

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 0010 OF 2004

BETWEEN : **R. C. MANUBHAI AND COMPANY LIMITED** a
limited liability company having its registered
office at Ba, Fiji.

Plaintiff

AND : **MOHAMMED RAFIQ** of Vaileka Town, Rakiraki,
Fiji, Businessman.

Defendant

Before : Hon. Mr. Justice Sunil Sharma

Counsel : Mr. S. K. Ram for the Plaintiff
Mr. R. Kumar & Ms. S. Devi for the Defendant

Date of Judgment : 31 March, 2017

J U D G M E N T

BACKGROUND INFORMATION

[1] The Plaintiff claims from the Defendant the following:

- (a) Judgment for the sum of \$15,878.40 inclusive of damages in the sum of \$880.00;
- (b) Interest on the sum of \$14,998.40 at the rate of 13.5% per annum from 1 March, 2003 to the date of judgment;

(c) Further interest at the rate of 13.5% per annum from the date of judgment to the date of payment; and

(d) Costs.

STATEMENT OF CLAIM

[2] The Plaintiff in its Statement of Claim dated 29 December, 2003 states the following:

- “1. *The Plaintiff claims from the Defendant the sum of \$14,998.40 (Fourteen Thousand Nine Hundred Ninety Eight Dollars and Forty Cents) being amount due and owing, for the goods sold and delivered by the Plaintiff to the Defendant at the request of the Defendant between March 2003 to May 2003.*
2. *Several demands for payment have been made but the Defendant has refused and/or neglected to pay.*
3. *The Defendant had agreed with the Plaintiff to pay interest on any sum due and owing at a rate of 13.5 per centum per annum in the event that the Defendant defaulted in payment.*
4. *By a notice dated 1st October 2003, the Plaintiff required the payment of the entire sum.*
5. *The Defendant neglected and/or refused to comply with the notice.*

6. *As a result of the breach the Plaintiff has also suffered loss and damages.*

PARTICULARS OF DAMAGES

Incidental expenses in following up, phone calls, transport costs, costs of faxing, posting notices and obtaining legal advice to the date of issue of Writ of Summons to recover debt.

\$880.00

STATEMENT OF DEFENCE

- [3] The Defendant by his Statement of Defence dated 4 February, 2004 states the following:

- “1. **THE** Defendant denies being indebted to the Plaintiff in the sum claimed and the Defendant further denies requesting for any goods between March 2003 to May 2003 from the Plaintiff.
2. **THE** Defendant in answer to Paragraph 2 of the Statement of Claim says that he is not indebted to Plaintiff.
3. **AS** regards Paragraph 3 of the Statement of Claim the Defendant denies the alleged agreement as he has not requested for any goods between the dates alleged by the Plaintiff.
4. **IN** answer to Paragraph 4 of the Statement of Claim the Defendant says that he is under no legal obligation to pay the Plaintiff the sum claimed.

5. **THE** Defendant takes issue with Paragraph 5 of the Statement of Claim.
6. **THE** Defendant does not admit the allegations in Paragraph 6 of the Statement of Claim and puts the Plaintiff to strict proof of matters alleged therein.
7. **THE** Defendant further pleads that the Plaintiff's action is unenforceable by virtue of non-compliance with the Sale of Goods Act.
8. **THE** Defendant therefore prays that the Plaintiff's claim be dismissed with costs."

[4] The Plaintiff called one witness whereas the Defendant called two witnesses.

[5] By consent the following documentary evidence were tendered during the hearing and marked as follows:

- (a) Plaintiff's Exhibit "A" - Debt Calculation Sheet;
- (b) Plaintiff's Exhibit "B" - Rakiraki Tax Invoices 1 to 36;
- (c) Plaintiff's Exhibits "C1"
and "C2" - Credit notes 2146 and 2147;
- (d) Plaintiff's Exhibit "D" - Official receipt no. 123561 dated
31/05/2003 for \$552.84;

- (e) Plaintiff's Exhibit "E" - Demand Notice dated 1 October, 2003;
- (f) Plaintiff's Exhibit "F" - Statutory Declaration dated 29 October, 2003.

DEFENDANT'S EXHIBITS

- (i) Defendant's Exhibit "A" - Agreement between Mohammed Rafiq and Sanmogam Goundar dated 27/09/2002;
- (ii) Defendant's Exhibit "B" - Cheque butt dated 30/05/2003;
- (iii) Defendant's Exhibit "C" - Cheque butt dated 04/08/2003;
- (iv) Defendant's Exhibit "D" - Cheque butt dated 27/06/2003;
- (v) Defendant's Exhibit "E" - Cheque butt dated 16/08/2003;
- (vi) Defendant's Exhibit "F" - Cheque butt dated 15/11/2003;
- (vii) Defendant's Exhibit "G" - Deed between the Defendant and Sanmogam Goundar dated 06/10/2003.

EVIDENCE

- [6] The Plaintiff called Yangtेशwar Permal its Credit Controller who informed the court that he has close to 18 years work experience with the Plaintiff Company.
- [7] The Plaintiff Company has eight branches, Permal is based at the Head Office in Ba and the proceedings are in respect of Plaintiff's Rakiraki Branch.

- [8] The witness informed the court that when a customer acquires goods on credit an invoice is issued. In respect of the proceedings the Defendant's name was on the invoices issued by the Company for sale of goods on credit. The Defendant was mentioned in the invoice as Rafiq whose account number was R3002. The invoice issued by the Plaintiff amongst other things showed the description of the items sold, the quantity of the items supplied, price and total. The abbreviations "D/D number" in the invoice stood for delivery docket. According to the witness an invoice is raised once an item is supplied on credit, with the invoice a delivery docket is also given to the customer when the items are supplied to the customer.
- [9] Upon receipt of delivery the customer is required to verify the items and then sign on the delivery docket. The witness knows the Defendant as Mohammed Rafiq and is also known as Rafiq Umarji. The Defendant is the one and the only person recorded in all the invoices. Monthly statements are sent to the customers, which are either emailed, personally delivered or faxed, however, statements can also be sent fortnightly as well if requested by a customer.
- [10] The witness also explained that credit notes are issued when a customer returns goods or is overcharged. In every credit note the invoice number is mentioned. The Defendant was purchasing various items for his project on the same account and paying.
- [11] In the Plaintiff's bundle of documents the witness was able to identify:
1. Debt Calculation Sheet which shows the date of the invoices, invoice numbers, the outstanding amounts, due date, interest of 13.5% per annum etc. The calculation has taken into account

credit notes 2146 and 2147 issued and the payment of \$552.84 by the Defendant as per Plaintiff's official receipt number 123561 dated 31/05/2003. The unpaid invoices were from 18 March, 2003 to 30 May, 2003. The invoices yet to be paid were identified by the witness to be from page 3 to page 36 of the Plaintiff's bundle of documents. The above were marked as Plaintiff's Exhibits "A" and "B".

2. Credit notes 2146 and 2147 issued were identified and marked as Plaintiff's Exhibit "C1" and "C2".
3. Official receipt issued by the Plaintiff dated 31/05/2003 number 123561 for the sum of \$552.84 was marked as Plaintiff's Exhibit "D".

[12] Since the Defendant did not make any payments to settle the outstanding invoices the Plaintiff issued a Demand Notice dated 1 October, 2003 which was served on the Defendant. The Demand Notice is marked as Plaintiff's Exhibit "E" and the Statutory Declaration stating service of the Demand Notice on the Defendant on 8 October, 2003 is marked as Plaintiff's Exhibit "F".

[13] According to the witness after the Demand Notice was served the Defendant did not dispute the debt. It was after legal action was instituted that the Defendant disputed the invoices stating that he did not receive the materials.

[14] The witness maintained that materials were supplied to the Defendant, if the items would have been supplied to the Defendant's contractor Sanmogam Goundar than the invoices would have been under Sanmogam's name.

- [15] The witness stated that the Defendant owed the Plaintiff Company the sum of \$14,998.40, and in addition to this the Plaintiff was seeking interest and costs.
- [16] In cross examination the witness was referred to Plaintiff's Exhibit "D" the official receipt issued by the Plaintiff in respect of the Defendant's payment of \$552-84. In the Debt Calculation Sheet Plaintiff's Exhibit "A" the amount mentioned was \$880-00 being for invoice number 611467 dated 30 May, 2003. Counsel for the Defendant sought an explanation for the difference. The witness replied that short payment was possible since credit note may have been issued to the customer.
- [17] The witness agreed that the contractor hired by the Defendant was Sanmogam Goundar also known as Annu Goundar who was doing renovation works and building the downstairs shop of the Defendant. However, witness was not aware about the contract between Sanmogam Goundar and the Defendant.
- [18] The witness agreed that Sanmogam Goundar had a credit account with the Plaintiff Company which was closed due to non-payment.
- [19] The witness also informed the court that before materials were supplied to the Defendant he went to see the Defendant with the Rakiraki Branch Manager Vijay since Sanmogam's account had closed due to non-payment.
- [20] Since the Defendant was a well-known person in Rakiraki credit was approved as a one off credit account which was from 18 March 2003 to 30 May 2003.

- [21] The witness maintained that the items were ordered by the Defendant who liaised with the Branch Manager Vijay and upon the Defendant's confirmation the items were supplied to the Defendant. The procedure was for the owner of the account to place the orders.
- [22] The witness further stated in cross examination that the materials if authorized by the Defendant would have been taken by his contractor Sanmogam Goundar.
- [23] The witness disagreed that delivery dockets were not tendered in court because Sanmogam Goundar had taken the items. The witness had gone to see the Defendant about three times regarding the issue of non-payment and on one occasion he had given a statement to the Defendant. According to the witness the Defendant informed him that he was waiting for progress loan from the Bank and the entire sum will be paid.
- [24] The witness disagreed when suggested that after Sanmogam's account became overdue the Plaintiff Company started charging the Defendant's account without informing the Defendant. The witness also confirmed that monthly statements were sent to the Defendant who never raised any objections.
- [25] This was the Plaintiff's case.

DEFENDANT'S CASE

- [26] The Defendant gave evidence and also called a witness.
- [27] The Defendant informed the court that he had entered into an Agreement with contractor Sanmogam Goundar also known as Annu Goundar dated 27 September, 2002. The Agreement was a general contract in the sum of \$47,000-00 payment was made to the contractor from a Bank Loan. The project started in October, 2002 but the contractor did not finish the entire work and left. The Agreement between the Defendant and Sanmogam Goundar dated 27 September, 2002 was marked as Defendant's Exhibit "A".
- [28] The Defendant further informed the court that he did not have any account with the Plaintiff Company because when he went to open an account he was told that there was a long procedure to be followed so the Defendant bought items and paid by his cheque. The following cheque butts were tendered by the Defendant:
- a) Defendant's Exhibit "B" - Cheque butt dated 30/05/2003;
 - b) Defendant's Exhibit "C" - Cheque butt dated 04/08/2003;
 - c) Defendant's Exhibit "D" - Cheque butt dated 27/06/2003;
 - d) Defendant's Exhibit "E" - Cheque butt dated 16/08/2003;
 - e) Defendant's Exhibit "F" - Cheque butt dated 15/11/2003.

[29] The Defendant stated that from March, 2003 to May, 2003 he was not aware of any other invoices issued by the Plaintiff Company.

[30] In respect of the invoices raised by the Plaintiff the Defendant said that he did not order those materials, neither did he authorize his contractor Sanmogam Goundar or anyone to order the items on his behalf. He also did not receive the materials or sign any documents confirming receipt or authorize anyone on his behalf to receive the same or authorize the Plaintiff to deliver the items to Sanmogam Goundar or anyone else. Furthermore the Defendant stated that he did not receive any invoices from the Plaintiff.

[31] The Defendant denied the following items were used in his project:

a). Invoice number 609834 dated 7 April, 2003 being Sisalation paper for \$75.00;

b). Invoice number 610553 dated 30 April, 2003 being Zincalume roofing iron for \$585.20;

c). Two items mentioned in invoice number 609964 dated 11 April, 2003 being Flashing for \$22.50 and Zincalume roofing iron for \$280.80.

Total amount \$963.50.

[32] The Defendant further stated that he did not receive any statements from the Plaintiff the only statement he received was from Muni Ratnam Goundar, Assistant Manager from Plaintiff Company in May, 2003 after Sanmogam had left his project. The Defendant denied Yangtेशwar Permal (PW1) had come to see him regarding his account.

- [33] After receiving the Demand Notice the Defendant contacted his contractor Sanmogam Goundar and a Deed was signed between the Defendant and Sanmogam Goundar dated 6 October, 2003. The Deed was tendered and marked as Defendant's Exhibit "G".
- [34] In cross examination the Defendant agreed that in the Agreement dated 27 September, 2002 and the Deed dated 6 October, 2003 the Plaintiff was not a party. The Defendant also agreed that apart from what is mentioned in the Agreement the contractor Sanmogam Goundar had done additional works.
- [35] The Defendant also agreed that regardless of whoever collected the items from the Plaintiff's shop the materials mentioned in the various invoices were used in his building. The Defendant agreed he had received the Demand Notice sent by the Plaintiff's Solicitors on 8 October, 2003, however, the Deed was made two days earlier that is on 6 October, 2003. When the Deed was made the Defendant was aware that there was an account in his name at the Plaintiff Company and money was owed, however, the Defendant denied he owed any money to the Plaintiff.
- [36] The Defendant maintained his defence as per his Statement of Defence dated 4 February, 2004 filed on 6 February, 2004 by his former Solicitors and he agreed that nowhere in the Statement of Defence it was stated that money was owed by Sanmogam Goundar.
- [37] The Deed was for the first time brought to the attention of the court and the Plaintiff on 2 July, 2008. Thereafter the Defendant instructed his

Solicitors to file third party proceedings against Sanmogam Goundar to sue him.

[38] In further cross examination the Defendant was referred to the Deed made between him and Sanmogam Goundar and questioned about Sanmogam Goundar abandoning the Defendant's project before the completion date of end of February, 2003. For clarity I have reproduced the excerpts of the relevant cross examination:

“Q: Look at the 5th line in the Deed. Work was to commence on the 10th day of October 2002 and to be completed on or before the end of February, 2003.”

During this period were you doing own work in the building as well?

A: Yes

Q: Given that Sanmogam Goundar left did he leave before end of February, 2003?

A: I can't remember

Q: If the end of the contract was February, 2003 he would have left before February, 2003 because he did not complete the job.

A: I am not sure

Q: But you sure he left before the completion?

A: Yes because he did not finish the job?

Q: You completed the job after he left?

A: Yes

Q: Look at Plaintiff's bundle, page 3, invoice number 609290 – 18/03/2003, last invoice 614667 dated 30/05/2003. All these invoices are dated after February 2003?

A: Yes”

- [39] Furthermore a Third Party Notice upon the Defendant's instructions was filed against Sanmogam Goundar, however, the Defendant was not sure if the Third Party Notice was served.
- [40] The final witness for the Defendant was Muni Ratnam Goundar who was the Assistant Branch Manager of the Plaintiff Company in 2003. In 2003 the Defendant had a temporary account with the Plaintiff Company which was active from March 2003 to May 2003 and Hardware materials were supplied in this account.
- [41] According to the witness Sanmogam Goundar was using the Defendant's account, however, he did not know whether the Defendant had authorized Sanmogam Goundar to use the Defendant's account since items were released upon the authorization of the Shop Manager Vijay Krishna Goundar. In May, 2003 the witness personally delivered one statement to the Defendant.
- [42] In cross examination the witness stated that once an order was received at times Sanmogam Goundar would personally come to pick the items or sometimes Sanmogam Goundar used to call the Manager for delivery of the items.
- [43] Upon questioning by the court the witness stated that to open a temporary account with the Plaintiff Company no documents were required the person who wanted to open the account would have to talk to the Branch Manager.
- [44] This was the Defendant's case.

ANALYSIS AND DETERMINATION

- [45] The Plaintiff says it entered into a contract of sale with the Defendant whereby goods namely Hardware materials were sold to the Defendant on credit under Defendant's account number R3002. The Plaintiff seeks from the Defendant payment for the materials ordered and supplied at the Defendant's request as per the numerous invoices of the Plaintiff (from 18 March 2003 to 30 May 2003) raised against the temporary credit account of the Defendant. Under the contract of sale the Defendant was supposed to have paid for the price of the materials supplied within a period of 30 days from the date of the invoices which he did not.
- [46] The Plaintiff's claim is for the sum of \$14,998.40 together with interest at the rate of 13.5% per annum and costs.
- [47] After the Defendant failed and/or neglected to pay the amount owed, the Plaintiff through its Solicitors on 8 October, 2003 personally served the Defendant with a Demand Notice.
- [48] Despite the service of the Demand Notice the Plaintiff did not receive any payment from the Defendant hence legal proceedings were instituted against the Defendant.

STATEMENT OF DEFENCE

- [49] The Defendant filed his Statement of Defence in which he denied ordering any materials from March, 2003 to May, 2003 hence he was not indebted to the Plaintiff.

[50] I note from the evidence adduced in court that the Defendant's contention has been that if there was any payment to be made to the Plaintiff it was the responsibility of his contractor one Sanmogam Goundar also known as Annu Goundar with whom he had entered into a general contract for his renovation and building works.

[51] I also note the Statement of Defence does not state that there is a Third Party who is indebted to the Plaintiff and not the Defendant.

THIRD PARTY PROCEEDINGS

[52] As legal proceedings progressed it was for the first time on 2 July, 2008 when the matter was for hearing that the Defendant revealed there was a Deed executed between him and his contractor Sanmogam Goundar.

[53] On 2 July, 2008 leave was granted to the Defendant to issue Third Party Notice to Sanmogam Goundar and on 10 July, 2008 a Third Party Notice was issued. I note from the court file that despite been granted leave to serve the Third Party the Defendant did not do so.

[54] In the Third Party Notice the Defendant interalia mentioned the following at paragraph two:

"The Defendant claims against you as Third Party to be indemnified against the Plaintiff's claim ... on the grounds that you, the Third Party, purchased goods from the Plaintiff under the Defendant's account with the Plaintiff for your own benefit and purpose ..."

- [55] Any arrangement or agreement between the Defendant and Sanmogam Goundar was a matter entirely between them. The two parties had signed an Agreement and a Deed in this case. The Defendant agrees that the Plaintiff Company was not a signatory to the Agreement and the Deed he had signed with Sanmogam Goundar.
- [56] The Defendant also agreed that the Plaintiff Company was not aware of the Agreement or the Deed signed.
- [57] It is trite law that an agreement binds only the parties to that agreement it can have no legal effect on a third party, so essentially only a party to a contract can be sued on it and only a party to a contract can claim benefit under it (*see Pacific Transport Limited vs. Latchan Express Services Limited, civil action no. 494 of 1994 (10 December 1997)*).
- [58] In accordance with the law on privity of contract I am satisfied that the Agreement and the Deed signed between the Defendant and Sanmogam Goundar does not bind the Plaintiff Company.

LAW

- [59] The law governing sale of goods in Fiji is the Sale of Goods Act Cap 230. Section 5 of the Sale of Goods Act states:

“Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing or by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.”

[60] The Defendant contends that there was no contract of sale between him and the Plaintiff since there was no offer or acceptance in that he had not ordered the materials or received the same since the Plaintiff had not produced any delivery dockets to show that the Defendant had received the materials. Section 5 of the Sale of Goods Act makes it clear that a contract of sale can be established in numerous ways such as in writing, by word of mouth, partly in writing and partly by word of mouth or by implication from the conduct of the parties.

[61] The Defendant admitted that except for four items all other items supplied were used in his project and according to the Defendant's own witness Muni Ratnam Goundar the Defendant had an active credit account with the Plaintiff in 2003 from March to May whereby Hardware materials were supplied.

[62] On 31 May, 2003 the Defendant made a part payment of \$552.84 towards invoice no. 611467, dated 30 May, 2003 and I also note that there are two credit notes issued by the Plaintiff in relation to the Defendant's account R3002. The part payment made by the Defendant and the two credit notes issued by the Plaintiff showed that the Defendant was using his credit account and was aware of the transactions in the account.

[63] Section 6 (1) of the Sale of Goods Act states:

“A sale of goods ... on credit in the course of trade shall not be enforceable by action at the suit of the seller, unless –

- (a) at the time of the sale or agreement to sell an invoice or docket, serially numbered, be made in writing in duplicate, both original and duplicate containing –*
 - (i) the serial number;*
 - (ii) the date of the transaction;*
 - (iii) the name of the buyer;*
 - (iv) the nature and, except in the case of goods exempted from this provision by order of the Minister, the quantity of the goods, in the English language and in figures; and*
 - (v) the price in English words or figures; and*

- (b) at the time of delivery of the goods, the original or duplicate of the invoice or docket be delivered to the buyer or to some person to whom the goods may properly be delivered on his behalf ...”*

[64] I accept on the evidence that all the requirements of section 6 (1) of the Sale of Goods Act have been met including the delivery of the items ordered to the Defendant or to a person on his behalf under credit account R3002 which was in the name of the Defendant.

[65] Furthermore the Defendant had entered into a Deed with his contractor Sanmogam Goundar on 6 October, 2003 which was two days before he was served with the Demand Notice issued by the Plaintiff’s Solicitors.

[66] At paragraph two of the Deed the following is stated:

“That it is specifically agreed between the parties that the aforesaid sum does not include the sum owed by the contractor to R. C. Manubhai & Co. Ltd where even the account is in the name of the owner ...”

[67] It is obvious from the above that the Defendant knew he had an account with the Plaintiff Company and he also knew his contractor was using his account. I note from the Deed signed between the Defendant and Sanmogam Goundar that the duration for which the Defendant had engaged the contractor was from 1st day of October, 2002 till on or before the end of February 2003. The Defendant in his evidence said that his appointed contractor had left his project before completion date which was end of February, 2003. This means Sanmogam Goundar was not undertaking any works for the Defendant after end of February 2003. The question that comes to mind is why is the Defendant holding Sanmogam Goundar responsible for the payment of invoices raised from March, 2003 to May, 2003 after Sanmogam had left?

[68] The invoices for which the Plaintiff Company is seeking payment are dated 18th March, 2003 to 30th May, 2003 that is after Sanmogam Goundar had left the Defendant's project.

[69] Based on the evidence adduced in court I am satisfied that the Defendant had a temporary credit account with the Plaintiff Company being account no. R3002 which was used by the Defendant to order materials on credit. The materials ordered by the Defendant was supplied and/or delivered to the Defendant.

[70] I also note that the Defendant entered into a Deed with his contractor for payment by the contractor to the Plaintiff prior to been served with the Demand Notice. This means the Defendant was aware of his debt but wanted the contractor to pay for the same. This Deed was executed without the knowledge of the Plaintiff Company which was not a party to the Deed.

[71] The Plaintiff instituted legal proceedings on 20 January, 2004 yet a Third Party Notice was issued by the Defendant against Sanmogam Goundar in July, 2008 after a lapse of about four years.

[72] I accept the evidence of the Plaintiff's witness Yanteshwar Permal as reliable and truthful that the Defendant had a temporary credit account with the Plaintiff Company. The Plaintiff and the Defendant entered into a contract of sale by which the Plaintiff sold goods namely Hardware materials to the Defendant as per his request. The Plaintiff was sending monthly statements and the Defendant was aware of the amount due by him to the Plaintiff for materials sold and delivered. Furthermore the Defendant is the account holder and the Plaintiff's invoices were issued for the materials sold and delivered to the Defendant.

[73] I reject the evidence of the Defendant that he did not order the goods supplied for his project and that he did not receive or authorize anyone to receive them on his behalf. Further I reject the Defendant's evidence that he did not receive any invoices and was not aware of his debt. On his own admission the Defendant admitted receiving one statement in

May 2003 accordingly he had notice of the amount due by him to the Plaintiff Company.

[74] I also accept the evidence of Yangtेशwar Permal that the Defendant was purchasing various items for his project on the same account and paying. This is supported by the part payment made by the Defendant for invoice no. 611467 (Plaintiff's Exhibit "A") dated 30 May, 2003 in the sum of \$552.84 for which the Plaintiff had issued its official receipt no. 123561 dated 31 May, 2003 (Plaintiff's Exhibit no. "D").

[75] The Defendant in my view was at all material times aware of his indebtedness to the Plaintiff but he refused to pay the amount due and owing. I also reject the Defendant's evidence that four items in the invoices issued by the Plaintiff Company were not used in his project

COSTS

[76] The Plaintiff is seeking costs on an indemnity basis against the Defendant. The Plaintiff in its written submissions states that the conduct of the Defendant in the proceedings has been reprehensible. In support the Plaintiff relies on the Court of Appeal decision in *Police Service Commission vs. Beniamino Naiveli civil appeal no. ABU 0052U of 1995(16 August 1996)*. The Plaintiff also submitted that there are some situations where indemnity costs may be awarded by the court. The Plaintiff relied on the decision of Inoke J. in *Chandar Lok vs. Anand Kumar Singh [2010] HBC 321 of 2000 (20 January, 2010)* where the following situations were identified:

- “a). making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;*
- b). evidence of particular misconduct that causes loss of time to the Court and to other parties;*
- c). the fact that the proceedings were commenced or continued for some ulterior motive;*
- d). proceedings were commenced or continued in willful disregard of known facts or clearly established law;*
- e). the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions;*
- f). an imprudent refusal of an offer to compromise.”*

[77] The Plaintiff argues that the Defendant during the hearing had alleged that there was collusion between the Plaintiff and a Third Party to dishonestly charge goods obtained by the Third Party to the account of the Defendant. This according to the Plaintiff was akin to fraud and that the Defendant had to prove the allegations, however, there was no evidence led by the Defendant to support this.

[78] The Plaintiff also states that for the past 13 years the Defendant has been saying that none of the goods were sold and delivered to him but by his own admission over the two days hearing which could have been

avoided the Defendant admitted that all the items in the invoices except 4 items totaling \$963.50 were not delivered to his project.

[79] The Plaintiff seeks \$40,000.00 as indemnity costs being \$25,000.00 in legal costs so far and a further \$15,000.00 in relation to the hearing and submissions.

[80] Order 62 Rule 3 (3) and (4) of the High Court Rules gives discretion to the court to make any order as to the costs of any proceedings, however, this discretion ought to be exercised judiciously. Generally costs are awarded on a "party-party" basis, however, in some circumstances costs may be awarded on an indemnity basis. In this case I agree with the Plaintiff that the Defendant has made unsubstantiated allegations against the Plaintiff that the Defendant was a victim of dishonest practice orchestrated by the Plaintiff.

[81] The allegation raised by the Defendant had not been pleaded in the Statement of Defence yet it was raised by the Defendant during the two days hearing. Unfortunately counsel for the Plaintiff did not raise any objections when the Defendant was making such allegations hence it is not appropriate for the Plaintiff to ask for indemnity costs as a result.

[82] This matter has dragged for one reason or the other since 2004, however, to place the blame entirely on the Defendant is not fair. The Plaintiff should have sought costs when the matter scheduled for hearing got vacated upon the Defendant's application.

[83] The Defendant in my view should not be penalised for exercising his right to dispute matters since any risk the Defendant took was his own in respect of costs that could be awarded against him upon final determination of the matter. The Plaintiff is seeking \$40,000.00 as costs on an indemnity basis have also not provided any evidence to support its contention. I decline to make cost orders on an indemnity basis.

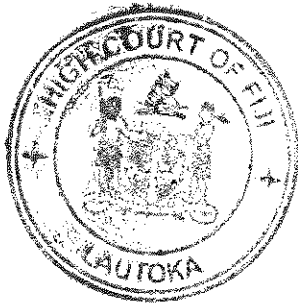
CONCLUSION

[84] Based on the evidence before the court I am satisfied that the Plaintiff has proven its claim on balance of probabilities that the Defendant owes the Plaintiff the sum of \$14,998.40 for goods sold and delivered to the Defendant from March 2003 to May 2003. The Plaintiff is also entitled to receive interest at the rate of 13.5% per annum with effect from 18 April, 2003. I disallow the claim of damages in the sum of \$880.00 since no evidence was adduced in this regard.

FINAL ORDERS

- (1) The Defendant is to pay the Plaintiff the sum of \$14,998.40 together with interest at the rate of 13.5% per annum from 18 April, 2003 till the date of this Judgement;
- (2) The Defendant's Statement of Defence is hereby struck out and dismissed;
- (3) Post Judgement statutory interest rate applies until the judgement sum is fully paid;

- (4) The Defendant is to pay the Plaintiff costs summarily assessed in the sum of \$7,000.00.




Sunil Sharma
JUDGE

At Lautoka
31 March, 2017

Solicitors

M/s. Samuel K. Ram for the Plaintiff.

M/s. Faiz Khan Lawyers for the Defendant.