

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 266 of 2019

**BETWEEN:** **KONTIKI FINANCE LIMITED** a limited liability company licensed as a Credit Institution, having its registered office at Level 5, Tappoo City, Suva.

PLAINTIFF

**AND:** **ASHNEEL NAVNEET CHAND** trading as **WASTE DISPOSAL SERVICES** of Lot 7 Buresasa, Sawani, Nausori.

DEFENDANT

**BEFORE:** Hon. Justice V D Sharma

**COUNSEL:** Mr. Gounder K. - for the Plaintiff  
No-appearance - of the Defendant

Date of Ruling: 27<sup>th</sup> September, 2019 @ 9.30 am

DECISION

*[Inter Parte Notice of Motion seeking Injunctive Orders pursuant to Order 29 of the High Court Rules 1988 and the Inherent Jurisdiction of this Honourable Court]*

INTRODUCTION

1. The Plaintiff filed a Notice of Motion coupled with an Affidavit in support and sought for the following orders:
  - (a) That the defendant immediately release to the Plaintiff the vehicles description of which is second-hand Mitsubishi Fuso 5 Ton Truck with chassis number FK417 J541150, engine number 6D16621763 and Motor Vehicle Registration number HY 459 and second-hand Toyota Dyna Truck with chassis number FB4JEA51738, engine umber JO5CA17581 and Motor Vehicle Registration number FI 019;
  - (b) That the Defendant and/or his servants or agents howsoever restrained from selling, transferring or otherwise in any manner disposing second-hand Mitsubishi Fuso 5 Ton Truck with chassis number FK417 J541150, engine number 6D16621763 and Motor Vehicle Registration number HY 459 and second-hand Toyota Dyna Truck with chassis number FB4JEA51738, engine umber JO5CA17581 and Motor Vehicle Registration number FI 019 until further order of this Honourable Court;
  - (c) That Police officers do act and render all assistance required by the Plaintiff in the enforcement of the Orders;
  - (d) The Defendant pay to the Plaintiff the costs of this application on a full indemnity basis; and
  - (e) Any further Orders and/or relief as this Honourable Court may deem fit.
2. The application is made pursuant to Order 29 of the High Court Rules 1988 and the inherent jurisdiction of this Honourable Court.
3. The Defendant failed to file any Response nor did he endeavor to make any appearances to counter the Plaintiff's application. The application was heard unopposed.
4. The Plaintiff furnished his written submissions in support of his application.

BACKGROUND

5. The Plaintiff claims that the Defendant obtained financial credit from the Plaintiff in the total sum of \$57,160.00 for the purchase of second-hand Mitsubishi Fuso 5 Ton Truck Registration number HY 459 as per Secured Credit Contract of 11 June 2015.
6. Subsequently, the Defendant applied for additional funds to repair his second-hand Toyota Dyna Truck Registration number FI 019 ("vehicle 2").
7. The Plaintiff refinanced the Defendant's previous account and paid out his previous loan which was based on Secured Credit Contract dated 11 June 2015.
8. The Plaintiff prepared a new account and facilitated the loan via Pre Disclosure Statement and Letter of Offer dated 28 December 2016.
9. That pursuant to Schedule 1 of Secured Credit Contract dated 28 December 2016, the Defendant obtained financial credit from the Plaintiff in the total sum of \$90,635.08 to are finance his loan with the Plaintiff and obtain additional funds repair to vehicle 2.

10. That pursuant to Schedule 3 of the Secured Credit Contract dated 28 December 2016, the loan was secured as the Defendant had provided vehicle 1 and vehicle 2 as securities.
11. That in conclusion for the loan facility, the Defendant's acquired insurance for the vehicle and the Plaintiff's interest was noted thereon. Furthermore, since vehicle 1 and vehicle 2 were securities for the loan, the Land Transport Authority noted the Plaintiff's financial interest.
12. The Defendant made his last payment in July 2019. Since then he is in default of his account repayments to the sum of \$144,496.89 with interest accruing at the rate of 24% per annum.
13. The Plaintiff therefore served Default Notices on the Defendant for payment of the outstanding arrears but was not satisfied by the Defendant.
14. The Plaintiff's bailiff after the breach of the arrears notice attempted numerous times to seize vehicle 1 and vehicle 2 via Repossession Notices.
15. However, the Defendant has prevented the Plaintiff's Bailiff to take possession of vehicle 1 and vehicle 2 by hiding the said vehicles.

CONSIDERATION OF APPLICATION

16. The issue before this court is whether to grant the Injunctive orders sought for in the Plaintiff's Notice of Motion?
17. After a careful perusal of the orders and/or relief sought at **Prayer No. 1 in the Notice of Motion** it can be ascertained that it is in the nature of a **Mandatory Order** and whereas **Prayer No. 2** is a **Restraining Order**.
18. The **Principles** for granting a **mandatory injunction** was set out in the case of Redland Bricks Ltd -v- Morris (1969) 2 ALL ER 576 as follows:
  - (i) *A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution, but in the proper case unhesitatingly.*
  - (ii) *Damages will not be a sufficient or adequate remedy if such damage does happen.*
  - (iii) *The cost to the defendants to do the work or the act must be taken into account.*
  - (iv) *The court must be careful to see that the defendants knows exactly infact what he has to do. However, the House of Lords went onto say that every case must depend essentially on its own particular circumstances. In a mandatory injunction case the principles to adhere will change on the circumstance of the case.*
19. In the current application, the Plaintiff is seeking through **Prayer No. 1** for the immediate release and possession of two motor vehicles registration Nos. HY 459 and FI 019 as the security for the loan obtained under Schedule 1 and 2 of the Secured Credit Contract.
20. Schedule 3 of the second Credit Contract gives the Plaintiff the right to repossession of its securities upon default of repayments of loan.

21. According to the Plaintiff, the Defendant made his final repayment of loan on 04<sup>th</sup> July 2018 and thereafter has continued to default payments up to a substantial amount of \$144,496.89 with interest accruing at 24% per annum.
22. The Plaintiff therefore now seeks an order to take the possession of the securities of the two vehicles under the loan facility agreement. Further, in the Plaintiff's pre-contractual disclosure statement and letter of offer disclosures annexure schedule 3 which gives the Plaintiff the right to repossession of vehicles in the event of defaults of repayments of loan.
23. In this case, the Plaintiff has defaulted payments of a substantial sum of \$144,496.89. Several default notices were served on Defendant in order to recover the arrears.
24. Subsequent attempts were made by the Plaintiff's bailiff to seize the vehicles via repossession notices but the Defendant has prevented the bailiff from taking possession vehicles.
25. The Plaintiff stated that there is a high risk of the Defendant hiding the vehicles, deposing of the vehicles and/or cause substantial damage to the vehicles held as securities and that the Plaintiff will lose or its interest in the said securities.
26. The failure of the Plaintiff to take possession of the security for loan obtained by the Defendant may result in Plaintiff suffering damages.
27. The Plaintiff is mindful of the damages that the Defendant may suffer as a result of the Injunctive orders being granted by this court and therefore the Plaintiff in light of this fact gives an undertaking as to damages accordingly.
28. Considering the above, damages will not be an adequate remedy since the Defendant owes the Plaintiff a substantial debt of \$144,496.89 with interest.
29. However, in order to determine the current application before court, this court needs to follow the test and principles laid down in *American Cyanide Co v Ethican Ltd (1975) AC 396*.
30. This court in the like needs to take into consideration the following:
  - (i) *Whether there is a prima facie case with the probabilities of plaintiff succeeding and whether there is a serious issue to be tried.*
  - (ii) *Whether the balance of convenience favours the court exercising its discretion in favour of the plaintiff.*
  - (iii) *Undertaking as to damages.*

**Serious Question to be Tried**

31. The Plaintiff has furnished court with the Affidavit in Support coupled with annexures pertaining to secured Credit Contracts, securities for the loan, default notices and arrears accrued at \$144,496.89 with interest as evidence to this court.
32. The Defendant's loan account with the Plaintiff is not only in default but also in substantial arrears for some period of time now and the Plaintiff has failed to recover the debt and/or repossess the securities over the loan.

33. This Court needs to hear and determine what is the total amount of loan and interest that the Defendant owes to the Plaintiff to date?
34. Why is it that the Defendant has failed to continue to pay and reduce the loan amount?
35. Further, why has the Defendant hidden the vehicles and not allowing it to be repossessed, sold and the debt recovered?
36. Therefore, this court is of the view that prima facie there are serious questions to be tried to determine what transpired between the Plaintiff and the Defendant.

Balance of convenience

37. The Court always needs to consider in determining where the balance of convenience lies. Whether the Applicant has furnished sufficient evidence to support its undertaking as to damages.
38. I make reference to the case of Honeymoon Island [Fiji] Ltd v. Follies International Ltd Civil Appeal No. ABU 0063 of 2007S (4 July 2008)- wherein the Court of Appeal stated-

*"[16] Applicants for interim injunctions who offer an undertaking as to damages must also 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; Natural Waters of Viti Limited v Crystal Clear Mineral Water [Fiji] Ltd [2004] ABU 0011 at p12."*

*[17] The opposing party is able to test or challenge any such financial information...;*

*[18] ...However in every case involving an application for an interlocutory injunction the onus is on the applicant to satisfy the Court that it can meet its undertaking as to damages whether or not the Court specifically directs the applicant's attention to the matter or not."*

39. The Plaintiff herein has provided its undertaking as to damages by evidencing in Annexure "G" within the Affidavit in Support stating "The Plaintiff is a reputable financial institution and is mindful of damages that the Defendant may suffer as a result of the injunctive orders being made and the Plaintiff Company gives its undertaking as to any damages."
40. Therefore, the aforementioned undertaking by the Plaintiff meets the test in Honeymoon (Supra) and Natural Waters (Supra) respectively.
41. Therefore the balance of convenience favours the Plaintiff accordingly.

Whether Damages would be an adequate remedy

42. Damages would not be an adequate remedy since the Defendant owes a substantive debt of \$144,496-89. Further, the Plaintiff's entitlement to the repossession of the vehicles in terms of Schedule 3 of the Secured Credit Contract and sale of the vehicles would mean that the Defendant has no other means to pay for the debt owed unless the Defendant can establish with evidence otherwise.

IN CONCLUSION

43. For the aforesaid rational, I find that the Plaintiff has satisfied this court with sufficiency of evidence that the Interim injunctive orders as sought for in the Notice of Motion should be granted.
44. Accordingly, I proceed to make the following orders:
- (i) That the Defendant immediately release to the Plaintiff the vehicles description of which is second-hand Mitsubishi Fuso 5 Ton Truck with chassis number FK417 J541150, engine number 6D16621763 and Motor Vehicle Registration number HY 459 and second-hand Toyota Dyna Truck with chassis number FB4JEA51738, engine number JO5CA17581 and Motor Vehicle Registration number FI 019;
  - (ii) That the Defendant and/or his servants or agents howsoever be restrained from selling, transferring or otherwise in any manner disposing second-hand Mitsubishi Fuso 5 Ton Truck with chassis number FK417 J541150, engine number 6D16621763 and Motor Vehicle Registration number HY 459 and second-hand Toyota Dyna Truck with chassis number FB4JEA51738, engine number JO5CA17581 and Motor Vehicle Registration number FI 019 until further orders of this Honourable Court;
  - (iii) That Police officers do act and render all assistance required by the Plaintiff in the enforcement of the Orders;
  - (iv) Cost of this application to be in the cause accordingly.
  - (v) Substantive Writ of Summons is adjourned to 04<sup>th</sup> November 2019 for mention and directions.
  - (vi) Orders accordingly.



VISHWA DATT SHARMA  
JUDGE  
SUVA  
27<sup>th</sup> Day of September, 2019

cc: Kumar Goundar Lawyers, Suva  
Ashneel Navneet Chand, Nausori.