

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 216 of 1997

BETWEEN

SAMISONI TUI BALE aka **TUIMASI LUTU** trading as
General Food Fiji Limited.

PLAINTIFF-APPELLANT

AND

NATIONAL BANK OF FIJI

1ST DEFENDANT-RESPONDENT

AND

NBF ASSET MANAGEMENT BANK

2ND DEFENDANT-RESPONDENT

Counsel

: Mr. K. Maisamoa for the Plaintiff-Appellant
Mr. K. Jamnadas for the Defendants-Respondents

Date of Hearing : 21st January, 2019

Date of Ruling : 25th January, 2019

RULING

(On the application for stay pending appeal)

- [1] The court dismissed the plaintiff's action and ordered the plaintiff to pay the defendants \$10,000.00 as costs. Being dissatisfied with the judgment of the court the plaintiff appealed to the Court of Appeal and filed a notice of motion supported by an affidavit seeking an order staying the payment of costs until the final determination of the appeal.
- [2] When the matter came up before this court today for hearing both counsel made submissions and the learned counsel for the plaintiff-appellant cited the decision in **Natural Waters Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005), in support of his submissions.
- [3] In **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** (*Supra*) the Court of Appeal held that in an application of stay pending appeal the court should consider the following;
- a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 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.

In the same judgment the Court of Appeal made the following observations;

Many of the factors to which we have referred relate to the overall balance of convenience and the status quo. When regard is had to all of these factors, we are satisfied that the interests of justice are against the grant of a stay. This is particularly so in view of our comment above that the application for leave to appeal is unlikely to succeed. We can find no factors that come anywhere near outweighing this consideration -indeed most of the factors are to the contrary.

- [4] I will now consider whether the plaintiff-appellant's right of appeal will be rendered nugatory if the stay is not granted.
- [5] In his affidavit filed in support of the application for stay pending appeal the plaintiff has averred that the appeal will not be rendered nugatory if the stay is granted and the stay will not be prejudicial to the defendants since they had means at their disposal in contrast to the plaintiff-appellant.
- [6] The application of the plaintiff-appellant is only for the stay of the payment of costs. Therefore, the execution of the judgment is stayed or not, it will not be prejudicial to any of the parties. As plaintiff-appellant has stated in the affidavit the defendants have sufficient means to pay back the costs even if the Court of Appeal decides the appeal in favour of the plaintiff-appellant. The defendants are financial institutions there would not be any difficulty for the plaintiff-appellant to recover the costs paid to the defendants. This fact has in fact been admitted by the plaintiff-appellant in his affidavit in support.
- [7] Therefore, the rights of the plaintiff-appellant will not be affected in any way even if the appeal is decided in his favour.

- [8] The other grounds set out in the decision in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** (*Supra*) have no application to the present application. There is no effect on the third parties or any public interest since this is a claim personal to the plaintiff-appellant. The entire judgment is based on the findings of fact and the court refused to place any responsibility on the defendants for the reason that plaintiff-appellant's own act has resulted in his loss.
- [9] The learned counsel for the defendants-respondents submitted that the rule of the High Court Rules mentioned in the Notice of Motion for Stay is incorrect. Stating the incorrect number of the particular provision in any application alone is not sufficient for the court to strike out the application. If, of course, the plaintiff-appellant has failed to comply with the relevant provisions of the law in making this application the court has no alternative but to refuse the application. In this instance there is no objection that the plaintiff-appellant has failed to comply with the relevant provisions of the law. Therefore, objection of the learned counsel for the defendants-respondents is rejected.
- [10] For the reasons stated above I see no reason to stay the payment of the costs awarded to the defendants-respondents by the plaintiff-appellant.

ORDERS:

1. The application for stay pending appeal is refused.
2. The plaintiff-appellant is ordered to pay \$2000.00 as costs of this application to the defendants-respondents.



25th January, 2019


Lyone Seneviratne

JUDGE