

**IN THE HIGH COURT OF FIJI AT LABASA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 39 of 2011**

**BETWEEN** : **RAJENDRA MANI NAIDU**

**PLAINTIFF**

**AND** : **FIJI FOREST INDUSTRIES LIMITED**

**DEFENDANT**

**BEFORE** : **Hon. Justice Kamal Kumar**

**COUNSEL** : Mr A. Ram for the Applicant (Defendant)  
Mr K. Padiyachi (on instructions) for the Respondent  
(Plaintiff)

**Date of Hearing** : 11 July 2014

**Date of Ruling** : 13 October 2014

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**RULING**  
**(Application for Stay of Execution)**

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## **1.0 Introduction**

1.1 On 15 April 2014, the Applicant (Defendant) made Application by Notice of Motion dated 7<sup>th</sup> April 2014, seeking following Orders:-

*“(a) That the orders granted on 18<sup>th</sup> February 2014 by the Honourable Justice Brito-Mutunayagam in this action be stayed pending the final determination of the Appeal.*

*(b) That the costs of this application be costs in the cause.”*

1.2 On 12 May 2014, his Lordship Justice Brito-Mutunayagam directed parties to file Affidavits, granted interim stay until final determination of the Stay Application and adjourned the Application before Master to finalise hearing date for the Application.

1.3 On 13 June 2014, the Master directed parties to file Submissions and adjourned the Application to 11 July 2014, for hearing.

1.4 Following Affidavits were filed on behalf of the parties:-

### **For Applicant**

- (i) Affidavit in Support of Kamlesh Narayan sworn on 4 April 2014;
- (ii) Affidavit in Reply of Nita Smith sworn on 9 June, 2014.

### **For Respondent**

- (i) Affidavit in Opposition of Rajendra Mani Naidu sworn on 20 May 2014;
- (ii) Affidavit in Reply of Rajendra Mani Naidu sworn on 12 June 2014.

1.5 Parties also filed Submissions.

## **2.0 Background Facts**

2.1 The claim in this action arose out of workplace accident on 11 November 2009, because of alleged negligence of the Applicant (employer) as a result of which Respondent (employee) received injuries.

- 2.2 Applicant denied the allegation of negligence on its part and alleged that Respondent sustained injuries due to his negligence or alternatively he was contributory negligent.
- 2.3 Trial was held on 17 May 2013, and Judgment was delivered on 18 February 2014.
- 2.4 In his Judgment the Learned Trial Judge held that Applicant was negligent in failing to provide safe system of work and dismissed Applicant's claim that Respondent contributed to his injuries.
- 2.5 The Learned Trial Judge ordered Applicant to pay Respondent a sum of \$119,138.50 in damages plus \$5,000.00 costs.
- 2.6 On 31 March 2014, Applicant filed Notice and Grounds of Appeal in following terms:-

"1. *The Learned Trial Judge erred in law and in fact in holding that the Defendant:-*

- (a) failed to provide a safe and proper system or working;*
- (b) failed to supervise and take precaution;*
- (c) exposed the Plaintiff to risk of damage or injury;*
- (d) was negligent;*

*and failed to properly and/or adequately evaluate all the evidence as to liability.*

2. *The Learned Trial Judge erred in law and in fact in holding that the supervisor DW3 did not give instructions when he had done so.*
3. *The Learned Trial Judge erred in law and in fact in interpreting the course of events wrongly.*
4. *The Learned Trial Judge erred in law and in fact in concluding as to*

liability through a misunderstanding of the actual process of sanding ply boards.

5. *The Learned Trial Judge erred in law and in fact in holding in paragraph 6.10 that the documents did not attribute fault to the Plaintiff when the report did not address the issue of fault at all.*
6. *The Learned Trial Judge erred in law and in fact in holding that “no training” and “no supervision” was provided and in implying that the former resulted in the latter.*
7. *The Learned Trial Judge erred in law and in fact in holding that the sanding machine was defective when there was no evidence to base the conclusion on.*
8. *The Learned Trial Judge erred in law and in fact in holding at paragraphs 6.11 and 6.18 that Section 10 and 36 of the Factories Act were breached when:-*
  - (a) *the same were not pleaded;*
  - (b) *no moving parts needed to be guarded.*
9. *The Learned Trial Judge erred in law and in fact in holding that the machine was dangerous and the danger was foreseeable and avoidable when such finding was against the weight of evidence and the pleadings did not assert the same.*
10. *The Learned Trial Judge erred in law and in fact in holding that res-ipsa-loquitor applied in the instant case when the same was inapplicable and there was no evidence that the sanding machine was designed to take the board in, and not eject it. Neither did the Defendant have to disprove its negligence.*
11. *The Learned Trial Judge erred in law and in fact in holding that there was no contributory negligence and holding that pleading the*

*contributory negligence by the Defendant re-enforced the Defendant's breach when the same was pleaded in the alternative.*

12. *The Learned Trial Judge erred in law and in fact in holding that DW3's evidence was not believable and yet believing the Plaintiff's evidence when the Plaintiff was found to be unreliable nor credible.*
13. *The Learned Trial Judge erred in law and in fact in holding that the Plaintiff was entitled to \$60,000 for pain and suffering and loss of amenities of life when the same was:-*
  - (i) *not comparable to other similar awards;*
  - (ii) *exorbitant in all the circumstances of the case;*
  - (iii) *and the Plaintiff's evidence as to the extent to pain and suffering was not believed in light of contrary medical reports and behaviour in Court.*
14. *The Learned Trial Judge erred in law and in fact in holding that the Plaintiff was entitled to a multiplier of 8 when a lower multiplier ought to have been used.*
15. *The Learned Trial Judge erred in law and in fact in not taking into consideration the fact that the Plaintiff was a casual labourer who gave evidence that the work was intermittent and not regular.*
16. *The Learned Trial Judge erred in law and in holding that the Plaintiff had altogether lost his capacity to work when the evidence was otherwise.*
17. *The Learned Trial Judge erred in law and in fact in not taking into account that compensation by way of weekly salaries had been paid to the Plaintiff.*
18. *The Appellant reserves the right to alter or add further grounds of appeal on the availability of the copy record."*

- 2.7 Security for Costs of Appeal has been determined and paid by the Defendant.

### 3.0 Application for Stay

- 3.1 Order 45 Rule 10 of the High Court Rules provides:-

***“10. Without prejudice to Order 47, rule 1, 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 on the ground of matters which have occurred since the date of the judgment or order and the Court may be order grant such relief, and on such terms, as it thinks just.”***

- 3.2 It is well established and undisputed that the Courts have unfettered discretion to either grant or refuse stay of execution.

- 3.3 However, discretion should be exercised judicially and in the interest of justice depending on circumstances of each case.

- 3.4 Courts have over number of years identified various factors that need to be considered in determining application for stay of execution of judgment.

- 3.5 In **Chand v. Lata** [2008] FJHC; Civil Action No. 38 of 2011 (18 July 2008) identified the principles governing stay of execution as follows:-

“1. The grant or refusal of a stay is a discretionary matter for the Court: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union**, citing **AG v. Emberson** (1889) 24 QBVC, at 58, 59

2. The Court does not make a practice of depriving a successful litigant of the fruits of litigation by locking up funds to which *prima facie* the litigant is entitled, pending an appeal: **Fiji Sugar Corporation Limited v. Fiji Sugar & General**

**Workers' Union**, citing *Supreme Court Practice* 1979, p. 909; **The Annot Lyle** (1886) 11 PD, at 116 (CA); **Monk v. Bartram** (1891) 1 QBV 346

3. When a party is appealing, exercising an undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Wilson v. Church** (No. 2)(1879) 12 ChD, at 456, 459 (CA)
4. If there is a risk that the appeal will prove abortive if successful and a stay is not granted the Court will ordinarily exercise its discretion in favour of granting a stay: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Scarborough v. Lew's Junction Stores Pty Ltd** (1963) VR 129, at 130
5. In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **AG v. Emberson**
6. A stay will be granted where the special circumstances of the case so require, that is, they justify departure from the ordinary rule that a successful litigant is entitled to the fruits of the litigation pending the determination of any appeal: **Prasad v. Prasad** [1997] FJHC 30; HBC0307d.96s (6 March 1997), citing **Annot Lyle** (1886) 11 PD 114, at 116; **Scarborough v. Lew's Junction Stores Pty Ltd** (1963) VR 129, at 130; and see also **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**
7. In exercising its discretion the Court will weigh consideration such as balance of convenience and the competing rights of the parties before it: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **AG v. Emberson**

8. As a general rule, the only ground for a stay of execution is an Affidavit showing that if the damages and the costs were paid there is not reasonable probability of getting them back if the appeal succeeds: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**, citing **Atkins v. GW Ry** (1886) 2 TLW 400
9. Where there is a risk that a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion, refuse the application: **Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union**

3.6 In **Natural Water of Fiji Limited v. Crystal Clear Mineral Water (Fiji) Limited** [2005] FJCA 13 ABU0011.2004S (18 March 2005) Fiji Court of Appeal stated as follows:-

*"The following non-comprehensive list of factors conventionally taken into account by a court in considering a stay emerge from **Dymocks Franchise Systems (SW) Pty Ltd v. Bilgola Enterprises Ltd** (1999) 13PRNZ 48, at p.50 and **Area One Consortium Ltd v. Treaty of Waitangi Fisheries Commission** (12993) 7PRNZ 2000:*

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

3.7 In **Murthi v. Patel** [2000] FJCA 17; ABU0014.2000S (5 May 2000) his Lordship Justice Ian Thomson JA (as he then was) stated as follows:-

*“A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if an appellant shows that he has a good arguable case to present on the hearing of the appeal and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favour.”*

3.8 The basis of Applicant’s Application for Stay of Execution of the Judgment as stated in the Affidavit and Submissions filed/made by the Applicant are:-

- (i) Applicant has good grounds of appeal on issue of liability and quantum which has real chance of success;
- (ii) If stay is granted appeal will be rendered nugatory as Respondent is unemployed and has no financial means;
- (iii) Respondent or no Third Party will be injuriously affected by the grant of stay;
- (iv) Applicant will prosecute the Appeal expeditiously;
- (v) Applicant is insured;
- (vi) Respondent is also appealing the judgment on quantum.

3.9 Respondent on the other hand claims that:-

- (i) Applicant's appeal has no merits and has no likelihood of success;
- (ii) He is unemployed and is prejudiced by not receiving any compensation from date of injury;
- (iii) Respondent has cross-appealed on issue of quantum.

3.10 Before I deal with the Application for Stay of Execution I think it is appropriate that I comment on certain aspects of Affidavits sworn by the Respondent.

3.11 At paragraph 6 of his Affidavit in Opposition sworn on 20<sup>th</sup> May 2014, he stated as follows:-

*"I deny paragraph 4 of the said affidavit and say that the defendants appeal has got no merits and has no likelihood of success whatsoever."*

3.12 It is not disputed that Respondent has no legal qualification and therefore is not in a position to make statements on merits or demerits of the appeal.

3.13 If Respondent has been advised by his legal advisors then he should state that rather than making it appear that it is his statement.

3.14 In the same token I note at paragraph 4 of Kamlesh Narayan's Affidavit in Support sworn on 4 April 2014, and filed on behalf of the Applicant he states as follows:-

*"4. I am informed and verily believe that the Defendant has good grounds to pursue a successful appeal."*

3.15 Just stating I am informed is not good enough. In such circumstances the deponent must state the source of information and that he believes in the information.

3.16 At paragraph 12 of Respondent's Affidavit in Reply sworn on 12 June 2014, he states as follows:-

*"I say that QBE Insurance is a company which is renowned for dubious dealings unscrupulous behaviour and dishonest conduct."*

3.17 I agree with Applicant's Submission that above statement is quite damaging to QBE Insurance and is made without any evidence to substantiate the allegation made therein. The fact that Applicant is exercising its right of appeal does not call for such defamatory allegations to be made against it.

3.18 The deponent of Affidavits and his/her legal advisors should consider the consequence of making such allegations without any basis before Affidavits are sworn.

3.19 At paragraph 12 of Respondent's Affidavit in Opposition sworn on 20<sup>th</sup> May 2014, he states that:-

*"By reasons of the stay, I will be prejudiced and there is likelihood this appeal will not be determined in the next five years."*

3.20 Once again Respondent has not stated the basis upon which he made such a statement. Had he or his legal advisor conducted any research as to how long it takes for an appeal to be disposed off under current system of case management then they should have stated so, rather than making unfounded statements without any evidence and which lacks merit.

3.21 Generally, where a party is represented by Legal Practitioner the Legal Practitioner drafts the Affidavits on behalf of the litigant as it appears to be the case here.

3.22 Legal Practitioners and the litigants should take heed of the fact that Affidavits filed in any matter should only address the facts/information with supporting evidence and source of information which are relevant to the issue in question before the Courts and under no circumstance should

Affidavits be used as a means for character assassination or to defame the opposing party or any third party or used (Order 41 Rules 5 and 6 of the High Court Rules) for any ulterior motive.

- 3.23 Any allegation such as the ones made by the Respondent and quoted at paragraphs 3.16 and 3.19 hereof may lead to serious consequences for the deponent and the drafters of the Affidavit.
- 3.24 In view of the comments made above I have disregarded the statements in the Affidavit of Respondent which are referred to at paragraphs 3.11, 3.16 and 3.19 of this Ruling.
- 3.25 The Applicant in its submission raised objection to filing of Affidavit in Reply sworn on 12 June 2014 by the Respondent without Leave of the Court.
- 3.26 The parties, Legal Practitioners and registry staff should always pay heed to and comply with Courts direction in respect to filing of Court documents.
- 3.27 This is to ensure that Interlocutory Applications are disposed off in a timely and efficient manner.
- 3.28 If parties intend to file any documents in addition to documents that are directed to be filed by Court then the parties should seek Leave of the Court to do so.
- 3.29 Since the Respondents Affidavit in Reply sworn on 12 June 2014 does not raise any new matters I will grant Leave for its use in respect to the Application for Stay of Execution which is of course subject to my comments in paragraphs 3.11 to 3.24 of this Ruling.
- 3.30 I will now consider the principles and factors relating to Application for Stay of Execution.

**Whether Appeal If Successful Will Be Nugatory**

- 3.31 Respondent has in his Affidavit sworn on 20 May 2014, stated that he has been unemployed after the accident. Accident took place on 11 November

November 2009. It is not disputed that Respondent is unemployed and will not be in a position to repay the judgment sum if it is paid to him once appeal is determined in Applicant's favour.

### **Bona Fides of the Appeal as to Prosecution of the Appeal**

- 3.32 Based on the Affidavit evidence I have no doubt that the Applicant has done all that can be done by Applicant to prosecute the Appeal diligently and it has not in any way delayed the progress of the Appeal.
- 3.33 If the parties are waiting for Learned Trial Judges notes to compile Copy Record then no fault can be attributed to the Applicant.

### **Whether Respondent will be Injuriouslly Affected by the Stay**

- 3.34 Respondent has stated in his Affidavit evidence that he has been unemployed after date of accident which is 11 November 2009.
- 3.35 The Learned Trial Judge made finding that the Respondent has *"lost his pre-accident earning capacity to work as a mechanic or labour."*
- 3.36 Whilst I agree that a stay pending determination of the Appeal will not injuriously affect the Respondent it will nevertheless cause him some discomfort and difficulty financially.

### **Effect on Third Party, Novelty And Importance of Question Involved And Public Interest in the Proceeding**

- 3.37 I agree with Applicant's submissions that there's no issue of any third part being affected, no novel question is to be determined or there is no public interest in this proceedings.

### **Chances of Appeal Succeeding**

- 3.38 It is apparent from the grounds of appeal on the issue of liability mostly challenge finding of facts by the Learned Trial Judge based on evidence of witnesses.
- 3.39 It is well established that the Appellate Court will only interfere with findings of facts by the lower courts in exceptional circumstances for the reason that

it is the Trial Judge who has the opportunity to hear the witnesses and assess the credibility of their evidence in Court.

- 3.40 In **Rae v. International Insurance Brokers (Nelson Marlborough) Ltd** [1997] 3 NZLR 190 (CA) his Honour Justice Thomas at page 199 stated as follows:

*“As the evidence unfolds the trial judge gains an impression from the evidence which is not necessarily or usually apparent from the cold typeface of the transcript of that evidence on appeal. The Judge forms a perception of the facts in issue from which he or she adds or subtracts further facts as witnesses give their evidence, and so obtains as complete a picture as is possible of the events in issue. The Judge perceives first hand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result.*

*An appellate Court has none of these advantages and must acknowledge that the Court at first instance is far better placed to determine the facts. Indeed, it would be an arrogance for an appellate Court to assert the capacity to be able to “second-guess” a trial Judge’s findings of facts when it does not share those advantages. Exceptional caution in departing from the trial Judge’s findings of fact are therefore regarded as imperative.”*

- 3.41 In **Stutchbery v. Tappoos Holdings Ltd** [2005] FJCA 12; ABU0034.2004S (18 March 2005), Fiji’s Court of Appeal adopted from comments made by his Honour Thomas J in **Rae’s** case and stated as follows:-

*“An appellate court will not reverse the trial judges finding of fact unless there is clear and irrefutable evidence that the finding is erroneous.”*

- 3.42 Applicant also appealed against finding on issue of contributory negligence and award of damages that may have some chance of success.
- 3.43 It is not appropriate for this Court in dealing with Application for Stay of Execution of Judgment to go into detailed examinations of the grounds of appeal as to do so would be stepping in the shoes of the Appellate Court. All the Applicant has to show is that the grounds of appeal have some prospect of success.

3.44 As indicated earlier, I am of the view that even though Applicant may have no or very little chance of success to have findings of facts on issue of Applicant's negligence reversed, Applicant may have some prospect of success on the issue of contributory negligence and award of damages.

#### **Both Parties Appealing The Judgment**

3.45 Applicant submits that since both parties are appealing against the Learned Trial Judge's Judgment a stay should be granted automatically.

3.46 This submission is totally misconceived for the following reasons:-

- (i) Respondent is appealing against the order on quantum only;
- (ii) If Respondent's appeal is successful then the award of damages payable to him will increase;
- (iii) If Respondent's appeal is unsuccessful then award of damages remain undisturbed as far as Respondent's Appeal is concerned.

3.47 The fact that Respondent has appealed against the quantum of damages does not entitle Applicant for automatic stay of execution of Learned Trial Judge's Judgment. It also is not a relevant factor in favour of granting stay of execution.

#### **Balance of Convenience/Interest of Justice**

3.48 I have taken following into consideration in assessing balance of convenience:-

- (i) If stay of execution is not granted on full judgment sum then appeal will be rendered nugatory;
- (ii) Even though Applicant may have no or little chance of success in respect to finding on Applicant's negligence it has some chance of success in respect to finding on contributory negligence and amount of damages;

- (iii) If judgment sum is paid to Respondent then it may not be recovered if Applicant's appeal on issue of liability is successful;
- (iv) Whilst Respondent will not be injuriously affected by any stay pending determination of appeal he is financially disadvantaged to some extent;
- (v) QBE Insurance will be paying the judgment sum as insurer and their ability to pay the judgment sum is not doubted;
- (vi) Injury took place on 11 November 2009 and since then Respondent has been unemployed;
- (vii) QBE Insurance by its Counsel have undertaken to pay judgment sum in Court;
- (viii) Respondent does not oppose stay of execution in its entirety but wants 50% of judgment sum to be paid to him as a condition for granting stay.

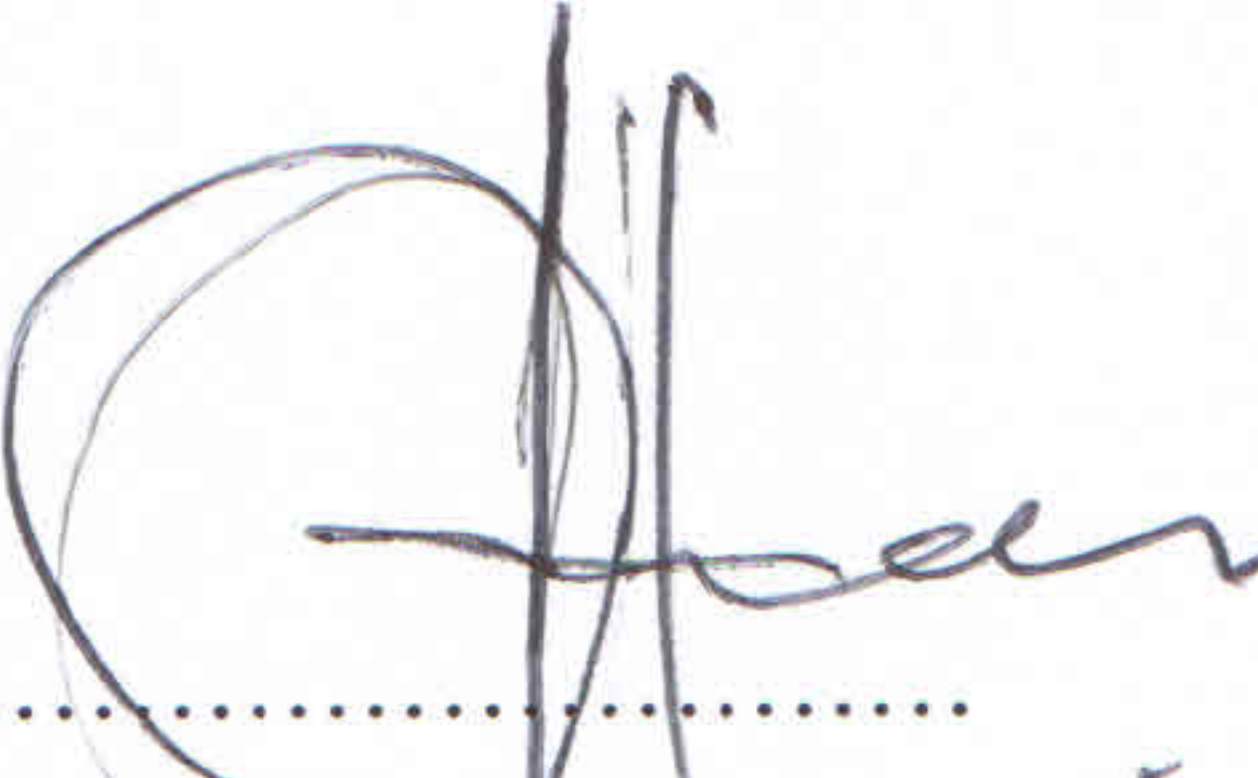
3.49 After consideration of above factors and in the interest of justice I am of the view that a conditional stay of execution should be granted.

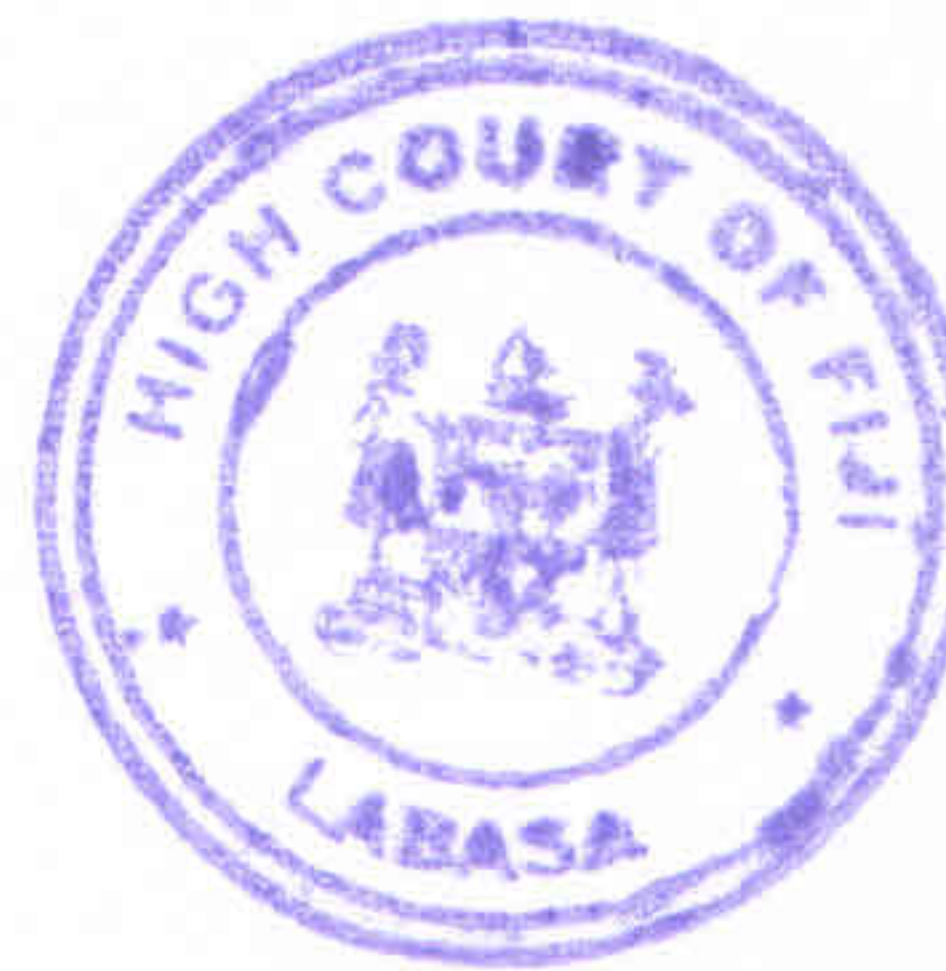
#### **4.0 Conclusion**

I make following Orders:-

- (i) Execution of Judgment of his Lordship Justice Brito Mutunayagam delivered on 18 February 2014 be stayed until final determination of the Appeal on the condition that Applicant (Defendant) pay a sum of \$15,000.00 to the Respondent (Plaintiff) within seven (7) days of this Ruling;
- (ii) The sum of \$15,000.00 to be paid pursuant to preceding paragraph is to be deducted from any judgment sum to be paid to the Respondent (Plaintiff) upon determination of the Appeal;

- (iii) Applicant (Defendant) do pay Respondent's (Plaintiff) costs of the Application for Stay of Execution assessed in the sum of \$1,000.00.

  
.....  
K. Kumar  
**JUDGE**



At Labasa

13 October 2014

Gibson & Co for the Applicant (Defendant)  
Maqbool & Co for the Respondent (Plaintiff)