

**IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA**

Misc Action No. **5** of 2008

BETWEEN: RAMA KANT SHARMA father's name Vishnu Deo Sharma of Drasa,
Dentist

APPLICANT/APPELLANT

AND

PRASHAANT NITEN MAJARAJ father's name Baij Narayan Maharaj of Vatuwaqe
Street, Suva, Assistant Account

RESPONDENT

JUDGMENT

1. This matter came before me ex parte at approximately 2.40pm on Friday 25 January 2008. The Applicant/Appellant sought a stay of stop order made by the Lautoka Family Court on 25 January 2008.
2. After hearing briefly from Counsel, I determined that:
 - The Magistrates Court File wherein the stop order was granted should be brought to this Court so that I could determine the basis upon which the stop order was granted;
 - Counsel for the Respondent should be contacted to ask him to come before the Court so that the Respondent would be represented and he could be heard;
 - The Applicant/Appellant could be contacted by Counsel to have him attend at Court.
3. It is the practice of this Court consistent with the decision in *Pickwick International Inc (GB) Ltd v. Multiple Sound Distributors Ltd and Anor* [1972] 3 All ER 384, per Justice Megarry, to ensure that in ex parte applications papers are served on Respondents and give a return date so that they can be present to be heard: *Kaliova Masau of Ekubu Village and Ors v. Attorney General of Fiji and Ors* Civil Action No. HBC 120 of 2007L, No. 48/2007, 19 April 2007.
- 4. Grant of Stop Order**

The Magistrates Court File shows that the stop order was granted in accordance with the following:

The Applicant [Applicant/Appellant in the present matter] had lodged an Application in the Family Court Division of Lautoka Magistrates Court seeking return of particular documents which are said to be the property of his daughter;

The Applicant/Appellant holds Permanent Residency of the USA and the Magistrates Court was asked that he be stopped because of irregularities in the Affidavit (Form 23);

Also ask that the original Application be set aside.

Court satisfied with application for stop order – some irregularities in the Affidavit (Form 23).

Orders:

1. Stop Order to be issued against the Applicant forthwith. Immigration Department to be informed forthwith.
2. Adjourn to 7 February 2008.

5. Attendance of Counsel

The High Court Clerk at my request endeavoured to contact Counsel for the Respondent and upon contacting his office was informed that Counsel was absent in Sigatoka. Hence I was obliged to consider the matter in his absence.

6. Applicant/Appellant

The Applicant/Appellant was contacted and appeared in Court. I had sought his presence as I had wished to obtain from him information as to his scheduled departure from Fiji as I had considered whether the matter could be adjourned until Monday 28 January 2008 when it could be dealt with inter partes.

7. Having been able to read and consider that matters set out above as in the Magistrates Court file, however, and having heard from Counsel for the Applicant/Appellant earlier that the Applicant/Appellant has an airticket and is scheduled to leave Fiji by Sunday 27 January 2008, I formed the view that the matter should be dealt with forthwith.

8. Relevant Principles on a Stay Application

The relevant principle for consideration on applications for stay pending appeal have been articulated recently by the Fiji Court of Appeal in *Natural Waters of Viti Ltd v. Crystal Clear Mineral Water (Fiji) Ltd* FCA Civil Appeal No. ABU 0011 of 2004/S, 18 March 2005, as follows:

8.1 The principles to be applied on an application for stay pending appeal are conveniently summarized 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 87.

8.2 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 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 *Phillip Morris (NZ) Ltd v. Ligget & 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.

8.3 I have carefully considered each of the above matters as they are relevant in the present application. Having taken them into account and applied them to the matters set out in the Affidavit filed with the ex parte application and most particularly the matters set out above as taken from the Magistrates Court file, I make the following orders.

Orders

1. The stop order made 25 January 2008 by the Family Court Division of the Lautoka Magistrates Court issued against the Applicant/Appellant Ramakant Sharma be stayed and cancelled forthwith.
2. The order made by the Family Court Division of the Lautoka Magistrates Court on 25 January 2008 be stayed and cancelled pending appeal.
3. The Department of Immigration be notified and allow Ramakant Sharma to travel overseas as he wishes.
4. The matter to be called before me in Lautoka High Court on 28 February 2008 at 9.30am.
5. Costs in the cause.

Justice JA Scutt
25 January 2008

