

IN THE HIGH COURT OF FIJI AT SUVA

Action No. 338 of 2003

Between	Trade Air Engineering (West) Limited	1 st Plaintiff
	Nitendra Singh	2 nd Plaintiff
	Peni Lesuma	3 rd Plaintiff
	Jagdishwar Singh	4 th Plaintiff
And:	Mechanical Services Limited	1 st Defendant
	Khushal Sattyam	2 nd Defendant

Appearances : Mr C.B.Young for the first plaintiff
Mr V. Pillay for the defendants

Dates of hearing : 21st March, 2013

JUDGMENT

1. *The application*

This is an application by the defendants for an order for stay of execution of my judgment, pending the determination of their appeal to the Court of Appeal. The application is opposed.

2. *The determination*

2.1 The law on stay pending appeal is settled. In *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* ,(Civil Appeal ABU0011.04S) the Court of Appeal set out the following principles to be considered, in granting a stay pending appeal:

- (a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Phillip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).*
- (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.*

2.2 The first ground advanced by counsel for the defendants, Mr Pillay in support of the stay is that the appeal will be rendered nugatory, if no stay is granted.

2.2.1 Counsel for the first plaintiff, Mr Young, in riposte advanced two contentions. Firstly, that the defendants have not averred that the monies ordered to be paid to the first plaintiff, would not be recoverable, if their appeal is successful. It was further submitted that a stay may be granted pending appeal, in circumstances where it is asserted that a judgment-creditor is insolvent or leaving the country. Secondly, it was argued that a stay is rarely granted of the payment of a sum of money. In support, a passage from the judgment of Ward JA in *Iftakhar Iqbal Khan v Michael French*, (CBV0002.05S) as referred to by His Lordship Chief Justice Gates in *Ward v Chandra*, (CBV0010.10) was relied on.

2.2.2 The rule that a stay would only be granted, if there would be no reasonable prospect of recovering the damages and costs paid, as set out in *The Supreme Court Practice 1991 vol 1*, has been considered to be antiquated and too stringent a test in *Linotype-Hell Finance Ltd v Baker*, (1992) 4 All ER 887 . Staughton LJ at page 888 stated as follows:

“ it seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution.”(emphasis added)

2.2.3 I find that the affidavit in support of the stay has not asserted that they would be reduced to penury or otherwise ruined.

2.2.4 The general principle as regards the payment of a sum of money, was explained by Ward JA in *Iftakhar Iqbal Khan v Michael French*, (*supra*) in these terms:

“Only in the rarest of cases is that sufficient to justify a stay as subsequent success in the appeal will be implemented by repayment

to the appellant. This is not a case of performance or restraint of some action or destruction of property which will irreversibly change the status quo and render a successful appeal nugatory.”(emphasis added)

2.2.5 The matter before me is not a case “*where a stay is required in order to preserve the subject matter of the litigation*” per His Lordship Chief Justice Gates in *Ward v Chandra*,(*supra*) citing *Jennings Construction Ltd v Burgunday Royale Investments Pty.Ltd(No 1)*, (1968) 161 CLR 681, 685.

2.2.6 I have no doubt that the defendants’ appeal will not be rendered nugatory.

2.3 The second contention advanced by Mr Pillay is that the first plaintiff would not be injuriously affected by the stay. He argued that the balance of convenience favours both parties, since the plaintiffs have filed a cross-appeal on the quantum awarded.

2.3.1 The short answer to this submission is that “*Once successful, the litigant should not be lightly deprived of the fruits of his successful litigation*”-*The Annot Lyle*,(1886) 11 PD 114 at 116 as approved in *Ward v Chandra*,(*supra*).

2.4 Finally, Mr Pillay submitted that the first plaintiff had not replied to the affidavit in support of the stay.

2.4.1 Mr Young, counsel for the first plaintiff, in response, argued that the affidavit is devoid of evidence A reply was unwarranted. He relied on the case of *Bidder v Bridges*,(1884) 26 Ch D 1, in support of the proposition that affidavit evidence must set out not only fact, but also grounds of belief of the deponent.

2.4.2 In my judgment, the affidavit contain bare assertions .

2.5 It is important to consider the prospects of success of the appeal. The affidavit avers that the plaintiffs did not exhibit any evidence to establish the goodwill or the business reputation of the first plaintiff, prior to the publication of the article complained of. This is set out in the first of the three sub-paragraphs of the fourth ground of appeal. The affidavit also states that the defendants have good grounds of appeal. A copy of the Notice and the grounds of appeal have been attached to the affidavit.

2.5.1 The plaintiffs had filed action for defamation and malicious falsehood, as regards the publication of an article title “*Nadi Airport’s new look terminals ‘not so cool job’ Why its million dollar cooling system’s falling*” in the Fiji Islands Business magazine in July, 2003.I delivered judgment on 16th

November,2012. I awarded \$100,000.00 as general damages to the first plaintiff and costs of \$4,000.00.

2.5.2 The first and second grounds of appeal take issue that the defendants were not the author or publisher of the article and had not authorised its contents. It is also contended that there was no evidence that 10,000 copies of the magazine containing the article had been printed. The agreed facts recorded at the pre-trial conference provide that the first defendant was the group editor-in-chief, the second defendant was the publisher and printer of the Fiji Islands Business magazine “*a monthly business magazine published in Fiji and having wide circulation in Fiji and in other countries of the South Pacific*”. I am satisfied that the evidence adduced established the extent of publication of the article and also the business reputation of the first plaintiff.

2.5.3 The passage from the judgment of Lord Fisher MR in *South Helton Coal v N-E News Association*, [1894] 1 QB 133 as cited in the submissions filed by the defendants at the close of the main hearing, provides a complete answer to the contention in paragraph (b) of the fourth ground of appeal, viz, that the statements did not reflect upon the trading reputation of the first plaintiff.

2.5.4 I find that the other grounds of appeal do not raise valid defences nor arguable issues of law. There are no novel or important questions of law involved in the application before me.

2.6 In the circumstances, I am not satisfied as to the bona fides of the defendants as to the prosecution of the appeal.

2.7 It seems quite clear to me, that the balance of convenience lies heavily in refusing the stay pending appeal. I reiterate that the payment of the sum awarded would not change the status quo.

3. **Orders**

I decline the application for stay of execution. The defendants shall pay costs summarily assessed in a sum of \$ 2500 to the first plaintiff within 14 days.

6th June, 2013

A.L.B. Brito Mutunayagam

Judge