

IN THE EMPLOYMENT RELATIONS COURT AT SUVA
CENTRAL DIVISION
CIVIL JURISDICTION

ERCC 08 of 2015

BETWEEN: **DAMODARAN NAIR**

APPLICANT

AND: **FIJI PUBLIC SERVICE ASSOCIATION**

RESPONDENT

Date of Hearing : 5th October 2023
For the Applicant : Mr Nair D.
For the Respondent: Ms Rakai M.
Date of Decision : 28 November 2023
Before : Levaci, SLTTW Acting Puisne Judge

RULING
(APPLICATION FOR STAY PENDING APPEAL)
APPLICATION FOR COMPLIANCE ORDERS)

Reliefs and background

1. In a Judgment delivered by the High Court after trial, it was determined that the Plaintiff/Applicant (compliance order applications) was unlawfully and unfairly terminated whilst working at FPSA and that he should be paid \$35,000 for unlawful and unfair dismissal with costs to the sum of \$5,500.00.
2. Following on from that Judgment, two applications have been filed in this Court.

3. The first application is to seek for Compliance Orders (“CO Application”) pursuant to section 221 (1) (b) of the Employment Relations Act 2007 made by the Plaintiff/Applicant.
4. The Second application, filed by the Defendant few days thereafter, sort for Stay Pending Appeal (“SPA Application”).
5. The Court heard both applications together giving parties the liberty to make submissions in law and refer to their Affidavits pertaining to their respective application. My Ruling is based on both the applications.

Affidavit evidences

Compliance Orders Application

6. The Plaintiff/Applicant (COA Application) relies upon his Affidavit which states as follows—

“4That the Respondent was required to comply with the said Order (s) of Madam Justice Wati within twenty-one [21] days from 21 July 2023 in the absence of any Stay granted by the Fiji Court of Appeal on the trial judge, in any event, the Respondent is required to comply with the costs ordered in the Judgment.

5. That I further say by merely filing an application for Stay on 17 August 2023 does not constitute a Stay of the Judgment unless the Fiji Court of Appeal said judgment required the Respondent to comply with the orders within 21 days whereas there has not been any compliance nor stay in the execution of the orders granted by the Fiji Court of Appeal.

6. That the Respondent in its Notice of Appeal before the Employment Court is seeking Stay of the Judgment of Madam Justice Wati and has also filed a similar application in this Court seeking the same relief. In this aspect, I say that the Respondent by invoking two different jurisdictions seeking the same relief has abused Court process. Copy of the Notice of Grounds of Appeal filed in the Court of Appeal are annexed as **DN2**. That the Respondent has willfully defied the orders of Madam Justice Wati and deprive me of the fruits of litigation and I pray for the orders sought in my motion to be granted and the Stay application filed by the Respondent in this Court be struck out for abuse of court process with courts.”

7. In reply to the Application COA Application, the Respondent's Affidavit is as follows –

“4. That in Response to paragraph 4 the Applicant is misleading the Court as the Judge gave the Respondent within a month to pay the Judgment sum which is due on 2st August 2023. However, prior to the due date on 18th August 2023 the Respondent filed an application for stay of proceedings as it is appealing the High Court decision. The Respondent has filed and served its Notice and Grounds of Appeal in the Fiji Court of Appeal on 17th August 2023. The Chief Registrar has dealt with security of costs application on 30th August 2023 and ordered that \$2000.00 be paid within 30 days. The Applicant has filed a cross-appeal on 21st August 2023 so cannot have an appeal and also ask for compliance too.

5. That in response to the contents of paragraph 5 the stay application although filed earlier on 18th August 2023 was issued late which is the prerogative of the High Court Civil Registry. The Respondent submits that this Court ought to grant a stay because even the Applicant has filed a cross-appeal on 21st August 2023 and there is an Appeal before the Fiji Court of Appeal by us. The Notice and Grounds show that there are merits in the appeal and we should await the outcome in the next Court.

6. That in response to paragraph 6 the Respondent is before this Court which is the same court which issued the ruling for a stay and this will be dealt with during the hearing. The Respondent seeks that this compliance application be struck out with costs on an indemnity basis.

7. The Applicant is misleading the Court by saying that the Respondent has willfully defying the orders when there is a stay application before the Court for determination an appeal in the Court of Appeal. The Respondent has also filed an Appeal which is the right of every litigant. If the Court compels the Respondent to pay out \$40,500.00 and the appeal is reversed it will be very difficult for the Respondent to recover the said amount from the Applicant. The Applicant could also further appeal so it would be prudent that no orders for compliance be granted based on the circumstances of the case.”

Application for Stay pending Appeal

8. The Defendant/Applicant has also filed an Application for SPA together with an Affidavit as follows:

5. That the original Respondent/Applicant in this proceedings, Fiji Public Service Association seeks a stay of all the remedies set out in Paragraph 93 of the ruling of Justice Anjala Wati of Friday 21st July 2023 until the determination of the Notice and Grounds of Appeal.

6. The final orders of High Court Judge Justice Anjala Wati are as follows –

(a) The total sum of monies in the sum of \$40,500 (Forty Thousand five hundred dollars) inclusive of costs to be paid within a month from the date of the order which is Friday 21st July 2023;

7. That if the original Respondent/ Applicant in this proceedings Fiji Public Service Association were to pay the Original Applicant/Respondent, Damodaran Nair the total sums of monies in the sums of \$40,500 (Forty Thousand Five Hundred Dollars) before the determination of the Appeal there is no guarantee that it would be able to recover the monies after the Appeal is dealt with in the proceedings.

8. That the Original Respondent/Applicant in this proceedings, Fiji Public Service Association has many assets and is one of the largest trade unions in Fiji and is in a position to pay the monies once the Appeal is finalized and determined by the Fiji Court of Appeal. An example of one of the properties owned by the Original Respondent/Applicant in this proceedings, Fiji Public Service Association is Sports City which is valued approximately at F\$52,000 (Fifty Two Thousand Dollars) (VEP). Attached and marked “B” is a copy of the valuation of the property.”

9. The Plaintiff/Respondent has filed an Affidavit in Reply to the SPA as follows –

“2. In reply to paragraph 4, I say the deponent is well aware, under the FPSA Constitution only the General Secretary has the authority to depose the said Affidavit and in her absence, another executive member authorized by the National President may do so. In the absence of such authority, I say the authority given to Kamlesh Chand is void as such the affidavit ought to be expunged from the court records.

3. I further say that the deponent is seemingly unaware of the principles guiding Stay pending Appeal that is provided in the Employment Act and the Fiji Court of Appeal rules. In essence merely filing an application for stay in both the jurisdictions that is the Fiji Court of Appeal and this Court does not constitute a stay more so when seeking stay against costs with an irregular application. It has been settled that costs ordered, prima facie, a matter of judicial discretion and the Respondent has not shown any substantial injustice that will be caused by complying with the judgment.

4. Furthermore my application for variation is only in respect of one aspect of the judgment and apparently the deponent may not have understood my notice for variation of the judgment in the Fiji Court of Appeal. In the prevailing

circumstances, this Honorable Court has the jurisdiction to order compliance in the absence of any Stay granted by the Learned Judge or the Court of Appeal.

5. The payment of security of costs is for the likely expense for the preparation, certification and copying of the record that may be incurred by the Registry including prosecution of the appeal, and payment of costs that may arise from the Appeal proceedings but does not justify Stay of the judgment ordered by learned judge including costs. The failure of the Respondent to pay costs as ordered shows the Respondent is merely flouting the lawful orders and compliance ought to be issued.”

Law on Compliance applications and on Stay Pending Appeal

10. Section 221 (1) (b) of the Employment Relations Act 2007 allows the Court the powers to order the compliance of an Order of the Court and thus to do a specific thing on terms and conditions that the Court deems fit.
11. In section 245 of the Employment Relations Act an application for Appeal from the Employment Relations Court is made to the Court of Appeal. Similar to these provisions Rules 34 of the Court of Appeal Rules.
12. In section 20 (1) (e) of the Fiji Court of Appeal Act empowers the single judge of the Court of Appeal powers to stay execution of orders or to make interim orders for payments preventing prejudice pending appeals.
13. Under the Court of Appeal Rules, Rule 26 (3) requires that any application made to the Court of Appeal or High Court must be firstly made to the High Court.
14. In Order 45 Rule (1) of the High Court Rules requires that a party against whom a judgment has been given may apply for stay of execution of the judgment or order or other relief on matters occurred since the date of the judgment or order and the Court may by order grant such reliefs on terms as it thinks just.
15. In Nasese Bus Co Ltd v Transport Workers Union [2023] FJCA 89; ABU34.2021 (2 June 2023) His Lordship Gunaeratne P, C.A stated when considering compliance orders and stay-

“On 21st July, 2023, when the case is scheduled to be “*taken-up*” before the Court, the only issue to be considered would be “*the compliance orders*” against which this Court has granted leave to appeal.

[27] Yet, in the absence of “*a stay order*”, the Appellant would stand exposed to and liable for consequences for not complying with the said “*compliance orders*”.

16. The Court therefore will consider the Stay application as it has been heard together with the compliance application and if the Court refuses stay, automatically compliance orders will follow.
17. The objection of the Plaintiff/Respondent in the SPA application is that the grounds of appeal has no merits and hence stay should not be granted as it is a delay in denying the Plaintiff/Respondent fruits of their success.
18. The Plaintiff/Respondent also argues that the deponent in the Affidavit in support of SPA is not the proper authority to depose of the document. The Court has looked at the Affidavit and finds that it will accept the evidence of the Defendant/Applicant.
19. In New World -v- Vanualevu Hardware (Fiji) Ltd [2015] FJCA 172; ABU 76.2015 (17 December 2015) Callanchini, President C.A held that –

“[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.”

20. In addition, the following factors were considered in Natural Waters of Viti Ltd -v- Crystal Clear Mineral Water (Fiji) Ltd [2005] FJC 13; ABU 0011. 2004 (18 March 2005) as follows

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- (c) Whether the injurious party will be affected by the stay;
 - (d) the *bonafide* of the applications as to the prosecution of the appeal;
 - (e) the effect on third parties;
 - (f) novelty and importance of questions involved;
 - (g) the public interest in the proceeding;
 - (h) The overall balance of convenience and the status quo.”
- (a) *Whether appeal is rendered nugatory if stay is not granted and whether the injurious party will be affected?*

21. The Defendant/Appellant seeks to stay the matter on the sole ground that the Respondent is unable to recover the proceeds if the judgment is released to him and the decision is overturned in the Court of Appeal. In Neo Fiji Ltd -v- Ausmech Services (Australia) Ltd [2019] FJCA 174; ABU 39.2018 (11 September 2019), President of CA his Lordship Justice Callanchini when considering a money claim had this to say: -

“Since the decision of this Court in Attorney-General of Fiji and Ministry of Health v Dre [2011] FJCA 11; Misc. 13 of 2010, 17 February 2011, the ability of the appellant (defendant) to recover the judgment amount in the event that a stay is not granted is not decisive and is only one of a number of factors that must be considered. In my view the appellant has not established that the appeal will be rendered nugatory in the event that a stay is not granted. The balance of convenience is not necessarily decisive in this matter and both the public interest and the nature of the issues involved are not significant in this application.”

22. I find with persuasion, when considering the principles of Attorney General -v- Ministry of Health -v- Loraini Dre (Supra) for an application for interim payment as well as stay, the Court had firstly considered the Grounds of Appeal and their chances as one of the factors. In addition there was a number of authorities requiring that there be evidence on Affidavit to prove that the Respondent was incapable of making payments in the event the decision of the Court of Appeal was not in their favor.
23. The Defendant/Appellant has argued that the Plaintiff/Respondent had filed a cross-appeal as well and that it would be appropriate that the status quo remain until the Appeal was determined.
24. The Affidavit of the Defendant/Appellant, which the Court accepts, does not provide any evidences that the Plaintiff/Respondent is incapable of making repayments.
25. The court finds that the judgment is not rendered nugatory if stay is not granted.
- On balance of convenience and on competing rights stay should be granted?

26. In considering this factor, the Court must look at the appeal grounds.

27. Grounds 1 to 14 of the Appeal in summary, raises issues regarding-

- (i) The Executive Board and how it was constituted;
- (ii) That the Plaintiff/Respondent accepted his promotion which was part of the human resources policy conditions;
- (iii) That the General Secretary was entitled to make recommendations based on investigations conducted and

(iv) That the Board did not act unlawfully and unfairly in the procedures adopted to summary dismiss the Respondent.

28. The court finds that the issues raised are arguable and that require further consideration of the Court of Appeal. In having done so, the grounds of appeal are clear and concise and therefore the Court finds that there is some chances of success.
29. Furthermore, the Plaintiff/Respondent has also filed their appeal and thus there also consideration on a balance of convenience, that they too would require that Court of Appeal to consider the quantum awarded to him.
30. The Court therefore finds that on a balance of convenience, that stay should be granted pending the Appeal.

Compliance Orders

31. Since the Court is granting Stay Pending Appeal, the Court will therefore dismiss the application for Compliance Orders.
32. The court is mindful that although the result of payout is the same for both Compliance Orders and Orders for Interim Damages, the principles pertaining to the applications are different and cannot be clustered together.


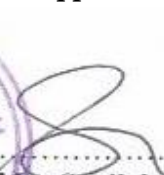
Costs

33. The Court grants costs of \$500 to the Defendant/Applicant.

Orders of the Court:

34. The Court orders as follows:

- (a) That the Court will grant an order for Stay pending Appeal;*
(b) Application for Compliance orders is dismissed;
(c) That costs be awarded to the Applicant for \$500.

A circular purple seal of the High Court of Fiji, featuring a central emblem with a crown and two figures, surrounded by the text "HIGH COURT OF FIJI".
A handwritten signature in blue ink, appearing to read "Mrs Senileba LWTT Levaci".
Mrs Senileba LWTT Levaci
Acting Puisne Judge
High Court – Suva, 28 November, 2023