

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Civil Action No. HBC 205 of 2013

BETWEEN : **NAIM ENGINEERING CONSTRUCTION (FIJI) LIMITED** a duly incorporated limited liability company having its registered office situated at Lot 26 Main Street, Savusavu.

Plaintiff

AND : **A.R. QUARRY & CONCRETE LIMITED** a limited liability company having its registered office at Nadi.

Defendants

Appearances : Mr Koya for the Plaintiff

: Mr R. Singh for the Defendant

Date of Hearing : 25th April 2014

INTERLOCUTORY JUDGEMENT

Introduction

1. By an Inter Parte Notice of motion dated 14th November 2013 the Plaintiff sought the following reliefs from court.
 - a) An injunction restraining the defendant namely A R Quarry and Concrete Limited either by itself and/or its employees and/or its agents and/or whomsoever from proceeding with Winding Up petition until further orders of the court.
 - b) That the winding up petition to be heard on the 22nd day of June 2014 be stayed until the determination of the Writ of Summons.
 - c) Such further Orders that this Court deems fit.
 - d) That costs be on solicitor-client indemnity basis.

2. The plaintiffs Inter Parte Notice of Motion was supported by an affidavit of Viren Kumar, Assistant Contracts Manager of the Plaintiff Company sworn on 14th of November 2013.

Background

3. Viren Kumar has deposed in his affidavit inter alia the following facts:
 - i) That the Plaintiff company is an overseas based company that was contracted by the Fiji Government for the development and rehabilitation of the roads in Particular Kings-Queen Highway.
 - ii) That the Defendant company was a sub contractor for the Plaintiff Company and the contracted work as per the letter of Acceptance on 5th July 2011 was for rehabilitation work for the road between Sigatoka to Korotogo.
 - iii) That the sub contracted work undertaken by the defendant company was carried out in phases as such the letter of acceptance were specifically identified as packages reflecting the respective 5km rehabilitation work to be undertaken.
 - iv) That the letters of Acceptance contained standard conditions that were used by the Plaintiffs when any work is sub contracted, the Defendant company was familiar with these conditions, the defendant was responsible for the following rehabilitation work.

Sigatoka – Korotogo Route

- i) Package A
- ii) Package B
- iii) Package C
- iv) Package D

Nadi back Road

- v) In the initial letter of Acceptance a contract sum is quoted which is the estimate of the value of the work. However the actual sum that is paid to the sub contractor is determined by the value of work done.
- vi) That there was no dispute regarding payments for packages B, C and D and respective payment certificates have been issued and payments made to the defendant.
- vii) However, there was a dispute between the plaintiff company and the defendant company regarding the payment for Package A and Nadi Back Road.

- viii) That the plaintiff company has endorsed and issued a erroneously prepared payment certificate to the Defendant company which has intended to pay out fully the entire contract sum which was the issue for the dispute.
- ix) That the error was rectified by the Management and the Plaintiff discussed the matter with the defendant after which the defendant agreed that they will disregard the said payment certificate.
- x) That the copy of the defective payment certificate had been sent in good faith to the defendant company before the error was discovered and the same payment certificate has been used by the defendant company to justify the winding up petition as they alleged that this is a debt owed to them.
- xi) That the said payment certificate was never paid due to the error made and it was abandoned and cancelled by the parties and new payment certificate was prepared and endorsed and paid out to the defendant accordingly.
- xii) That payment certificate 1 – dated 10th August 2011 was paid out to the defendant by Westpac cheque No. 002849 and payment certificate 2 dated 19th August 2011 was paid by Westpac cheque No. 002925.
- xiii) That the final payment certificate for package A has been certified by the Plaintiff for the sum of \$6279.73. However there was a payment due from the defendant in the sum of \$1034.59 and the total amount owed to the defendant by the Plaintiff at the end of June 2012 was \$5240.14.
- xiv) That the Plaintiff is disputing the alleged debt of \$228,967.00 because it is based on a defective payment certificate.
- xv) That the defendant is deliberately and fraudulently relying upon the said payment certificate to extract money from the plaintiff company which it is not entitle to.
- xvi) That the defendant has been informed that the outstanding payments due to them in the sum of \$5240.14 has been deducted by the plaintiff by virtue of clause 24 of the contract.
- xvii) That in compiling the final accounts and reconciling all the accounts for Packages A to D and the Nadi Back Road regarding the defendants account by the plaintiff it was determined that the defendant owed the Plaintiff \$17,858.57 and the plaintiff deducted the sum of \$5240.14 from the defendants account which amount the plaintiff owed to the

defendant and the balance owed by the defendant to the plaintiff was \$12,618.43.

- xviii) That on 25th May 2012 the defendants issued Westpac cheque No. 608145 for a sum of \$1584 for payments regarding the supply of some quarry material but the said cheque was dishonoured.
 - xix) That the plaintiff company did not receive any other response from the defendants solicitors after 19th of July 2012 and given the uncertainty and the expiration of the 21 days in which the Defendant could proceed with their petition by winding up the Plaintiffs company obtained an injunction against the defendant.
 - xx) That the solicitors of the defendant company filed summons to strike out the writ of summons on 18th July 2013 due to an endorsement of the writ being insufficient to disclose a reasonable cause of action and or in the alternative the absence of any supporting statement of claim in the writ.
 - xxi) That a ruling was delivered on the 25th of October 2013 by the Hon. Master by which the writ was struck out and consequently the injunction was no longer valid.
 - xxii) That in the absence of the injunction the defendant Company has on the 11th of November 2013 served the Plaintiff Company with a Winding Up petition which has been filed and listed to be heard on the 22nd of January 2013 and that they have advertised the said petition on the 6th of November, 2013.
 - xxiii) That he believes damages would be insufficient as he believed the defendant Company does not have the means to compensate the Plaintiff Company
 - xxiv) That the defendants are abusing the winding up process to obtain money fraudulently when there is no debt owed by the plaintiff to them.
 - xxv) That the plaintiff Company is in a position to meet any claim for damages brought by the defendants arising out of the grant of an injunction and gives the usual undertaking as to damages.
4. Opposing the Plaintiffs application the defendant filed an affidavit sworn by Riyaz Ali one of its Directors on 18th of November 2013 and a supplementary affidavit sworn on 13th of December 2013 with the leave of the Court.
5. By the affidavit in Reply and the supplementary affidavit, Riyaz Ali, has inter alia deposed the following facts.

- i) That the winding up petition was served on the plaintiff on the 11th November 2013 and that it was advertised in the Fiji Sun on the 12th November 2013.
- ii) That the defendants claim in the winding up Action is based on Package D and retention amounts for various packages.
- iii) That after invoice in the sum of \$136239.92 was rendered (Exhibit E) there were number of issues raised by the plaintiff on the invoice and also by defendant on the issue of payments to be made under that invoice and retention for other portion of contract and performance bond.
- iv) That after negotiations plaintiff issued the final payment certificate for Package D dated 20th January 2012 in the sum of \$110773.04 (Exhibit F) and the deponent Viren Kumar approved the said payments as Senior Quantity Surveyor.
- V) That the defendant was never advised that any payment certificate was issued in error and was abandoned and the defendant deny that defendant owed any money whatsoever to the plaintiff.
- vi) That till todate they have not provided any evidence to show that there is an error on the final payment certificate.
- vii) That therefore the defendants claim on its winding up proceedings is made up as follows;
 - a) **\$110,773.04** as per final payment certificate dated 20th January 2012.
 - b) **\$63,838.50** for Premix Laid which should not have been deducted in aforementioned final certificate as per the contents of the Plaintiffs letter of the 8th February 2011 [**Exhibit A**]
 - c) **\$12750.00** The Hire of Low Bed and Water Cart Trailer hired by the Plaintiff from the Defendant.
 - d) **\$18,105.46** claim for Payment 1,2 and 3 retention deducted for Nadi Back Road (Annexed are copies of payment certificate, which show the deductions, made as **Exhibit B**)
 - e) **\$20,700.00** for shoulder work at the Nadi Back Road.
 - f) **\$2,800.00** for labour and traffic provided to the Plaintiff by the Defendant. These are payments for the flagman who control traffic at the time of conducting the road works.

- vii) That apart from the above defendant has now noted that Bond in the sum of \$13000.00 and retention in the sum of \$6483.74 remains to be paid by the plaintiff to the defendant.
 - ix) That there was no dispute regarding payments for works done for packages A, B and C as full payment was made except Bond and retention amount.
 - x) That error on the Final payment certificate was only raised when the winding up notice was served to the plaintiff and the plaintiff refused to make payments under the final payment certificate.
 - xi) That the plaintiffs office was well informed by him that the cheques given by the defendant should not be presented in the bank until the plaintiff clears the defendants payments which was to be made in the same bank account from which the cheque was issued however the plaintiffs office still presented the cheque to the bank knowing that there was no funds in the bank and this act was done deliberately to have the defendants cheque returned.
 - xii) That the breakdown of accounts (Final account summary) attached as VK7 is incorrect and the defendants Solicitors have written and sought particulars of the summary made but have not received a reply to the same.
 - xiii) That the plaintiff has not given any proper undertaking of the damages therefore the application filed by the plaintiff to be struck out.
6. When the matter was taken up for hearing on 25th April 2014 the Court heard oral arguments of both counsels who submitted written submissions thereafter with leave of the Court.

The Law and Analysis

- 7) In deciding whether to grant an injunction or not the Court is guided by the principles laid down in **American Cyanamid V Ethicon (1975) AC 396**

The principles were as follows;

- a) Is there is a serious question to be tried?
- b) Where does the balance of convenience lie?
- c) Are damages adequate remedy?

- 8) **Is there a serious question to be tried?**

In considering whether there is a serious question to be tried in this action the Court should be satisfied on the evidence placed before it that there is a substantial defence to the alleged debt which require investigation in

which case with winding up be entertained by the Company is not the appropriate remedy. The Plaintiff has the onus to establish a substantial dispute to obtaining an injunction against the defendant.

- 9) **In Mann and Another v Goldstein and Another (1968) 2 ALL E.R**
Page 769 it was held as follows;

"As the existence of the debt on which each winding up petition was founded was disputed on grounds showing a substantial defence requiring investigation, the petitioner did not establish that he was a creditor and thus had the locus standi to present the petition and the Companies court was not the appropriate Court to decide the dispute; accordingly the presentations of the petitions was on abuse of the process of the Court, and injunctions would be granted restraining until trial or further order, the advertisement or prosecution of the winding up petitions."

Emphasis added

It was held in In re Tweeds Garages Ltd. (1962) 1ch Page 406 at Page 407 as follows;

"that the only qualification required of the petitioner was that it was a creditor; and that where there was no doubt (and there was none here) that the petitioner was a creditor for a sum which would otherwise entitle it to a winding up order, a dispute as to the precise sum owed was not a sufficient answer to the petition."

- 10) Having in mind the principles set out in the above cases I will now consider the evidence in this matter to determine whether the debt on which the Winding Up petition is founded is disputed by the Plaintiff on grounds showing a substantial defence.
- 11) In this matter the Defendants claim is particularised at paragraph 10 of the defendants supplementary affidavit. It is evident from the said paragraph that the defendant has based his claim on the amount of \$110,773.04 stated in the final payment certificate dated 20th January 2012 which is attached to the affidavit of the defendant marked Exhibit 'F'."
- 12) The deponent of the Affidavit filed in support of the inter-parte notice of motion, Viren Kumar and the deponent of the Affidavit filed in reply Riaz Ali have signed the said final payment certificate and it is approved by the Senior General Manager of the Plaintiff Company.
- 13) It is contended by the Plaintiff that the payment certificate was prepared erroneously and the said error was rectified by the management when they discovered the error by the Accounts in preparing the payment certificate (Paragraph 20 of the affidavit of Viren Kumar).

- 14) Furthermore it is stated in the affidavit that the plaintiff discussed the matter with the defendant and it was agreed that they will disregard the said defective payment certificate and the same payment certificate is used by the defendant company to justify the winding up petition as they allege that this a debt owed to them by the plaintiff company.
- 15) When considering the evidence before me I find that the plaintiff has not produced any letter or advice sent to the defendant company informing it that the payment certificate is erroneous and therefore to disregard it.
- 16) If such an error appeared in the approved payment certificate plaintiff company should have acted in a prudent manner and corrected it with proper written notice to the defendant company and followed the proper accounting methods to do so, and thereby posses evidence to prove their contention.
- 17) It is difficult to believe that a reputed company engaged in a Government contract will endeavour to rectify an error in a payment certificate issued to a sub contractor by having a discussion with him without resorting to the proper procedure to do so.

Furthermore, no evidence is produced by the plaintiff to prove that the defendant company agreed to disregard the payment certificate.

- 18) Considering the affidavit evidence, I find that the plaintiff has raised the issue of an erroneous payment certificate only after the Winding Up Notice was served on them.
- 19) Moreover the plaintiff has offered no objection or dispute to the balance of the claim made by the defendant particularised at Paragraph 10 of the defendants supplementary affidavit.
- 20) Viren Kumar has deposed in his affidavit that a summary of all the expenses and payments for the sub contractor works carried out by the defendant was compiled and was also provided to the defendants Solicitors. The said summary is attached to the affidavit marked VK 7.

However, the said summary does not provide any reference or clarification to the error alleged to have been made in the payment certificate marked as Exhibit F.

- 21) Viren Kumar has deposed further in his affidavit that after deducting a sum of \$5240.14 from the defendants account defendant owes the plaintiff \$12618.43.
- 22) There is no evidence to the effect that the plaintiff demanded a sum of \$12618.43 from the defendant prior to serving winding up notice, on the defendant.

- 23) Considering the evidence before me, I am of the view that the plaintiff has failed to establish that the debt on which the winding up petition was founded was disputed on grounds showing a substantial defence requiring investigation. It is clear from the evidence before me that the plaintiff has repeatedly stated the debt is disputed without saying something substantive about the dispute and also raised a dispute after receiving the Winding Up Notice.

For the reasons set out above, I am of the view that the plaintiff has failed to establish that there is a serious question to be tried in this matter.

Undertaking as to damages

- 24) The deponent Viren Kumar has deposed on his affidavit that the Statement of Accounts of the plaintiff Company is attached marked as VK 9 and that the Plaintiff Company is in a position to meet any claim for damages brought by the defendant arising out of the grant of an injunction.
- 25) Though Viren Kumar has deposed that he is attaching the Statement of Accounts of the Plaintiff Company all he has attached is a bank statement, no accounts of the plaintiff Company has been provided.
- 26) Credit balance in the bank statement VK 9 cannot be accepted as an asset of the company because it can be withdrawn or transferred at any time by the Account Holder. It also does not disclose the liabilities of the Account holder.
- 27) In **Natural Water of Viti Limited V Crystal clear Mineral Water (Fiji) Limited** [2004] FJCA 59 ABU 0011 2004Sand ABU 0011 A 2004S (26 November 2004)

Court held as follows:

"Applicant for a interim injunction who offer an undertaking as to damages should proffer sufficient evidence of their financial position. The Court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy."

- 28) Considering the above mentioned guideline on undertaking, I am of the view that the undertaking as to damages provided by the Plaintiff is inadequate to sustain an injunction. Furthermore Viren Kumar has misrepresented facts by attaching a bank statement and deposing in his affidavit that he is attaching the statement of Accounts of the Company.
- 29) Considering all of the above, I am of the view that the Plaintiff has failed to satisfy the principles laid down on American Cynamid case for injunctive relief.

Defendants application seeking leave to withdraw its Counter claim.

- 30) The Counsel for the defendant made an oral application seeking leave to withdraw its Counter claim at the hearing date of this matter.
- 31) By the supplementary written submission filed by the defendants solicitor the defendant reiterates its application seeking leave to withdraw its counter claim pursuant to Order 21 rule 2 (2) (b) of the High Court Rules.
- 32) As the defendant is making the application to withdraw the Counter claim after the expiry of 14 days after service on him of a defence to Counter claim I am of the view that it should be made in the proper manner by a motion giving notice to the plaintiff and cannot be allowed on an oral application.

Final Orders

- (1) Inter-Parte Notice of Motion of the Plaintiff dated 14th November 2013 be dismissed and injunctions refused.
- (2) Defendants oral application to withdraw the Counter-Claim disallowed.
- (3) The Plaintiff to pay the Defendant costs summarily assessed at \$1000


L.S. Abeygunaratne

Judge

15/05/2014

