

THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 112 of 2014

BETWEEN : ONE HUNDRED SANDS LIMITED

PLAINTIFF

AND : TE ARAWA LIMITED

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A. K. Singh for the Plaintiff
Ms L. Prasad for the Defendant.

Date of Hearing : 20 June 2018

Date of Judgment : 13 July 2018

DECISION

1. This is the Defendant's Summons for stay pending appeal (Summons).
2. The Defendant is praying for an Order that the judgment delivered by me on 3 May 2018 and all executions and proceedings thereunder be stayed until the determination of the Appeal to the Court of Appeal and that the costs of this application be costs in the cause.
3. The Application is made pursuant to Order 45 rule 10 of the High Court Rules. It is supported by the affidavit of Elizabeth Morris (Morris). Ms Morris deposes as follows:
 - (1) She is one of the Company directors of the Defendant.
 - (2) She has "been informed by my Solicitors" that their grounds of appeal are meritorious (para 4).
 - (3) She has "been informed by my Solicitors and verily believe that the Plaintiff will not be prejudiced if we were granted leave to appeal as the sum of FJ\$1,200,000.00 the refund of which the Plaintiff is seeking and which the Learned Judge ordered to be paid to the Plaintiff ("Judgment Sum") has been paid into Court" (para 5).
 - (4) The appeal will be rendered nugatory if a stay is not granted because the Respondent being " a foreign based company" ..."will not be able to reimburse the Judgment sum paid out to it and which will be then out of the control and jurisdiction of this Honourable Court".

4. The affidavit in opposition is sworn by Timothy Manning (Manning) the Chairman/Director of the Plaintiff. He deposes as follows:
- (1) Morris "is guilty of deliberately misleading this Court" (para (h)) in deposing that the \$1,200,000 has been paid into court.
 - (2) His solicitors inquired of the High Court and was informed by a letter dated 22 May 2018 from the Civil Registry that it had obtained confirmation from one, Ms Florence of Howards Lawyers that the money has not been deposited to the High Court (para (c)).
 - (3) That Morris is guilty of perjury (para (p)).
 - (4) The Defendant has not appealed against the order for the refund of the deposit and option fees to the Plaintiff.
 - (5) The order for payment made by Mr Justice Alfred is subject to the consent order of Court sealed on 22 September 2015.
5. The affidavit in reply is affirmed by Morris who deposed as follows:
- (1) There was an oversight on her part and the judgment sum of \$1,200,000 was not paid into court but into "my Solicitors interest bearing account by order of the court made on 03 September 2015."
 - (2) "In any event, to clarify, the Defendant is not seeking a stay of the orders made on 03 September 2015....." (para 7).

- (3) The Plaintiff company is foreign owned with shareholders based abroad and the Defendant will not be able to recover the Judgment Sum if paid out to the Plaintiff (para 8).
6. The hearing commenced with Ms Prasad submitting. She said the appeal would be nugatory as the Plaintiff had no funds to pay if the appeal were successful. The shareholders are foreigners and the Defendant may be not be able to recover. The Plaintiff will not be prejudiced as the sum is in the Defendant's solicitors' trust account. The case here involved substantial issues and ought not to have been decided by summons.
7. Mr Singh then submitted. He said there should be no stay as the land had been sold to a third party and there is no contract that the Defendant can rely on to hold on to the deposit. A party cannot get out of the consent order of 22 September 2015, and the Defendant is bound by it. The Court cannot vary the consent order and there is no factual basis to consider setting it aside. Counsel asked for the Defendant's application to be dismissed as the Defendant did not come to court with clean hands.
8. Counsel said the standards of the High Court of Fiji have to be met but had not been met by the Defendant. The Court can sanction such a deponent (Morris) and send the papers to the Director of Public Prosecutions. The Defendant's grounds of appeal are unmeritorious and have a minimal chance of success. In the grounds of appeal there is no complaint of injustice and no complaint of error of fact.

9. He said the complaint was the procedure was wrong. The conclusions of the judge under rule 3 and rule 7 of Order 33 High Court Rules are not under attack. Counsel concluded by stating it is the Plaintiff's money which is being held by the Defendant which should be refunded as soon as possible as the Defendant is earning interest on it and nothing to the Plaintiff.
10. Ms Prasad in her reply conceded that no one looking at Morris' affidavit will know it is Howards Lawyers in para 4 and the Singapore company counsel in para 5. She said it was an oversight and there was no criminal intention. They were not varying the consent order. There was no urgency to release the money.
11. At the end of the arguments I said I would take time for consideration. Having done so I now proceed to deliver my decision.
12. At the outset I shall refer to the leading case of Natural Waters of Viti Limited AND Crystal Clear Mineral Water (Fiji) Limited : Court of Appeal Civil Appeal No ABU 0011 of 2004S : 18 March 2005. I agree with Ms Prasad that this has the principles governing a stay application.
13. The Court of Appeal (the Court) said it was not satisfied that declining a stay would render the appeal nugatory (para [12]). It also said it was satisfied that the interests of justice are against the grant of a stay. The Court refused the application and ordered costs of \$1,500 plus disbursements to be paid to the other side.
14. I am fortified in the conclusion I am reaching by the fact that a consent order was recorded by this Court on 3 September 2015, which order was sealed on 22

September 2015, upon hearing Mr Devenesh Sharma for the Plaintiff and Mr William Clarke for the Defendant. Para 1 reads "That by consent, the sum of FJD \$1,200,000.00 only in the trust account of Howards Lawyers be placed in a specific trust account bearing interest and amount and interest thereon to be dealt with only in accordance with order made by this Court".

15. Morris in her affidavit in reply, in para 7 deposes the Defendant is not seeking a stay of the orders made on 3 September 2015. And Ms Prasad in her oral submission stated they were not varying the consent order.
16. Consequently it follows that this Court must enforce the consent order that the \$1,200,000 be dealt with in accordance with the order made by this court in its judgment of 3 May 2018 that "the Stakeholders, Howards Lawyers are to promptly pay the Plaintiff the sum of \$1,200,000."
17. It is therefore surprising that Howards Lawyers have not complied with the judgment (which will be the order referred to the consent order) and paid the \$1,200,000 without delay after 3 May 2018. It is now more than 2 months later.
18. It is also to be noted that it was Mr William Clarke, himself, who consented to the order of 3 September 2015.
19. No doubt this delay has caused Mr Singh to lament that the standards of the High Court of Fiji had not been met by the Defendant and to invite the Court to sanction the deponent (Morris) and to send the papers to the Director of Public Prosecutions. Mr Singh obviously does not consider that Morris can explain away her sworn statement that she had "been informed by my Solicitors" by another sworn statement that there was an oversight on her part.

20. Like the Court of Appeal in "Natural Waters" I am not satisfied that declining a stay would render the appeal nugatory, for the following reasons:
- (1) The \$1,200,000 is in the first place the Plaintiff's money (emphasis supplied).
 - (2) The Defendant's deponent (Morris) and their Counsel, Ms Prasad make much of the contention the Plaintiff is foreign owned with shareholders who are based abroad/foreigners. They ignore the fact that the Plaintiff is a Fiji registered company and that it is axiomatic that a limited company is a legal entity which is distinct and separate from its shareholders.
21. A thorough perusal of the evidence before this Court and the Law discloses no likelihood of success for the appeal and that it is against the interests of justice to grant a stay.
22. At the end of the day I am satisfied that there are no reasons to grant a stay and the application in the Summons filed on 15 May 2018 is hereby refused and the Defendant is to pay the Plaintiff the costs of this application summarily assessed at \$1,250.00

Delivered at Suva this 13th day of July 2018.



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David Alfred
JUDGE
High Court of Fiji