

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

**CIVIL ACTION NO. HBC 40 OF 2014**

**BETWEEN** : **DHIMANT PATEL** of Mountain View, Nadi, Retired. **PLAINTIFF**

**AND** : **COURTS (FIJI) LIMITED** a limited liability company having its registered office at 123 Ratu Mara Road, Samabula trading as **COURTS MEGASTORE** Votualevu, Nadi. **DEFENDANT**

**Appearances** : Mr R. Gordon for applicant  
Mr E. Moapa for plaintiff/respondent  
**Date of Hearing** : 3 September 2019  
**Date of Ruling** : 18 September 2019

**R U L I N G**  
[on stay pending appeal]

**Introduction**

- [01] This is an application by the New India Assurance Company Limited (*the applicant*) for stay of enforcement of judgment, pending appeal (*the application*).
- [02] The application is supported by an affidavit of Ranjani Narayan, Insurance Officer of the New India Assurance Company Limited.
- [03] The plaintiff/respondent (*the plaintiff*) opposes the application and filed an affidavit in opposition sworn by Dhimant Patel, the plaintiff.
- [04] At the hearing both parties made oral submissions.

## **Background**

- [05] The Court has, after a trial, pronounced a judgment in favour of the plaintiff in the sum of approximately \$16,000.00. The New India Assurance Company Limited, the applicant has appealed the judgment to the Fiji Court of Appeal stepping into shoes of the defendant. The appeal is yet to be heard. The applicant has paid the security for costs. In the meantime, the plaintiff has commenced enforcement process. He has issued a statutory demand notice against the defendant. The applicant applies for a stay of execution pending final determination of the appeal.

## **The Law**

- [06] Rule 34 of the Court of Appeal Rules ('CAR') says an appeal does not operate as a stay of execution.
- [07] CAR, R 26(3) provides: "wherever under these Rules an application, may be made either to the court below or to the Court of Appeal, it shall be made in the first instance to the court below.

## **The Principal on Stay**

- [08] The Fiji Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU 11 of 2004, 18 March 2005, set out the principles on stay pending appeal as follows: "(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative); (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."

## **Discussions**

- [09] The applicant seeks a stay of execution pending appeal. The applicant is not the defendant against whom the judgment was pronounced but the defendant's Insurance Company. The Insurance Company has filed the supporting affidavit through its Insurance Officer. The applicant Insurance Company standing in the shoes of the defendant has appealed the judgment delivered against the defendant in the sum of approximately \$16,000.00.

- [10] The defendant did not file an affidavit to demonstrate its ability to pay the judgment sum if the appeal were unsuccessful. The enforcement process has been initiated against the defendant, not against the Insurance Company.
- [11] The plaintiff objects to the affidavit filed by the Insurance Company on the grounds that:
1. *The Insurance Company should have been informed of the incident from the very outset of the High Court Proceedings. The defendant had a duty to disclose details of the incident to the Insurance.*
  2. *The Insurance Company cannot and is barred by legislation to defend and step into the shoes of the defendant at the enforcement of judgment stage.*
  3. *There was no form of appearance or any offer for settlement by the Insurance Company.*
- [12] Another objection taken by the plaintiff in respect of the affidavit in support was that the contents of the affidavit are just bare statements except paragraph 1, 7 and 12, which contradicts O 41, R 5 of the HCR.
- [13] The HCR, O 41, R 5(1) states that "... an affidavit may contain only such facts as the deponent is able of his or her own knowledge to prove, and R 5 (2) ... that an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof".
- [14] The applicant's supporting affidavit simply states, without the source, the Insurance Company has the means and ability to pay any sum that may be adjudged owing to the plaintiff if the appeal is unsuccessful.
- [15] The winding up process has commenced, as means to enforce the judgment, against the defendant company and not against the Insurance Company. Therefore, Insurance Company cannot apply for the discharge of the statutory demand issued against the defendant company invoking section 516 of the Companies Act.
- [16] I uphold the preliminary issue raised by the plaintiff that the supporting affidavit carries bare statements without the source and the grounds thereof and that the Insurance Company cannot step into the shoes of the defendant at the

enforcement of judgment stage. It follows that there is no proper supporting affidavit filed by the defendant.

[17] For the reasons set out above, I would refuse to grant a stay of execution, pending appeal, with summarily assessed costs of \$500.00 payable to the plaintiff by the applicant within 14 days.

**The result**

1. Stay pending appeal refused.
2. Applicant shall pay summarily assessed costs of \$500.00 to the plaintiff within 14 days.

*M.H. Mohamed Ajmeer*  
18/9/19

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**M.H. Mohamed Ajmeer**  
**JUDGE**



**At Lautoka**  
**18 September 2019**

**Solicitors:**

For the applicant: Gordon & Co, Barristers & Solicitors

For the respondent: Babu Singh & Associates, Barristers & Solicitors