

IN THE HIGH COURT OF FIJI AT SUVA

CENTRAL JURISDICTION

CIVIL JURISDICTION

HBC 203 OF 2023

BETWEEN:

ASHNEEL CHAND MAHARAJ T/A  
ASHNEEL CHAND MAHARAJ  
SUPERMARKET PTE LTD also known as  
MAHARAJ GROUP PTE FIJI LIMITED

PLAINTIFF/APPLICANT

AND:

PRAMESH CHAND MAHARAJ, OMLESH  
CHAND MAHARAJ, KAMLESH CHAND  
MAHARAJ AND KRISHNEEL CHAND  
MAHARAJ

FIRST DEFENDANT/RESPONDENT

AND:

BANK OF THE SOUTH PACIFIC

SECOND DEFENDANT/RESPONDENT

Date of Hearing : 7 July 2023  
For the Plaintiff/Applicant: Ms Mataitoga  
Date of Decision: 11 July 2023  
Before: Levaci SLTTW, J

RULING

*(EX-PARTE APPLICATION FOR INTERIM INJUNCTION QUIA TIMET)*

### **Background**

- 1.0 The Plaintiff/Applicant had filed an ex-parte application seeking interim injunction (*quia timet*) against the Defendant/Respondents. Together with an ex-parte application was a Writ of Summons seeking restrain the Second Defendant/Respondents from exercising their mortgagee power of sale to sell the property by tender to another.
- 2.0 On the basis of a loan granted by the Plaintiff/Applicant to Omlesh Chand Maharaj for the sum of \$2540.00, the parties entered into a contract for services on the 17 of May 2022 for Omlesh Chand Maharaj to work as a Sales and Purchasing officer from the Plaintiff/Applicant for a period of 3 years and be paid \$250.00 in lieu of the debt with a repayment plan entered into on 5 June 2022.
- 3.0 After Omlesh Chand Maharaj left employment, the parties entered into another undertaking for the First Defendants to place the property registered under the name of Kamlesh Chand Maharaj, the father of Omlesh Chand Maharaj, as mortgage in the event Omlesh Chand Maharaj failed to repay a debt of \$40,000 worth of goods obtained without permission from the Plaintiff/Applicant's supermarket in addition to the balance of the loan of \$1140.
- 4.0 The Plaintiff/Applicant claims that the Defendant/Respondent breached their undertakings by failing to repay the debt and transfer the property to be registered to the Plaintiff/Applicant.
- 5.0 The Plaintiff/Applicant is now seeking orders to interim orders to restrain the Second Defendant from exercising their Powers of Mortgagee Sale pending the proceedings.

### **Application for injunction**

- 6.0 The Plaintiff/Applicant relies upon his Affidavit which states as follows –
  - '1'. I am the Director of the Plaintiff Company and I am duly authorised to swear this Affidavit on behalf of the Company in this matter.
  2. I depose to the matters herein from my own knowledge and from the knowledge gained from perusal of the documents relevant to this matter unless otherwise so stated to be advised, information and belief.
  3. I employed one Omlesh Chand Maharaj being the second named First Defendant in this matter on the 17<sup>th</sup> of My 2022. Annexed hereto and marked with the letter **ACM-1**' is a copy of the Employment Agreement.

## **THE BACKGROUND**

4. The second-named First Defendant had approached the Plaintiff seeking assistance to clear his debt as the police were coming after him.
5. The Plaintiff also made an arrangement suiting to both the Plaintiff and second named First Defendant, which was loaning the monies to the second-named First Defendant in exchange the second-named First Defendant works for the Plaintiff.
6. The loan received by the second-named First Defendant from the Plaintiff will then be deducted from the wages the second-named First Defendant receives from the Plaintiff.

## **THE LOAN**

7. On or around 17 May 2022, the second-named first Defendant accepted the loan in the sum of \$2,540.00 (Two Thousand Fiv Hundred and Forty Thousand Dollars) from the Plaintiff, in exchange he is employed in the position of Sales and Purchasing Officer with the Plaintiff.
8. The conditions of the Employment Agreement specified that the second named First Defendant is to work for a term of 3 years for the Plaintiff and be paid \$250.00 (Two Hundred and Fifty Dollars) every week.

## **THE EMPLOYMENT**

9. The second –named First Defendant began work on 17 May 2022 with the Plaintiff and left after working for the Plaintiff for 2 weeks.
10. The Plaintiff had only recovered \$500.00 (Five Hundred Dollars) from the second-named First Defendant for the 2 weeks of employment with the Plaintiff.
11. In addition, the second-named First Defendant took goods and monies totaling to the sum of \$40,000.00 (Forty Thousand Dollars) from the Plaintiff when exiting the place of employment.

## **RECOVERY BY WAY OF UNDERTAKING**

12. The Plaintiff to recover its lost asses to the second named First Defendant and the first named First Defendants was in agreement with the third named First Defendant to place as security their property described in Certificate of Title No. 17936, Lot 60 on DP 4522 situated at Lot 60, Off Lal Singh Road, Waila, Nausori (hereinafter referred to as 'the property') Annexed hereto and marked with the letter **ACM-2**" is a cpy of the Title of the property.

13. The first named First Defendant and the third-named First Defendant executed a legal undertaking agreeing that the Plaintiff will be reimbursed the sum of \$40,000.00 (Forty Thousand Dollars) within 3 weeks from the date of the legal undertaking. Annexed hereto and marked with the letter "ACM-3" is a copy of the legal undertaking.
14. The Plaintiff allowed and the First Defendant agreed in the legal undertaking that the property may be mortgaged so the Plaintiff can recover all its lost assets to the second named First Defendant.
15. The timeframe allowed, in the legal undertaking, for the First Defendant to mortgage the property was 3 weeks subject to an extension written and consented to by both parties to the legal undertaking.
16. The Plaintiff also allowed the second-named First Defendant to return to work as per the employment contract and failure to comply will result in the First Defendant owing to the Plaintiff in damages the sum of \$41,140 (Forty One Thousand One Hundred and Forty Dollars).
17. I verily believe that there is a serious question to be tried that must be tried as the First Defendant, being the registered proprietor of the property, entered into an undertaking with the Plaintiff using the property as security.

## **THE MORTGAGE**

18. On or around 17 June 2023, the Second Defendant advertised a Tender for the sale of the First Defendant's property and despite our repeated requests to delay the advertisement and tender process as it would affect my equitable interest on the property. Annexed hereto and marked "ACM-4" is a copy of the Tender advertisement.
19. The Tender advertisement by the Second Defendant directly affected the Plaintiff's ability to exercise its rights made available in its Undertaking of 5<sup>th</sup> June 2022 to have the property transferred from the First Defendant to the Plaintiff, particularly when due diligence and negotiation were ongoing.
20. I verily believe that the First Defendant acted in bad faith as by its actions it was deliberately impeding the Plaintiff's ability to have the property transferred from the First Defendant to itself.
21. On or around 19<sup>th</sup> June 2023, I visited the office of the Second Defendant to discuss on the existence of my equitable interest on the property that was advertised by tender.
22. I verily believe that the Plaintiff's loss will be overwhelming and irreparable if the Defendants are allowed to proceed with the signing of the Sale and Purchase Agreement with a new buyer.

23. I verily believe that the Second Defendant's actions are a deliberate attempt to force the sale of the property impeding on the Plaintiff's right under the Legal Undertaking voluntarily executed by the First Defendant.
24. The Plaintiff is advised by its solicitors that if the Defendant is not reinstated from entering into the Sale and Purchase Agreement with a new buyer, the Plaintiff will lose its rights to recover its losses caused by the First Defendant. Should this occur then the Plaintiffs loss will be overwhelming and irreparable.
25. I am advised by the Plaintiff's solicitors that the Plaintiff's claim against the Defendant has a good chance of succeeding as it has serious issues to be tried
26. The Defendants would be unjustly enriched if there are no orders prohibiting them from selling the property. The Second Defendant will be able to recover the total sum when the property is transferred to the Plaintiff as stipulated in the Legal Undertaking made between the Plaintiff and the First Defendant
27. If the Plaintiff's application is allowed, they will be able to resume operations and continue with repayments of the loan whilst the court determines the clam against them.
28. The Plaintiff is a substantial company yin Fiji and gives the usual undertaking as to damages consequent upon grant of an injunction restraining the Defendant from disposing of and dealing with its assets in Fiji.'

**Order 29 Rule 1 of the High Court Rules for Injunctive Reliefs for quia *timet***

7.0 Order 29 r 1 of the High Court Rules 1988 prescribes the procedure for an application for Injunction stipulates:

- 1 (1) An application for the grant of an injunction maybe made by any party to a cause or matter before or after trial of the cause or matter, whether or not a claim for the injunction was included in the party's writ, originating summons, counterclaim or third party notice, as the case may be.
- (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex-parte on affidavit but, except as aforesaid, such application must be made by motion or summons.
- (3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in the case the injunction applied for may be granted on terms providing for the issue of Writ of Summons and such other terms, if any, the Court thinks fit.'

8.0 When considering an application for interlocutory injunction made ex-parte, the Court is guided by the tests laid down by the House of Lords in the American Cyanamid Co –v- Ethicon Ltd [1975] A.C 396; [1975] 2 W.L.R 316, HL for which the Courts discretion must be exercised. In that case the initial questions are:

- (i) is there a serious question to be tried;
- (ii) would damages be an adequate remedy for a party by the Courts grant or failure to grant injunction and
- (ii) where does the balance of convenience lie.

9.0 The key principles identified in case of American Cyanamid (Supra) summaries in the 'Supreme Court Practice 1999' (Sweet and Maxwell, London, 1998) pg 565 para 29/L/3 states –

- (i) evidences have not been tested by oral examination are only tendered on Affidavit;
- (ii) the grant of the remedy is discretionary and temporary;
- (iii) it is not the courts function to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend upon nor to determine serious questions of law for detailed argument;
- (iv) where an application for injunction is to restrain a defendant from doing acts alleged to be in violation of the plaintiffs legal rights contested on facts the granting of the injunction tis to be taken when the existence of the right or violation of the right is uncertain and will remain until final judgement;
- (v) To mitigate injustice during uncertainty when granting interlocutory injunction
- (vi) subject to undertakings to pay damages to the defendant sustained by reason of the injunction if it is shown at trial that the Plaintiff was not entitled to injunction
- (vii) the objective of seeking injunction is to protect the plaintiff from injury by violation of his right for which could not be adequately compensated in damages recoverable in the action of uncertainty where resolved in his factor at trial; the plaintiffs need for protection is weighed against the corresponding need of the defendant to be protected against injury
- (viii) the claim is not frivolous or vexatious and there is a serious question to be tried;
- (ix) On evidence satisfying the court by both parties at a hearing on the application of the Applicant, on a balance of probabilities that the act of the other party, may, on a balance of convenience, violate the Applicants rights.
- (x) there must be available on materials placed before the Court at hearing, that the plaintiff has a real prospect of succeeding in his claim for permanent

injunction at trial, the court should then consider the balance of convenience to grant or refuse an interlocutory relief.'

- 10.0 In the case of Wakaya Limited –v- Kenneth Chamber and Marsha Chambers [2012] (Supra) Justices of Appeal Judge Marsoof, Judge Chandra and Judge Sundaram explained –

'25. The Petitioner claimed the ownership of Wakaya Island from which certain parcels of land had been sold and the material placed before the High Court would show that Lot 6 was owned by the 2<sup>nd</sup> Respondent even though the Petitioner may have been able to exercise certain rights in respect of the said parcel of land in terms of the contract on which the ownership of the 2<sup>nd</sup> Respondent to the said land was based. Did the proposed action of the 1<sup>st</sup> Respondent affect the Petitioner's rights, if any in respect of the said Lot 6? There was no material to show such a situation arisen.'

- 11.0 In Siskina –v- Distos S.A (1979) AC.210 p 256 Diplock LJ held that a-

'ancillary and incidental to the pre-existing cause of action, (and) dependent upon there being pre-existing cause of action against the Defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff.' (underlining my emphasis)

### **Analysis and Determination**

- 12.0 The Plaintiff/Applicant has sort for an interim injunction against the 2<sup>nd</sup> Defendant/Respondent from exercising their powers as Mortgagee sale pending the proceedings on the basis that the 1<sup>st</sup> Defendants who were registered owners of the property had agreed to mortgage their property to pay the debt, failing they would transfer the property to the Plaintiff/Applicant in lieu of a debt \$41,140.00.
- 13.0 The Court finds from the Statement of Claim and the Affidavit in support that the issues contested are serious questions to be tried by the Court and are not frivolous or vexatious.
- 14.0 The Court considered whether damages was an adequate remedy. The claim for payment of debt totaling \$41,140.00 is the basis of the claim by the Plaintiff/Applicant. It is as a result of the Defendant/Respondents breaches to their undertaking that the Plaintiff/Applicant now seeks for an injunction to the sale of the property.
- 15.0 When considering the evidences before the Court, the Court finds that to restrain the 2<sup>nd</sup> Defendant/Respondent from exercising their Power of Sale must be balanced with whether the Plaintiff/Defendant's rights has been violated.
- 16.0 The Plaintiff/Applicant claims an equitable interest on the said property based on breach of the First Defendant/Respondent's undertaking. The Court has not considered the evidences to determine the claim for the said interest and this will be established at trial.

- 17.0 The Court will not normally grant an interlocutory injunction where the applicant also seeks a permanent restraint against the Respondent. For the Court to consider such an application, the Court must carefully consider the other factors.
- 18.0 In this case, the Plaintiff/Applicant is seeking reliefs of both damages as well as permanent restraint. The relief of damages is to be determined at the end of trial. The Court finds that the relief of damages is sufficient and adequate and not necessarily will injunctions do the same.
- 19.0 The third consideration is whether there are undertakings as to damages. Apart from a paragraph, there are no materials before the Court to show that the Plaintiff/Applicant can satisfy the Court as to the undertakings it is capable of offering. The Court is not satisfied that there is sufficient undertakings in case there are damages sustained by the Defendants as a result of the interlocutory injunction.
- 20.0 The last consideration is where the balance of convenience lies. The Court must carefully weigh out the 2<sup>nd</sup> Defendant/Respondents power to exercise their right of sale as opposed to the Plaintiff/Applicants rights to retention of the status quo.
- 21.0 In the case of Annabels Ltd –v- Avon Investment Ltd and National MBFinance [1997] FJHC; HBC 138 of 96 (27 June 1997) where both the Plaintiff and Defendant were seeking injunctions, the Plaintiff seeking injunction against the Second Defendants from entering and seizing the business equipment in excess of the goods in the Bill of Sale and the Second Defendant seeking to restrain the Plaintiff from the Second Defendants power as mortgagee to enter and seize the property. The claim by the Plaintiff was that the First Defendant owed lease rentals. The Court held that Second Defendant was exercising their right to enter and seize equipment under a bill of sale and hence cannot be restrained from doing so as there is a default in payment and hence the plaintiff is bound by the terms and conditions of the Agreement.
- 22.0 The statutory requirement to redeem the mortgage property according to section 72 of the Property Law Act occurs at the time in which the property is actually sold.
- 23.0 In Mohammed Isaq Khan –v- Fiji Development Bank [2000] 1 FLR 11 Fatiaki J stated –
- ‘At the outset the section provides that the entitlement to redeem may occur at any time before (the registered property) has been actually sold’. It should be noted that the words are not ‘sells’ but rather ‘has been actually sold’. On that basis that every word in a section ought to bear some meaning I am driven in the view that ‘actually when used in conjunction with ‘sold’ means that the sale in the exercise of mortgages ‘power of sale’ has been effectuated’ by a registered transfer of the mortgaged property such as a raise in the purchases favor, the protective provision of section 79 (3).’



- 24.0 In this instance the materials show that the First Defendant has not exercised such a right.
- 25.0 The Court finds that the Plaintiff/Applicant has not satisfied the Court that an interlocutory injunction should be imposed.

**Orders**

- 26.0 The Court orders as follows:
- (i) the application for interlocutory injunction is dismissed;
  - (ii) Costs in the cause.

