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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NOS. ABU 0011 & ABU 0011A OF 2004
(High Court Civil Action No. HBC 321 Of 2003L)

BETWEEN:

NATURAL WATERS OF VITI LTD

Appellant

AND:

CRYSTAL CLEAR MINERAL WATER (FIJI) LTD

Respondent

Coram: **Scott, JA**

Date of Hearing: **Monday, 18 April 2005**

Counsel: **Mr. J. Apted with Ms. M. Moody**

Date of Decision: **Friday, 22 April 2005**

DECISION

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[1] The parties are producers of bottled mineral water.

[2] In February 2004 the High Court at Lautoka granted an interlocutory injunction against the Appellant and dismissed the Appellant's cross application for an injunction against the Respondent.

[3] On appeal, this Court set aside the injunction granted by the High Court . On 26 November 2004 it granted a number of orders including an interim injunction

restraining the Respondent until further order whether by its directors, officers, servants or agents or otherwise from marketing its bottled water products in Fiji with the word "Fiji" in the brand label of such products.

[4] The court suspended the operation of the injunction for 28 days from the date of its grant. It also gave the parties liberty to apply to the Court for variation or recission of the order made.

[5] On 11 December 2004 the Respondent filed an application for leave to appeal to the Supreme Court. That application has been set down for hearing in the July 2005 session of this court.

[6] On 11 March 2005 the Respondent made a further application to this Court. It sought an order "suspending" the injunction granted on 26 November pending the hearing of its appeal to the Supreme Court. The application was heard on 15 March and was dismissed on 18 March.

[7] On 17 March the Appellant filed the present application. It is an ex parte application for leave to apply for an order for committal of the directors of the Respondent on ground that the Respondent has disobeyed and continues to disobey the injunction granted against it on 26 November 2004.

[8] The application was supported by two affidavits which exhibited clear photographic prima facie evidence of systematic breach by the Respondent of the injunction granted by this Court. Ms. Moody filed a helpful and comprehensive written submission. Both Ms. Moody and Mr. Apted also made oral submissions.

[9] In the face of the supporting evidence the first question is whether the Court of Appeal has jurisdiction to punish for contempt. The second is whether, in these circumstances, it should do so.

[10] The Court of Appeal Act (Cap. 12) not untypically does not mention proceedings for contempt at all. Section 13, however, provides that:

> "for all the purposes of and incidental to the hearing and determination of any [civil] appeal ... and the amendment execution *and enforcement* of any order judgment or decision made thereon the Court of Appeal shall have all the power, authority and jurisdiction of the High Court and such powers and authority as may be prescribed by Rules of Court." (emphasis added)

[11] Section 20 (1) (k) should also be noted. It provides that:

> "A judge of the Court may exercise the following powers of the Court –
>
> (k) generally to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal."

[12] The Court of Appeal Rules do not mention contempt of court however Rule 6 provides that:

> "Subject to these Rules, the High Court Rules shall apply to proceedings in and before the Court of Appeal in civil causes or matters."

[13] And Rule 7 provides that:

> "Where no other provision is made by these Rules or by any other enactment, the jurisdiction, power and authority of the Court of Appeal and the judges thereof shall be exercised – in civil causes or matters according generally to the course of the practice and procedure for the time being observed by an before Her Majesty's Court of Appeal in England."

[14] In view of the fact that our own High Court Rules are based on the 1988 English Supreme Court Rules it is accepted that the phrase "for the time being" should be interpreted as referring to 1988.

[15] The 1988 Edition of the Supreme Court Rules distinguishes between contempt committed in the face of the Court (O 52 r 5) and other disobedience of Orders of the Court (O 52 r 4). O 52 r 4 does not directly mention the Court of Appeal but instead refers to applications for an order for committal "other than [to] a Divisional Court." Paragraph 52/4/1 of the 1988 Supreme Court Practice (the White Book) states:

> "If the contempt is of an order of the Court of Appeal made on appeal, the application should be made to the Court below (Fortescue v. McKeown [1914] Ir R. 30; Pott v. Stuteley [1935] WN 140) otherwise to the Court of Appeal."

[16] O 52 r 5 provides that O 52 r 4 does not affect the Court of Appeal's power to commit a person guilty of contempt in the face of the court and this provision is mirrored by our own RHC O 52 r 4 which is to the same effect.

[17] Our own High Court Rules do not have a rule corresponding to the English O 52 r 4 since there is no Divisional Court in Fiji, however the practice there set out is, in my opinion, applicable in Fiji since the Fiji Court of Appeal is clearly a court "other than a Divisional Court."

[18] In the light of the foregoing it is clear that the Fiji Court of Appeal has jurisdiction to commit for contempt whether of its proceedings or of its order but it seems to me that, where the alleged contempt is of an order of the court made on appeal, the application for committal should be made to the High Court.

[19] Ms. Moody suggested a number of reasons why I should not follow that practice on this occasion.

[20] In the first place, she suggested that by giving the parties liberty to apply, this Court had "retained ownership" of the order and its possible breach. With respect, I disagree. The liberty given was to apply for the variation or recission of the order made, not for its enforcement by way of proceedings for contempt.

[21] Secondly, Ms. Moody sought to distinguish the facts of the present case from those which obtained in Fortescue v. McKeown and Pott v. Stuteley (supra). She kindly supplied copies of these cases which we do not have in our own library.

[22] While the facts of the cited cases are not identical to those of the present case the cases are in my view clear authority for the proposition that the High Court has jurisdiction to deal with contempt of orders made on appeal and that it is the High Court which is the proper and convenient place where that jurisdiction should be exercised.

[23] As is well understood, the standard of proof in civil contempt is proof beyond reasonable doubt (Re Bramblevale Ltd [1970] 1 Ch 128). Furthermore, the prescribed procedural steps antecedent to the exercise of the jurisdiction must be scrupulously observed and strict compliance insisted upon (Gordon v. Gordon [1946] P 99).

[24] In the present case, the affidavits filed by the Appellant certainly provide strong prima facie evidence of breaches by the Respondent but before these breaches could be found to have been proved some form of trial would have to take place. I do not consider that the Court of Appeal is the appropriate venue for such a trial to be held.

[25] Furthermore, in my opinion it is not at all clear that a single justice of appeal has jurisdiction to exercise the power vested in the Court of Appeal to conduct such a trial. It seems to me that Section 13 of the Act envisages the power being exercised by the full court, not by a single judge. In my view it is highly doubtful whether the power to commit is covered by the broad generality of the words contained in Section 20 (1) (k).

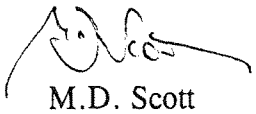
[26] There is another problem. Even if a single justice of appeal were to commit for contempt, to whom would an appeal against such an order lie? Ms. Moody suggested that the appeal would properly go to the full court but after comparing

Section 20 (1) of the Act with Section 35 and in particular Subsections 35 (3) and 35(4) she appeared to accept that the Rules do not make provision for such a procedure.

[27] The alternative of an appeal to the Supreme Court presents the obvious difficulty that punishment for contempt does not in itself raise a question of significant public importance.

[28] In conclusion, Ms. Moody suggested that the notorious delays experienced in the Lautoka High Court provided support for the view that the Court of Appeal was the appropriate court to hear this application. While the delays to which she referred are indeed regrettable, it is known that a second civil judge (without a backlog of reserved judgments) has now been appointed to the High Court at Lautoka. And it cannot be overlooked that the present application was not filed in this court until 17 March 2005, almost two months after the 28 days period of suspension ordered by this court had expired. Those two months can hardly be laid at the door of the High Court.

[29] In my view the proper court in which the present application should be heard is the High Court at Lautoka. Accordingly this application is dismissed.



M.D. Scott

Resident Justice of Appeal