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

CIVIL APPEAL NO. ABU0011 OF 2004S
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(High Court Civil Action No. HBC 321 of 2003L)

BETWEEN: NATURAL WATERS OF VITI LIMITED

Appellant

AND: CRYSTAL CLEAR MINERAL WATER (FIJI) LIMITED

Respondent

Coram: Tompkins, JA
Scott, JA

Hearing: Tuesday, 15 and Thursday 17 March 2005, Suva

Counsel: *G.P. Shankar* for the Respondent
J. Apted for the Appellant

Date of Judgment: Friday, 18 March 2005

JUDGMENT OF THE COURT

Background

[1] Since 1995 the appellant has been retailing bottled water under the brand name "Fiji Water". In 1999 the respondent commenced to retail bottled water under the brand name "Aqua Fiji". Proceedings were commenced in the High Court, one by the appellant against the respondent and one by the respondent against the appellant. It is unnecessary, for the purpose of this application, to detail the nature of these proceedings.

[2] On 26 November 2004 this Court, in appeal no ABU0011, discharged an injunction that had been granted by Connors J on 26 February 2004. By the same judgment in appeal no ABU0011A it allowed the appellant's appeal against the refusal of Connors J to grant an injunction. This Court ordered:

> [1] An interim injunction until further order of the Court restraining the respondent 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.
>
> [2] This interim injunction is to take effect 28 days from the delivery of this judgment.
>
> [3] This interim injunction is not to prevent the respondent from using the word "Fiji" on the labeling of such products to denote the place where such product is produced.
>
> [4] Leave is reserved to either party to apply to the Court for orders varying or rescinding these orders.
>
> [5] The appellant is entitled to costs on the appeal which we fix at $2,000.00

[3] By summons filed in this Court on 11 March 2005, the respondent sought an order the "that the injunction granted on 28 November 2004 (sic) be suspended." Mr. Shankar for the respondent advised the Court it was his intention to apply for an order that the injunction granted by this Court on 26 November 2004 be stayed until the hearing of an appeal to the Supreme Court. Accordingly, the Court will treat this application as an application for stay pending appeal.

[4] The application came before this Court on 15 March 2005. Counsel for the appellant applied for a short adjournment since it had only been served with the application and supporting affidavit on Friday in 11 March 2005. This was granted, the appellant was granted leave to file an affidavit and the respondent granted leave to file an affidavit in reply, and the hearing resumed on 17 March 2004.

The application for leave to appeal

[5] On 11 December 2004 the respondent filed an application in this Court for leave to appeal to the Supreme Court from the judgment of this Court of 26 November 2004. That

application also seeks an order that the injunction granted by this Court be discharged or varied so that the respondent's products in their present getup are not affected by the injunction. That application has an initial date for hearing on 7 April 2005.

[6] Clause 121 (2) of the Constitution and s 2 of the Supreme Court Act 1998, make it clear that the Supreme Court has jurisdiction to hear appeals only from final orders. The order made by this Court on 26 November 2004 was an interlocutory order. Mr Shankar accepted that this is so, but submitted that the Supreme Court had an inherent jurisdiction to hear an appeal from an interlocutory order, relying on s 119 of the Constitution. That submission will need to be finally determined when the application for leave to appeal is heard in this Court. But for the purposes of this application for stay, we will proceed on the assumption that the application for leave to appeal will almost certainly fail. That conclusion is itself sufficient to dispose of the application. But in deference to the submissions of counsel, we will consider other relevant factors.

Principles on a stay application

[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, *McGechan on Procedure* (2005):

> "On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.
>
> The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNZ 48, at p 50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:
>
> (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."

Comment

[8] We comment briefly on such of those factors as may be relevant in the present case.

[9] In the affidavit filed in support of the application the managing director of the respondent has deposed that the respondent has what he describes as a very lucrative agreement with Warwick Resort to supply its product to a value of $5,000 a month. The contract was not produced and the deponent does not say when the contract was entered into.

[10] At the hearing in the High Court it emerged that the respondent had changed the getup of its product on four occasions. Nothing in the affidavit on behalf of the respondent shows why the respondent cannot change its getup again to comply with the injunction. Counsel for the respondent submitted from the bar that to change the getup would be expensive and take time. No evidence has been produced to establish this submission, and the past practice of the company of changing its getup would tend to suggest otherwise.

[11] The appellant did not file an affidavit. But yesterday, contrary to the direction this Court gave when this application was first called on 15 March 2005, a further affidavit by the managing director of the respondent was filed. In it he deposes that the assets of the respondent in Fiji at 31 December 2004 was over $600,000. He does not say what are the assets of the respondent today. If, as we are apparently intended to assume, the respondent's assets are the same now as they were then, this evidence does not accord with the claim made in the earlier affidavit, that declining the stay is likely to cause the respondent financial ruin.

[12] For these reasons we are not satisfied that declining a stay would render the appeal nugatory.

[13] We question the bona fides of the respondent. The order granting the injunction was made on 26 November 2004. This application was filed on 11 March 2005, almost four months later. No explanation for the delay has been given. Nor is there an explanation why the respondent has not applied for an urgent hearing of its application to revoke the injunction

and for leave to appeal. Nor is there any explanation why, instead of filing these various applications in this Court, the respondent has not applied to the High Court for an urgent fixture to have the substantive application heard. The various steps adopted by the respondent have the hallmarks of a delaying action.

[14] The affidavit filed in support of this application refers to surveys that have been undertaken that, the respondent submits, suggest that there is no or little confusion between the two products. This evidence is of no relevance to the present application, although it will undoubtedly be relevant when the substantive application is heard in the High Court. However, we note that this survey was undertaken in February of this year and it contains such comments as "Aqua Fiji is fast selling compared to Fiji Water". This and other evidence produced by the respondent strongly suggests that the respondent is trading in breach of the injunction. We make no final finding in this respect, but the indication that the respondent is breaching the Court's order is a factor against the grant of a stay.

Conclusion

[15] 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.

[16] The application is refused. The appellant is entitled to costs on this application which we fix at $1,500 plus disbursements to be fixed by the Registrar if the parties are unable to agree.

FIJI COURT OF APPEAL

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Tompkins, JA

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Scott, JA

Solicitors:

Messrs. G.P. Shankar and Company, Ba for the Appellant
Munro leys, Suva for the Respondent