may be counter argued that by doing so it negated the effect of the quashing of the Respondent's decision which was the subject of judicial review.
- [25] Related to the matters of remitting the matter back to the Respondents was the raising of the question of double jeopardy which though canvassed before the High Court was not considered. The Appellants cited the decision in **Permanent Secretary for Public Service Commission v Matea** Civil Appeal No.CBV0009 of 1998 S in support of their argument which would seem to be a substantial argument before the full Court.

- [26] Further the guidelines set out by the learned High Court Judge for the Respondents to take into account when re-considering the matter related to the interpretation of the relevant Sections 151 and 53 of the Air Navigation Rules. As to whether the interpretation given to the relevant sections were correct would be matters which would be arguable before the Full Court.
- [27] The Respondents in their submissions has advanced the concept of public interest as against the interest of the Appellant and cited several authorities mostly relating to Legal Practitioners which I would consider to be appropriate when the matter is argued fully before the Full Court. In any event the advancing of such a concept by itself would signify the importance of these grounds of appeal.
- [28] Since the Respondents had already proceeded to take action in respect of the first named Appellant in terms of the directions given by the High Court, if their actions are not stayed the appeal of the Appellant would be rendered nugatory. Further any action taken by the Respondents in that respect and decisions given may give rise to further litigation apart from what is on foot which would be cumbersome for both parties.

Whether the successful party will be injuriously affected by the stay

- [29] As regards this principle the Respondents have not advanced any submissions as to how they would be injuriously affected by the grant of a stay. One can only surmise about the delay in dealing with the position of the first named Appellant regarding the applications made by him, which could be appropriately dealt with after the conclusion of the Appeal.

The bona fides of the Applicant as to the prosecution of the appeal

- [30] In his affidavit the first named appellant has stated that he filed his appeal in time and that he has taken steps to prosecute his appeal and dealt with the necessary steps. There appears to be no lack of bona fides on the part of the Appellants in prosecuting the appeal.

The effect on third parties

- [31] The Appellant in his affidavit has stated in paragraph 15 the impact of a decision suspending his licence, on his earnings and companies employees' livelihood and the consequent losses that may have to be incurred by his Companies. In paragraph 22 he has also stated further elaborating the effect that would be had on his companies and the staff of about 80 employees.
- [32] These averments have not been specifically controverted by the affidavit in reply filed on behalf of the Respondents by Ajai Kumar and therefore if a stay is not granted there can be an effect on third parties.

The novelty and importance of questions involved and public interest in the proceeding

- [33] Matters relating to the Aviation Industry and regarding regulatory mechanisms do not appear to have been dealt with previously in this jurisdiction and therefore the matters that are the subject of the appeal would be novel and important questions as well as invoking public interest.

The overall balance of convenience and the status quo

- [34] Considering the totality of the matters that would be under consideration in the appeal I would consider that the balance of convenience would be with the Appellants and it would be appropriate to maintain the status quo of the parties as at the time that the interim stay was granted.
- [35] For the reasons set out above, a stay is granted in terms of paragraphs [1] and [2] of the inter partes summons filed by the Appellants on 26th February 2019 pending the hearing of the appeal until it is finally determined by the full Court of the Court of Appeal.

Orders of Court:

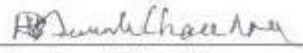
(1) The application of the Appellants:

- (a) Seeking a stay of execution of directions for the Respondents' to go through the decision making process again and reconsidering and reaching a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested by the Honourable High Court in the Judgment delivered on 26th October 2018; and*
- (b) Seeking a stay of any action, or further contemplated action, or withholding the processing of or refusal to issue of any aviation documents or renewals thereof for any of the Appellants by the first and second Respondents based on the fact of the conviction of the First named Appellant by the Nadi Magistrate's Court on 8th December 2017 which formed the grounds for the decision by the Respondents' of the 27th December 2017 quashed by the High Court on 26th October 2018⁹ and in part appealed to the Court of Appeal;*

are granted until the final determination of the appeal by the Court of Appeal;

- (c) The Appellants are ordered to expedite the hearing of the appeal by taking the necessary steps;*
- (d) Costs in the appeal.*




Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL