

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
APPELLATE JURISDICTION

CIVIL APPEAL NO. HBC 67 OF 2015

(On appeal from the High Court of
Fiji at Lautoka in the matter of Civil
Action No. HBC 67 OF 2015).

BETWEEN : **ANANTH AVIRAM REDDY** of Lautoka, Engineer/Law Graduate and
Businessman.

APPLICANT/DEFENDANT

AND : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED** a
duly registered limited liability company having its registered office at
Lot 11, Industrial Sub Division, Denarau Island, Nadi.

RESPONDENT/PLAINTIFF

Appearances : Mr A.K. Narayan (Jnr) for the respondent/plaintiff
Mr R. Singh for the applicant/defendant

Date of Hearing: 30 July 2018

Date of Ruling : 30 July 2018

RULING

[On setting aside application]

[01] The respondent/plaintiff (*the plaintiff*) seeks to set aside an interim stay of execution granted by the Court on 11 July 2018. The plaintiff relies on the affidavit of 20 March 2018 and filed on 21 March 2018. He did not file any affidavit in response to the affidavit filed by the applicant/defendant (*the defendant*) filed in support of the application for interim stay of execution pending the determination of the application for leave to appeal the learned Master's decision of 18 March 2016 out of time.

- [02] The grounds relied on by the defendant to set aside are that: 1. Misrepresentation and non-disclosure of material facts and 2. *functus*.
- [03] Mr Narayan appearing for the plaintiff argues that the court should not have granted the stay because there was non-disclosure of material facts and that the court is *functus officio* on the matter as the court had already refused the stay pending determination of their application for leave to appeal out of time. He submits that the interim stay should be set aside.
- [04] Mr Singh of counsel for the defendant submits that they did not particularize the material facts and that the Court is not *functus* as there is an application for seeking leave to appeal out of time, pending determination. He refers to me two case authorities: *Commissioner of Police v Wehrenberg* [2013] FJCA 114; ABU0024.2007 (1 November 2013) and *Ellis v Scott* [1964] 2 All E.R. (p 987) in support of his argument. He submits that the interim stay should not be set aside and the matter needs to be fully argued and that the court can consider the second application for stay on a different ground under change of circumstances.
- [05] In *Ellis* case (above), Sachs, J granted a stay on the second application where there were special circumstances.
- [06] In *Wehrenberg* (supra), the Fiji Court of Appeal said (at para 34):
- “Although the learned trial Judge in the course of his interim judgment dealt with the matters set out in the affidavits of the parties he did not make final conclusive orders regarding the declarations and the damages sought by the Respondents. The Appellant made the submission that the Judge was functus officio when he made the final judgment. The authorities submitted in support that submission Re: VGM Holdings Ltd [1941] 3 All ER 417; In re Laucala Beach Holdings Ltd [2003] FJHC 108; HBE0073D.2001S (30 may 2003) are not relevant to the present case as they are applicable in totally different situations.”*
- [07] The Court granted an interim stay considering the change of circumstances under the new ground-the application for bankruptcy on the second application.

The earlier order the court made on the first application for stay was an interim and not a final order.

[08] There is no affidavit sufficiently particularizing the non-disclosure of material facts and the issue of *functus officio* needs to be fully argued. The Court has granted only an interim stay and not a final order. The matter can still be fully argued *inter partes*.

[09] I am not satisfied why I should set aside the interim stay I granted on 11 July 2018. I would, therefore, refuse to set aside the interim stay but without costs.

[10] The matter is now adjourned for *inter partes* hearing at 9.30 am on 12 September 2018.

The Result

1. Application to set aside is refused.
2. No order as to costs.
3. The matter is adjourned for *inter partes* hearing at 9.30am on 12 September 2018.

M.H. Mohamed Ajmeer
30/7/18

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M.H. Mohamed Ajmeer

JUDGE

At Lautoka
30 July 2018

Solicitors:

For the plaintiff: M/s AK Lawyers, Barristers & Solicitors

For the defendant: M/s Patel & Sharma, Barristers & Solicitors

