

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL ABU 76 of 2015**  
**(High Court HBC 45 of 2014)**

**BETWEEN** : **NEWWORLD LIMITED**  
*Appellant*

**AND** : **VANUALEVU HARDWARE (FIJI) LIMITED**  
*First Respondent*

**AND** : **BASHIR KHAN**  
*Second Respondent*

**Coram** : **Calanchini P**

**Counsel** : **Mr A K Narayan for the Appellant**  
**Mr F Haniff for the Respondents**

**Date of Hearing** : **9 December 2015**

**Date of Ruling** : **17 December 2015**

**RULING**

[1] This is a renewed application for a stay pending appeal. On 21 October 2015 the High Court delivered judgment on a preliminary issue pursuant to an order made by

the Master under Order 33 Rule 4 of the High Court Rules. The issue to be determined was whether a proposed tenancy agreement was null and void for want of prior written consent required by section 13 of the State Lands Act Cap 132. In his judgment the learned High Court Judge concluded that the purported agreement dated 25 January 2014 was null and void for want of prior written consent from the Director of Lands as required by section 13 of the State Lands Act. Costs were awarded in favour of the Respondents on an indemnity basis.

- [2] Being dissatisfied with that Judgment the Appellant filed and served a notice of appeal. The Appellant has complied with Rule 16 of the Court of Appeal Rules (the Rules) as to time and Rule 17 of the Rules as to proof of service and security for costs to prosecute the appeal.
- [3] Under Rule 34 of the Rules an appeal does not operate as a stay of execution unless the court below or the Court of Appeal otherwise orders. Pursuant to Rule 26(3) whenever an application, such as an application for 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 4 December 2015 the learned High Court Judge granted a stay of execution to the extent that he ordered the delivery of vacant possession of the rented premises to the Respondents on or before 4 January 2016.
- [4] It is as a result of that order that the Appellant renews his application for stay pending appeal before the Court of Appeal. Pursuant to section 20(1) of the Court of Appeal Act a justice of appeal may exercise the power of the Court of Appeal to grant a stay of execution pending the appeal.
- [5] At the outset it should be noted that the application before this Court is not an appeal from the decision of the High Court refusing a stay of execution pending appeal. This is a fresh application in the form of a renewed application. In an application such as is presently before the Court it is not the function of the Court of Appeal to review the decision of the learned High Court Judge. The Court is exercising a concurrent original jurisdiction.



- [6] The application was made by summons filed on 4 December 2015 and was supported by an affidavit sworn on 4 December 2015 by Raj Gopal Achariya. A supplementary affidavit sworn on 7 December 2015 by Raj Gopal Achariya was subsequently filed by the Appellant. The application was opposed. An answering affidavit sworn on 8 December 2015 by Bashir Khan was filed on behalf of the Respondents. The parties filed written submissions prior to the hearing of the application on 9 December 2015.
- [7] It is at this stage convenient to state briefly some of the background facts that are relevant to the application. The Appellant has been a tenant of the Respondents for some years. It was not disputed that there was an agreement between the parties dated 10 August 2006 for a sub lease of the premises for what turned out to be a total period of 8 years and expiring on 31 August 2014. It appears also not to be in dispute that the necessary consent under section 13 of the State Lands Act had been obtained from the Director of Lands in respect of that agreement and sub-lease.
- [8] It should be noted that the term of the agreement dated 10 August 2006 was three years with a right of renewal for a further 5 years for a total term of 8 years. Litigation had been pending in the High Court between the parties as to whether the right of renewal had been exercised by the Appellant. The Appellant claimed in his statement of claim in the present High Court proceedings that the earlier action had been settled by an agreement entered into between the parties on 25 January 2014. The purported agreement was to be effective from 1 January 2014 for 10 years at a monthly rental of \$26,000.00. There were other terms and conditions that need not be noted for the purposes of this application. Eventually the Respondents denied the existence of any such agreement. However before that defence was taken the Master had ordered that the preliminary issue of consent be dealt with first by the Court.
- [9] The issue before the learned High Court Judge was not whether the consent had been obtained in accordance with section 13 of the State Lands Act but rather whether consent was required to be obtained for the purported agreement entered into on 25 January 2014. The learned Judge held that consent was required and since it had not been obtained the purported agreement was null and void. I have to express some concern at the logic behind the suggestion that a purported agreement can be regarded as null and void. If there was no agreement as is claimed by the Respondents, it is

difficult to understand how it can subsequently be said to be null and void. Be that as it may the parties argued the matter before me on its merits as if there was agreement on 25 January 2014. Yet, that remains a live issue in the court below.

- [10] The effect of the decision of the learned High Court Judge is that the Appellant is now required to hand over to the Respondents vacant possession of the premises on or before 4 January 2016 unless this Court grants a stay pending appeal. The learned High Court judge refused the stay pending appeal but granted a stay of execution until 4 January 2016. The consequences for the Appellant if a stay is not granted are set out in some detail in the supporting affidavit sworn on 4 December 2015. The Appellant conducts a substantial supermarket business in Labasa town which will have to close down. There is no suitable alternative site for the immediate conduct of that substantial supermarket business. It is claimed that the business will be permanently affected, if not, ruined and the good will of the business irreparably lost.
- [11] On the other hand the Respondents point out that the Appellant has been in occupation of the premises for many months carrying on its substantial supermarket business without paying rent to the Respondents. The Respondents face grave financial hardship and also have the opportunity to enter into a leasing arrangement for a much higher monthly rental.
- [12] Before moving on to consider the principles to be considered by this Court in an application for stay pending appeal, it is necessary to draw a distinction between the jurisdiction of this Court and the jurisdiction of the Supreme Court. An appeal to this Court in its civil appellate jurisdiction against a final judgment of the High Court exercising its original jurisdiction lies as of right (section 12 of the Court of Appeal Act). The appeal is by way of re-hearing on the papers. An appeal to the Supreme Court in its civil appellate jurisdiction is an appeal in the strict sense as a court of error. The petitioner requires the leave of the Supreme Court and in order to obtain that leave the petitioner must satisfy one of the stringent tests that are set out in section 7(3) of the Supreme Court Act 1998. It follows that the principles upon which the Supreme Court will consider an application for a stay pending appeal will be more rigorous than those applied by this Court.



- [13] It should be noted that there are no guidelines set out in the Court of Appeal Act or the Rules as to the matters that should be considered in determining whether to exercise the discretion to grant a stay pending appeal. It should also be noted that although both parties have referred the Court to a number of decisions of this Court where the Respondent has been exercising a statutory function in the interests of the public, those decisions are of little relevance to the present proceedings.
- [14] The factors that should be exercised by this Court in an application such as is presently before the Court were identified in Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd (ABU 11 of 2004 delivered on 18 March 2005). Generally a successful party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay.
- [15] So far as the first factor is concerned the Second Respondent has deposed that the Respondents are in a position to enter into an agreement with a new tenant. If the stay is not granted and the appeal is successful then the Appellant will not be able to resume occupancy under the sub-lease, the existence of which is still an issue before the High Court. To that extent a successful appeal would be rendered nugatory. The balance of convenience favours the Appellant. In the event that a stay was not granted the Appellant would be required to close the supermarket and cease trading as it would appear there is no suitable alternative premises for the business. It is apparent that the overall balance of convenience and the status quo indicate that a stay should be granted.
- [16] The Respondent's principal objection to the granting of a stay pending appeal was that the appeal had no merit whatsoever. This Court is required to consider the bona fides of the Appellant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail.

It is usually sufficient if an appellant has an arguable case. If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment then the application should be refused.

[17] The grounds of appeal upon which the Appellant relies are set out in the notice of appeal filed by the Appellant. They are:

- “1. *The Learned Trial Judge’s decision is contrary to the evidence and the developing principles in the area of law relating to provisions of section 13 of the State Lands Act and similar legislation.*
2. *The Learned Trial Judge failed to properly consider and/or apply the relevant principles of law as to the determination of whether the Agreement dated 25<sup>th</sup> January, 2015 was illegal, null and void and misapplied the principles enunciated in **Prasad v Chand.***
3. *The Learned Trial Judge erred in law and in fact in not holding that the Director of Land’s consent endorsed on the Agreements entered between the Plaintiff, it’s predecessor’s and Defendants from 1991 acted as a general consent to the Appellant as opposed to any third party to any dealings by subletting or by virtue of the holding over clause in all the agreements.*
4. *The Learned Trial Judge failed to properly interpret and apply the holding over clause and his decision was contrary to the evidence led by the Plaintiff.*
5. *The Learned trial Judge erred in law in awarding indemnity costs in all the circumstances.”*

[18] In order for the appeal to be properly argued before the Court it is essential that the Appellant states the grounds of appeal with clear and concise particulars. This requirement was emphasized in **Nasese Bus Company Limited and Another –v- Muni Chand** (ABU 40 of 2011 delivered 8 February 2013) at page 32 of the unreported version:

*“Every notice is required to specify the precise form of the order which the appellant proposes to ask the Court of Appeal to make. The purpose of the Rule (Rule 15 of the Rules) is to narrow the issues in the appeal, to shorten the hearing and to reduce costs. This can only be achieved if the Appellant states in his notice of appeal the findings of fact and points of law which are in issue in the appeal.”*



[19] In my judgment ground one is not sufficiently particularized to satisfy the Court's requirements. Grounds 2 and 4 do not necessarily assist the Appellant to the extent that neither ground would lead to the conclusion that the orders of the learned High Court Judge were wrong. Ground 3, however, does raise a novel and, arguably, a point of some importance. In his oral submissions Counsel for the Appellant referred the Court to the decision of Patel -v- Reddy (1982) 28 Fiji LR 134 in support of his submission that in certain circumstances consent by the Director of Lands may be implied. In my judgment the point is sufficiently arguable to conclude that the appeal is not groundless.

[20] For all of the above reasons I have concluded that a stay pending appeal should be granted but upon strict conditions.

*I order:*

1. *A stay pending appeal is granted on the following conditions:*

- (a) *The Appellant is to pay the rent owing between 1 January 2014 and 31 August 2014 being \$12,000.00 per month for 8 months together with interest fixed at 5% within 7 days from the date of this judgment.*
- (b) *The Appellant is to pay the rent owing between 1 September 2014 to 30 November 2015 being \$26,000.00 per month with interest fixed at 5% within 7 days from the date of this judgment.*
- (c) *The Appellant is to pay the sum of \$26,000 as the monthly rent due on 1 December 2015 within 7 days from the date of this judgment.*
- (d) *The Appellant is to pay future monthly rent as and when it falls due until the determination of the appeal.*

2. *In default of any of the conditions set out in paragraph 1 hereof the stay order is discharged with immediate effect.*

3. *The Appellant is to file and serve within 14 days from the date of this judgment an amended notice of appeal with the grounds of appeal sufficiently particularised to enable the Respondents and the Court to determine on what basis it is claimed that the judgment in the court below was wrong. In default of service of such a notice the stay is discharged with immediate effect.*

4. *The appeal is to be listed for callover in March on a date to be fixed for hearing in the May 2016 session of the Court of Appeal. To that end the Appellant is required to lodge the appeal record in the Registry for certification by 28 February 2016. Thereafter the parties are directed to comply with Practice Direction No.1 of 2015.*
  
5. *In the event that the Appellant defaults in any of the directions that apply to the Appellant in paragraph 4 above, the stay is discharged with immediate effect.*
  
6. *The costs of the application are costs in the appeal.*



*W. Calanchini*

**Hon. Mr Justice W. D. Calanchini**  
**PRESIDENT, COURT OF APPEAL**