

THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 172 of 2012

BETWEEN : AUSMECH SERVICES (AUSTRALIA) LIMITED

PLAINTIFF

AND : NEO (FIJI) LIMITED

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr G. O'Driscoll for the Plaintiff  
Mr F. Haniff for the Defendant.

Date of Hearing : 31 July 2018  
Date of Decision : 26 September 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 Hamza J on 17 May 2018 and all execution and proceedings be stayed pending the determination of its Appeal to the Court of Appeal and that the costs of this application abide by the result of the Appeal.
3. The Application is made pursuant to Order 47 rule 1 of the High Court Rules. It is supported by the affidavit of Sampath Udays (Udaya) who deposes as follows:
  - (1) He is an Administrative Officer of the Defendant.
  - (2) The Defendant is of the opinion that the appeal has reasonable prospects of success.
  - (3) If a stay is not granted the appeal will be rendered nugatory as the Plaintiff appears to have no assets in Fiji and both of its directors reside overseas, and it will be difficult to recover money from the Plaintiff if the judgment sum is transmitted offshore.
4. The hearing commenced with Mr Haniff submitting. He said there are merits in the appeal and the judge was wrong to treat both companies as one and the same as the Australian company is not a party to these proceedings. He said the Plaintiff has no assets in Fiji and had not filed an affidavit in reply detailing its assets. If the Defendant paid it will be dissipated as both the Plaintiff's directors reside overseas and the Plaintiff is no longer operating a business in Fiji.

5. Mr O'Driscoll then submitted. He said Hamza J found from the conduct of the parties that there was a valid contract between the Plaintiff and the Defendant. The Plaintiff was now owed the balance by the Defendant which up to then had paid to the Plaintiff. Australia was in the Commonwealth and the Defendant can recover the money paid under Reciprocal Enforcement proceedings. No evidence was shown that the Defendant cannot repay the judgment sum.
6. At the end of the arguments I said I would take time for consideration. Having done so I now proceed to deliver my decision.
7. 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, which lay down the principles governing a stay application.
8. The Court of Appeal 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.
9. Like the Court of Appeal in "Natural Waters" I am not satisfied that declining a stay would render the appeal nugatory, for the following reason:

The Defendant makes much of the contention the Plaintiff's directors are based abroad. They ignore the fact that the Plaintiff is a Fiji incorporated company (See Agreed Fact 1 in the Minutes of the Pre-Trial Conference) and that it is axiomatic that a limited company is a legal entity which is distinct and separate from its directors.

10. A perusal of Hamza J's judgment especially para [48] that there were enforceable contracts between the Plaintiff and the Defendant and para [50] that the Defendant has not denied that the outstanding sums were due, disclose no likelihood of success for an appeal and that it is against the interest of justice and against "the overall balance of convenience" to grant a stay.
  
11. In the result, I am satisfied that there are no reasons to grant a stay and the application in the Summons filed on 29 May 2018 is hereby refused and the Defendant is to pay the Plaintiff the costs of this application summarily assessed at \$750.00

Delivered at Suva this 26<sup>th</sup> day of September 2018.



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David Alfred

**JUDGE**

High Court of Fiji