

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 458 of 1993

BETWEEN : RESOLUTION TRUST CORPORATION

First Plaintiff

AND : THE CADLE COMPANY

Second Plaintiff

AND : LEINANI K. BORTLES AND LARRY LYNEL BORTLES

First Defendants

AND : A. MITCHELL GAY

Second Defendant

AND : ALAN C BEALL

Third Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr W Clarke (Ms P Law with him) for the First and Second Plaintiffs
Ms S Shameem (Ms J Lal with her) for the Second named First Defendant
Mr H K Nagin for the Second and Third Defendants

Date of Hearing: 3 October 2016

Date of Decision: 27 October 2016

DECISION

1. This is the 2nd and 3rd Defendants' Summons for a Stay pending appeal of my judgment delivered on 9 December 2015.
2. It is supported by the affidavit of Shamal Singh (Shamal) who deposes he is the litigation clerk of the Solicitors for the 2nd and 3rd Defendants.
3. There is another affidavit sworn by Robert Charles Hastings Jr (Hastings) who deposes he accepts and endorses Shamal's affidavit.
4. At the hearing of the Summons, Counsel for the Plaintiffs stated the Affidavit in Support (Shamal's Affidavit) was affirmed by a law clerk who is not qualified to depose to the grounds of appeal. He relied on the decision of the Court of Appeal, Fiji, in Civil Appeal No. ABU 0027 of 2008: Between Angenette Melania Heffernan ... Appellant AND the Hon. Justice John Edward Byrne ... 1st Respondent The Hon. Justice Anthony Harold Cumberland Gates ... 2nd Respondent The Hon. Aiyaz Sayed Khaiyum ... 3rd Respondent (Heffernan).
5. Counsel submitted that the Court should reject Shamal's affidavit and the Summons. He also asked the court to reject Hastings' affidavit as he was not a party to the proceedings and because in para 3 of his affidavit he accepts and endorses Shamal's affidavit. He asked for the Summons to be dismissed with costs on an indemnity basis to be paid by the 2nd and 3rd Defendants (Gay and Beall).
6. The Defendants' Counsel then submitted. He said there was a difference in the instant matter because there was the clerk's affidavit as well as Hastings' affidavit.

7. Plaintiffs' Counsel replied that no evidence was provided of any nugatory effects if a stay were not granted.
8. At the conclusion of the hearing, I said I would take time for consideration. I also said the summons to register the court order would be heard after this decision is given.
9. I now proceed to deliver my decision. I have perused the decision in Heffernan. There the affidavit in support of the motion for stay was affirmed by Mr Islam a "legal executive". Hickie, JA presumed Islam was not a lawyer, and said the affidavit "was of no support".
10. How much less is Shamal's affidavit of any support when he confirms he is only a litigation clerk.
11. I am therefore bound by the Court of Appeal decision to reject the affidavit in support of the summons here.
12. Hastings' affidavit does not purport to be an affidavit in support. He is not a lawyer and he is merely relying on what Shamal has affirmed. Once Shamal's affidavit is rejected, it must follow as the night the day that Hastings' affidavit must similarly be rejected. Consequently there is nothing before me by way of evidence to support the summons for a stay.
13. Counsel for the Defendants have cited the Court of Appeal, Fiji decision in Civil Appeal No. ABU 0011 of 2004S BETWEEN: Natural Waters of Viti Limited ... Appellant AND Crystal Clear Mineral Water (Fiji) Limited ... Respondent.
14. This case does not assist the Defendants. On the contrary it states that the court is satisfied that the interests of justice are against the grant of a stay, and refused the application.

15. In fine, for all the above reasons I dismiss the Summons for Stay filed on 8 August 2016 by the 2nd and 3rd Defendants with costs which I summarily assess at \$1,000.00 to be paid by them to the 1st and 2nd Plaintiffs.

Delivered at Suva this 27th day of October 2016



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David Alfred
JUDGE
High Court of Fiji