

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 262 OF 2019

BETWEEN : **PASIFIKA ENTERPRISE** of Nasau, Nadi.

RESPONDENT/PLAINTIFF

AND : **LAND TRANSPORT AUTHORITY** a body corporate established under the Land Transport Act.

APPLICANT/DEFENDANT

Appearances : Mr N. Chand with Mr V. Chand for the defendant/applicant
Mr R. Singh with Ms A. Swamy and Ms Vreetika for the
plaintiff/respondent

Date of Hearing : 25 August 2020

Date of Ruling : 16 October 2020

R U L I N G

[Stay pending appeal]

Introduction

[01] This is an application for stay of a judgment delivered by me on 06 July 2020 pending appeal. The judgment declared that a Traffic Infringement Notice (*TIN*) issued against the plaintiff by the defendant (*LTA*) to be invalid as it was in breach of sections 14 (2) and 15 of the Constitution. The judgment also ordered that the LTA must pay summarily assessed costs of \$1,000.00.

[02] At the hearing, both parties made oral submissions and only plaintiff tendered its written submissions. Counsel for the defendant sought 14 days to file their

written submission. This application was not objected to by counsel for the plaintiff provided that the plaintiff would file a supplemental submission. The court allowed that application. Accordingly, the defendant had filed their written submission on 08 September and the plaintiff its supplemental submission on 22 September 2020. I was greatly assisted by their submissions. I am grateful to counsel and their team of their efforts.

Grounds of appeal

[03] The defendant has lodged a timely appeal against the declaratory judgment on the following grounds:

- (a) *The Learned Judge erred in law when he held that the Land Transport (Traffic Infringement Notice) Regulations 2017 has a reverse onus provision in that it shifts the burden of proof to the accused or applies a presumption of fact or it operates against the accused.*
- (b) *The Learned Judge erred in law when he held that the Regulations 6(c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 has the effect of a reverse onus in that it requires a person issued with the Traffic Infringement Notice to prove his innocence. On the contrary, the words “elect to dispute the fixed penalty in court” simply mean that if a person issued with the Traffic Infringement Notice disagrees with the said notice, he or she has the option to dispute the notice in court however, he or she retains the presumption of innocence as it is the Appellant’s responsibility to establish guilt.*
- (c) *The Learned Judge erred in law and in fact when he held that regulation 6(c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 violates the right of presumption of innocence guaranteed under section 14(2) of the Constitution without adopting a reasonable interpretation of the law which is consistent with the Constitution as required under section 3(2) of the Constitution.*
- (d) *In applying section 2(2) of the Constitution which states that any law that is inconsistent with the Constitution of the Republic of Fiji (‘Constitution’) is invalid to the extent of the inconsistency, the Learned Judge erred in law and in fact when he held that regulation 6(c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 is in violation of section 14(2)(a) of the Constitution.*

- e) *The Learned Judge erred in law and in fact when he held that the deeming provision of a conviction under regulation 9 of the Land Transport (Traffic Infringement Notice) Regulations 2017 violates the Respondent's rights under section 14(2)(a) and 15(1) of the Constitution.*
- f) *By determining that regulation 6 of the Land Transport (Traffic Infringement Notice) Regulations 2017 has the effect of a reverse onus, the Learned Judge incorrectly held that the Appellant ought to have made submissions on the purpose of introducing a reverse onus in the said regulation.*
- g) *The Learned Judge erred in law and in fact when he heard and determined the Respondent's Originating Summons dated 15 October 2020 which relates to section 14(2) and 15 under the Bill of Rights Chapter of the Constitution, without firstly satisfying itself as to whether the Attorney-General was provided notice of the matter, and thereby denying the Attorney-General its constitutional right to consider intervening in the matter, pursuant to section 44(7) and (8) of the Constitution.*

Evidence

[04] The defendant relied on an affidavit in support and affidavit in response made by Samuel Simpson, CEO of the defendant. The plaintiff relied on affidavit in reply made by Umesh Kant, the director of the plaintiff company.

Legal principles

[05] The principles governing the application for stay pending appeal were summarized in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005) as follows:

“(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 [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."*

The submissions

[06] Mr N. Chand on behalf of the defendant argues that the appeal is of paramount importance because the defendant's TIN matters pending in Court is likely to be struck out in compliance with the declaratory order made in this Court. His argument involved the following preposition:

- a. *Order 45, R 10 clearly provides that a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief and the declaration order is nevertheless an order or other relief within the purview of O 45, R 10 and therefore can be stayed, especially, if that declaratory order is made by the Court on 6 July 2020, has the implication of rendering the validity of the Land Transport (Traffic Infringement Notice) Regulation 2017 upon which TIN No. 3589118 was issued a nullity.*
- b. *By the effect and implication of such a declaratory order, the defendant will not only refund the fines paid by the plaintiff in breach of relevant traffic laws, but also discharge the plaintiff from the breach.*
- c. *In general and even though conceptually there can be no stay order against a declaratory order nonetheless such order should be considered.*
- d. *The implied coercive element in the declaratory order made the by Court is clear. The words "null and void" clearly invalidates the TIN issued against the plaintiff. Therefore, warrants a stay considering the nature, circumstances and facts of this case and the implication the declarations may have on the general*

public the defendant particularly in carrying out plaintiff's statutory roles of enforcing traffic laws in Fiji.

- e. If no stay is granted the defendant's appeal will be nugatory. The enforcement of law by issuance of TIN by the defendant will be entirely futile exercise at the expense of public funds.*
- f. They stay of execution is required in order to preserve the subject matter of the litigation.*
- g. The plaintiff will not be injuriously affected by the grant of stay since the declaratory order has the effect of allowing the plaintiff to benefit from a statutory offence.*
- h. The defendant's summons to fix security for costs was heard on 11 August 2020 and the court has dispensed with the requirement of payment of security for costs.*
- i. While the declaratory order is specific to the TIN issued against the plaintiff, its effect clearly undermines other TIN that has been issued by the defendant to other persons in Fiji.*
- j. The defendant is a statutory authority and part of the State and the plaintiff ought to have served the documents on the Attorney General's Office in compliance with the section 13 of the State Proceedings Act.*
- k. The appeal raised fundamental issues of both fact and law in relation to the defendant's authority to enforce traffic laws which includes the authority to issue traffic infringement notices, and has strong prospects of success.*
- l. The appeal is of paramount importance because the defendant's TIN matters pending in Court is most likely to be struck out in compliance with the declaratory order made in this Court.*
- m. The balance of convenience and status quo indicates that a stay of the declaration is necessary.*

[07] On the other hand, Mr Singh on behalf of the plaintiff contends that a stay order cannot be made in respect of a declaratory order. His contention revolves around:

- a. *The stay orders should not be granted.*
- b. *The declaration made by the Court is protecting the interest of the public.*
- c. *The declaration only states the rights of the plaintiff under the constitution and the validity of the TIN.*
- d. *The issue of service of documents on the Attorney General was not raised by the defendant initially when the proceedings were instituted against it. The issue was not raised until the stage of appeal.*
- e. *The plaintiff was required to serve the Office of the Attorney General. The defendant has waived its right to object on this ground. It was not raised at the initial proceedings. He relied on section 44 (a) of the Constitution.*

Discussion and determination

[08] The defendant applies to this Court for an order staying the execution of the declaratory judgment made by this court on 6 July 2020, whereby the Court declared the TIN No. 3589118 issued on 5 March 2019 is in breach of Section 14(2) and 15 of the Constitution and therefore *null and void*.

[09] The application is vehemently objected to by the plaintiff.

[10] Primarily, the application to stay hinges on the question whether a stay can be granted on a declaratory judgment.

[11] Counsel for the defendant had advanced his arguments on the basis that the declaratory judgment effectively declares that the Land Transport (Traffic

Infringement Notice] Regulations 2017 (*“Regulations 2017”*) is unconstitutional. This argument is, with due respect to counsel, incorrect and misconceived. The declaratory judgment made by the court does not declare that the Regulations 2017 is unconstitutional. What the court said in its judgment [at para 35] was that:

“[35] In the absence of the legitimate aim to meet by the reverse onus, it would be very hard for the court to decide that it (reverse onus) was proportionate means of a legitimate aim. In the circumstances, I would hold that R6 (c) of the regulation 2017 violates the right of presumption of innocence guaranteed under section 14 (2) (a) of the Constitution. Section 2 (2) of the Constitution declares that any law which is inconsistent with the Constitution is invalid to the extent of the inconsistency. Therefore, R 6 (c) is inconsistent with the Constitution, accordingly must be read subject to the Constitution. This translates that rule (R 6 (c)) must be read as “will be prosecuted in court”.”

[12] In its judgment, the court clearly says R 6 (c) of the Regulations 2017 is inconsistent with constitution, and accordingly must be read subject to the Constitution. The court then suggested that it (R 6 (c)) may be read as *‘will be prosecuted in court’* instead of the phrase *‘elect to dispute the fixed penalty in court’*. The court opined that R 6 (c) that elect to dispute the fixed penalty in court clearly has the effect of reverse onus meaning the person issued with a TIN must prove his innocence while the Constitution guarantees the presumption of innocence as a fundamental human right.

[13] It must be emphasised that the court by its declaratory judgment does not in any way declare that the entire provisions of the Regulations 2017 are in violation of the Constitution. The judgment relates only to R 6 (c), not to the entire provisions of the Regulations 2017. Therefore, the judgment does not preclude the defendant from carrying out its statutory role of enforcing traffic law in Fiji. However, it will be noted that only when it comes to R 6 (c) it must be read subject to the Constitution, i.e. read as *“will be prosecuted in court”* and acted accordingly.

[14] The impugned judgment is a declaratory judgment and not executory order which is enforceable by execution. It only declares that the TIN issued by the defendant against the plaintiff violates the Constitution and therefore *null and void*. It does declare the Regulations 2017 violates the Constitution.

Whether declaratory orders can be stayed pending appeal

[15] It is submitted on behalf of the plaintiff that the declaratory judgment could not be stayed. In support of his submission, he relies on *Registration Officer for the Suva City Fijian Urban Constituency v Ah Koy* [1994] FJCA 1; Abu0023d.92s (5 January 1994).

[16] In *Ah Koy* (above), Fiji Court of Appeal agreeing with the respondent's contention that there can be no stay order in respect of declaratory judgments said:

"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."

- [17] In the matter at hand, the court made a declaratory judgment that the TIN issued against the plaintiff violates the Constitution. It is not of coercive nature requiring execution like executory orders which are enforceable by execution. The appeal is lodged against the declaratory judgment. Since the judgment is only declaration which requires no execution, the question of stay pending appeal does not arise. In other words, the declaratory judgment cannot be stayed as there is nothing to stay. The application to stay can be refused on this ground alone. However, for completeness I consider other aspects as well.

The issue of service on the Office of the Attorney General

- [18] Counsel for the defendant contended that the defendant is a statutory authority and part of the State and the plaintiff ought to have served the documents on the Attorney General's Office in compliance with the section 13 of the State Proceedings Act.
- [19] On behalf of the plaintiff, it was submitted that the issue of service of documents on the Attorney General was not raised initially when the proceedings were instituted against it. As such, the defendant had waived its right to take issue of that matter now.
- [20] Apparently, the defendant did not raise such an issue during proceedings. It appears that the defendant is going to raise that issue in appeal for the very first

time. Generally, the appellant would not be able to raise a point which was not raised before the court below. It is unlikely that the defendant would succeed in raising this point for the very first time in appeal.

Failure to give notice to Attorney General under s. 44 (8) of the Constitution

[21] One of the grounds of appeal raises the issue of failure to give section 44 (8) notice to the Attorney General. Section 44 (8) of the Constitution states:

“(8) If the proceedings before the High Court relate to a matter concerning a provision of this Chapter, the High Court must not proceed to hear and determine the matter until it is satisfied that notice of the matter has been given to the Attorney-General and a reasonable time has elapsed since the giving of the notice for consideration by the Attorney-General of the question of intervention in the proceedings.”

[22] However, section 44 (9) says:

“(9) A notice under subsection (8) is not required to be given to the Attorney-General if the Attorney-General or the State is a party to the proceedings.” (Emphasis supplied)

[23] Undoubtedly, the defendant (LTA) is a statutory body, and therefore is part of the State. It is admitted in their submission. At paragraph 49 of the submission, the defendant admits that:

“49. The Defendant is a statutory authority and part of the State and the Plaintiff ought to have served the documents on the Attorney General’s Office in compliance with the Section 13 of the State Proceedings Act.” (Emphasis mine)

[24] Furthermore, the defendant has been granted exemption from the requirement for payment of security for costs for the appeal on the basis that it is part of the State.

[25] Counsel appearing for the plaintiff submitted that the defendant conceded that they are part of the State so that a notice under section 44 (8) was not required, and that even if it was required the defendant has waived their right to raise such objection by failing to raise it during the proceedings.

[26] The defendant was well aware from the beginning that the plaintiff had raised a matter concerning the Bill of Rights. The defendant being part of the State should have obtained the Attorney General's advice. Instead of getting advice of the Attorney General, the defendant had opted to engage a private lawyer to defend them in the proceedings.

[27] Again, the defendant intends to raise the section 44 (8) notice issue for the very first time in the appeal. Further, it appears to me that section 44 (9) has triggered and therefore such notice been not required given the fact that the defendant is part of the State.

Public interest in the proceeding, overall balance of convenience and *status quo*

[28] Comments of these aspects are not warranted as the declaration the court made cannot be stayed because it is only declaration and is not of a coercive nature. The defendant's power under the Regulation 2017 is not affected in any way by the declaratory judgment. Therefore, the question of public interest does not arise as the defendant argued.

Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory

[29] It was submitted on behalf of the defendant that by the effect and implication of such a declaratory order, the defendant will not only refund the fines paid by the plaintiff in breach of the relevant traffic laws, but also discharge the plaintiff from the breach.

[30] In this regard, the court must ask the following questions when considering an application for stay of execution pending appeal:

(a) If a stay is refused, what are the risks of the appeal being stifled?

(b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?

(c) *If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?*

(See *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 1915, LTL 18/12/2001)

[31] These questions do not arise here. Presumably, even if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, there would be no risks of the appellant (defendant) being able to recover what has been paid to the respondent (plaintiff). There is no evidence before the court that the defendant would be unable to recover what has been paid to the plaintiff in the meantime if a stay is refused and the appeal succeeds.

Conclusion

[32] For the reasons given, I conclude that a case for a stay pending appeal has not been made out. Accordingly, I would dismiss the application with costs to the plaintiff, which I summarily assess at \$600.00.

Outcome:

1. Application for stay pending appeal is refused.
2. Defendant shall pay summarily assessed costs of \$600.00 to the plaintiff.

M.H. Mohamed Ajmeer

16/10/20

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M.H. Mohamed Ajmeer

JUDGE



At Lautoka
16 October 2020

Solicitors:

Legal Department, Land Transport Authority of Fiji for applicant/defendant
Patel and Sharma, Barristers & Solicitors for the plaintiff/respondent