

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 308 of 2013

BETWEEN : **JIANG PENG** and **WANG NA**

Plaintiffs/Respondents

AND : **NIWAZ ALI** and **SHABANA BI ALI** aka **SHABANA KHATOON ALI**

Defendants/Applicants

COUNSEL : Mr. S. Nandan for the Plaintiffs/ Respondents
Mr. V. Prasad for the Defendants/ Applicants

Dates of hearing : **24th November, 2015**

Date of Ruling : **25th January, 2015**

RULING

- [1] This is an application for stay of execution of the judgment pending appeal.
- [2] The plaintiffs and the defendants entered into two agreements for the sale and purchase of the shares of **Domino Pacific Corporation Limited** [A1] and sale and purchase of the shares of **Domino Fiji Limited** [A2].
- [3] It is the position of the plaintiffs that the 1st plaintiff paid \$ 47200.00 into the trust account of his solicitors and gave them the authority to pay that money to the trust account of VP Lawyers. Thereafter, many correspondences were exchanged between the parties.
- [4] The defendant while admitting the execution of the two agreements [A1 & A2] states that in terms of the said agreements the plaintiffs were liable to pay part of

the consideration at the time of the execution of the agreements and the balance to be paid upon settlement [Clause 2.2 & 2.3 of both agreements] but they failed to comply with clause 2.2 of the agreements.

- [5] The agreements were entered into by the parties on 14th August 2013. On 21st August 2013 the solicitors of the plaintiffs informed that the cheque was in their account. The defendants granted extension of time to pay the consideration till 2.30 p.m. on 23rd August 2013 and since there was no response from the plaintiffs, the defendants' solicitors served the notice of rescission of the contract on the plaintiffs on 30th August 2013.
- [6] In the originating summons of the plaintiffs, they have averred that the parties are obliged in terms of clause 16 of the agreements to refer the dispute between them for arbitration and also that their solicitors raised this issue with the defendants but there was no response from them.
- [7] The learned High Court Judge after hearing the parties decided to enter judgment for the plaintiffs as prayed for in the originating summons and the defendants appealed.
- [8] **Order 45 rule 10** of the High Court Rules provides;

Without prejudice to Order 47 rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

- [9] In the case of **Natural Waters of Viti Ltd v Chrystal Clear Mineral water (Fiji) Ltd Civil Appeal ABU0011.04S, 18th May 2005** the Court of Appeal set out the following guidelines to consider in granting or refusing an application for stay of execution of the judgment pending appeal;
- (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 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 proceedings.
- (g) The overall balance of convenience and the status quo.

- [10] Before deciding whether defendants' right of appeal will be rendered nugatory if the stay of execution of the judgment is not granted the Court must consider whether the defendants' have an arguable appeal with reasonable chance of success, in other words whether there are serious questions to be decided by the Court of appeal.
- [11] In deciding the above question, this Court, although is not expected to embark upon the exercise of deciding the appeal on its merits, must consider the judgment appealed against to ascertain whether there are important matters which require the attention of the Court of Appeal.
- [12] The plaintiffs in the originating summons sought the following reliefs;
- (a) A mandatory order ordering the defendants to do all things, deeds and acts necessary to submit themselves pursuant to Clause 16 of the two agreements for sale and purchase of shares in Domino Fiji Limited dated 14th October 2013 between the plaintiffs and the defendants.
 - (b) Any other order that this Court deems just and appropriate including costs.
- [13] Although the name of the other company is not mentioned in the prayer it is clear that what the plaintiffs sought from the Court was an order compelling the defendants to agree and take other steps to refer the dispute between them for arbitration as required by Clause 16 of both agreements.
- [14] **Clause 16** of both agreements reads as follows;
- Except as otherwise provided all questions or differences which may at any time hereafter arise between the parties touching upon this Agreement or the subject matter thereof or arising out of or in relation thereto respectively and whether as to construction or otherwise shall be referred to a single arbitrator in case the parties can agree upon one otherwise to 2 arbitrators, one be appointed by each party to the difference and either case in accordance with and subject to the provisions of the Arbitration Act.
- [15] This clause must be read with **Clause 10** of these agreements which reads as follows;

If the purchaser shall make default in payment of any monies hereby agreed to be paid or make default in performance or observance or any stipulation or agreement on the purchasers part herein contained, and if such default shall continue for a period of seven (7) days from the due date then and in such case, the Vendors without prejudice to any other remedies available to the Vendors may at their opinion exercise all or any of the following remedies, namely:

- (a) May rescind this agreement of sale and thereupon all monies paid hereunder be forfeited to the Vendors as liquidated damages.
- (b) May sue for specific performance of this Agreement.
- (c) May claim damages in addition to seeking specific performance of this Agreement.

- [16] When one considers these two clauses of the agreements it appears that a question of interpretation which goes to the root of the case arises for determination in appeal that is whether clause 10 of the agreement falls within the ambit of the phrase "**Except as otherwise provided....**" in clause 16, specially because there is no evidence on record that the plaintiffs in fact paid the amounts of money stated in clause 2.2 of the agreements and also whether the depositing of a cheque long after the due date with their own solicitors amounts to payment to the defendants. If the Court of Appeal answers these questions in favour of the defendants then any award made by the arbitrator would be of no force or avail in law. Therefore, the defendants will be affected injuriously if the stay is not granted and also that the defendants will be placed at a more disadvantageous position if the stay of execution is not granted than the plaintiffs if the stay is granted.
- [17] The interpretation of clauses 10 and 16 of these agreements as I have discussed above is of absolute importance so far as the rights not only of the defendants but also of the plaintiffs, are concerned.
- [18] It is also important to note that in this case the substantive relief prayed for by the plaintiffs is, an order on the defendants to comply with clause 16 of the agreement. If the Court refuses the application for stay the parties are compelled to go before an arbitrator and obtain a decision. If the Court of Appeal decides to allow the appeal and set aside the judgment of the High Court all steps taken before the arbitrator or arbitrators would be made nugatory. Therefore, if the defendants are compelled to refer the matter for arbitration it would only result in unnecessary expenses not only to the defendants but also to the plaintiffs.

[19] I am therefore, of the view that this is a fit and proper matter for the Court to stay the execution of the judgment pending the decision of the appeal.

[20] For the reasons set out above I make the following orders.

- 1) The execution of the judgment is stayed until the final determination of the appeal.




Lyone Seneviratne

JUDGE

25.01.2016