

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

**CIVIL ACTION NO. HBC 171 OF 2015**

**BETWEEN** : **RAHAMAT ALI** of Vomo Street, Lautoka, and Businessman.  
**PLAINTIFF**

**A N D** : **BANK OF SOUTH PACIFIC LIMITED** trading as BANK OF SOUTH PACIFIC having its registered office at Level 3, BSP Life Centre, Thomson Street, Suva, Fiji and carrying on business elsewhere in Fiji as Bankers.  
**FIRST DEFENDANT**

**A N D** : **HOUSING AUTHORITY** a body corporate established under the Housing Authority Act.  
**SECOND DEFENDANT**

**BEFORE** : Hon. Mr. Justice Mohamed Mackie.

**APPEARANCES** : Ms. Degei S, for the Plaintiff  
Ms. Devan S, for the 1<sup>st</sup> Defendant  
Ms. Ravai S, for the 2<sup>nd</sup> Defendant.

**TRIAL DATE** : 1<sup>st</sup> & 2<sup>nd</sup> August 2023.

**WRITTEN SUBMISSIONS:** By the Plaintiff filed on 31<sup>st</sup> October 2023.  
By the 1<sup>st</sup> Defendant filed on 30<sup>th</sup> August 2023.  
By the 2<sup>nd</sup> Defendant filed on 11<sup>th</sup> August 2023.

**DATE OF JUDGMENT** : 5<sup>th</sup> April 2024.

**JUDGMENT**

**A. INTRODUCTION:**

1. This is an action commenced by the Plaintiff on 7<sup>th</sup> October 2015, by filing his even dated Writ of Summons and the Statement of Claim (SOC), seeking the following substantial reliefs from the Defendants;

- i. *The sum of \$ 1,000,000.00 (One Million Dollars) being damages for loss of business and customers.*
- ii. *Damages for stress, anxiety, distress, and embarrassment.*



Writ of Summons and the Statement of claim. The 1<sup>st</sup> Defendant also moved for a judgment in a sum of \$ 678,607.59 with interest as per its counter claim.

7. As per the PTC Minutes filed on 5<sup>th</sup> September 2018, the parties, having recorded 3 agreed facts, have raised 51 issues for adjudication, wherein most of the issues appear to be redundant for the reasons to be stated in this judgment.
8. At the Trial held before me on 1<sup>st</sup> and 2<sup>nd</sup> of August 2023, the Plaintiff **RAHAMAT ALI** , gave evidence on his behalf by marking Documents from “**PEX-1**” to “ **PEX-4**”, after which one **SANJALESH LAL** , a Bank Officer, gave evidence on behalf of the 1<sup>st</sup> Defendant **Bank of South Pacific Limited**, by marking Documents from “**1DEX-1**” to “**1 DEX-15**”. **On behalf of the 2<sup>nd</sup> Defendant Housing Authority of Fiji** one **SASHI LATA**, a Team Leader Customer Service from the said Authority, gave evidence by marking Documents from “**2DEX-1**” to “**2DEX-6**”.
9. After the trial, the 2<sup>nd</sup> Defendant filed its written submissions (with the copies of the cited authorities) on 11<sup>th</sup> August 2023, the 1<sup>st</sup> Defendant filed its written submissions on 30<sup>th</sup> August 2023, and finally the Plaintiff filed his written submissions on 31<sup>st</sup> October 2023. I profusely thank Counsel for all the parties for the same.
10. After the conclusion of the Trial, prior to filing his written submissions, the Plaintiff on 17<sup>th</sup> October 2023 filed an Ex-parte Notice of Motion (which was converted as Inter-Partes), seeking reliefs, *inter alia*,
  - a. *That this Honorable Court to direct the Defendants to provide to this Honorable Court the consent that was given in writing **AND/OR** recall the witness for the 2<sup>nd</sup> Defendant.*
11. This Court on 27<sup>th</sup> October 2023, having heard the Motion inter-partes, dismissed the same for the reason stated in the impromptu Order made on the said date. Now, I further justify the said instant Order by relying on the decision given in a similar application by Hon. Jawed Mansoor –J (as he then was) in **Patrick John Jay v Semiti Digitaki – HBC 236 of 2017**, delivered on 11<sup>th</sup> August 2022.

**B. ANALYSIS:**

12. At the outset, a pertinent point that I have found on careful scrutiny of the case record and by verification from the Counsel for the parties on 26<sup>th</sup> March 2024, is that the Application for interim injunction Orders in this matter has been pending without being heard inter-partes, despite both the Defendants had filed their Affidavits in opposition and Reply by the plaintiff respectively as stated in paragraph 5 above.
13. Thus, the Ex-parte injunction Order issued on 8<sup>th</sup> October 2015, has remained intact and in force till this date, with no move being made by either of the parties to have an inter-partes hearing on the Application for injunction Orders.

14. By the said Ex-parte injunction Order, the 1<sup>st</sup> Defendant, who has the Mortgage in its favor for the recovery of the arrears of the debt claimed from the Plaintiff, has been restrained from proceeding with the intended sale of the property, which is the subject matter of the Mortgage.
15. The Plaintiff hereof, RAHAMAT ALI, is said to be the Guarantor for the loan facilities granted to an entity called WESTERN WRECKERS LIMITED, initially by HABIB BANK LIMITED and subsequently by its successor BANK OF SOUTH PACIFIC LIMITED, the 1<sup>st</sup> Defendant, as evidenced by “1DEx-1”, “1DEx-4”, “1DEx-5”, “1 DEx-7” , “1DEx-8” , “1DEx-9”, “1DEx-10” and “1DEx-11”. During all the time material, the Plaintiff was, admittedly, a Shareholder – Director of the said Company Western Wreckers Limited.
16. Another salient point observed here is that the final or the substantial reliefs sought by the Plaintiff in terms of the prayers to his Statement of Claim, for the following reasons, have nothing to do with the interim injunction Orders sought in the Notice of Motion and issued Ex-parte on 8<sup>th</sup> October 2015 restraining the Mortgage sale. **The Plaintiff in his Statement of Claim;**
  - A. Has not prayed for an Order declaring that a fraud has been committed by the Defendants (particularly by the 1<sup>st</sup> Defendant Bank) during the process of granting the loan and/ or overdraft and/ or other facilities to the Western Wreckers Limited.
  - B. Has not prayed for an Order declaring the impugned Mortgage Bond to be cancelled or to be made null and void on account of the alleged forgery.
  - C. Has not prayed for a relief declaring that he (the plaintiff) remains as the Title holder of the subject property with no encumbrance.
  - D. Has not prayed for a declaration that he did not sign any of the following instruments, namely;
    - i. The “**Letter of Offer of Finance Facility**” (the offer letter) dated 31<sup>st</sup> July 2013 marked “1DEx-1” issued by the 1<sup>st</sup> Defendant BSP.
    - ii. The initial “Mortgage **Bond**” dated on 8<sup>th</sup> December 1997 marked as “PEX-3” signed for a facility in favor of ALBIS MUFFLER HOUSE (FIJI) LTD by HABIB BANK LIMITED.
    - iii. The “**Memorandum of Mortgage**” dated on 18<sup>th</sup> July 2002 marked as “1DEx-3” for a facility by HABIB BANK LIMITED.
    - iv. The “the **Consumer Guarantee**” dated 17<sup>th</sup> February 2004 marked as “1DEx-4”, wherein the granter of the facilities was the HABIB BANK LIMITED.
    - v. The “**Offer Letter**” dated 22<sup>nd</sup> February 2012 marked as “1DEx-7” issued by the 1<sup>st</sup> Defendant BSP.
    - vi. The “**Offer letter**” dated 1<sup>st</sup> June 2012 marked as “1DEx-8” issued by the 1<sup>st</sup> Defendant BSP.
    - vii. The “**Offer Letter**” dated 08<sup>th</sup> October 2012 marked as “1DEx-10” issued by the 1<sup>st</sup> Defendant BSP.

17. In the absence of any substantial relief prayed for in his SOC in relation to the subject property and the Title of it, no interim injunction could have been issued and remained in force. Thus, the impugned Ex-parte interim injunction Order issued on 8<sup>th</sup> October 2015 is redundant and no purpose will be served as far as Plaintiff's final reliefs prayed for hereof are concerned. Accordingly, the impugned Ex-parte interim injunction Order issued on 8<sup>th</sup> October 2015 has to be vacated as prayed for by the Defendants.
18. What the Plaintiff has prayed for in his SOC as his substantial or final reliefs are the damages in a sum of \$ 1,000,000.00 (One Million Dollars) for the loss of business and customers, and the Damages for stress, anxiety, distress, and embarrassment.
19. For the Plaintiff to take home a monetary judgment as prayed for above, it was his onerous duty to prove his case on preponderance of evidence and justify the damages claimed by him by satisfying the Court that he suffered loss of business and customers, and he had to undergo stress, anxiety, distress and embarrassment, owing to the very reason of the intended Mortgage Sale of the property in question as published in the NEWS paper by the 1<sup>st</sup> Defendant BSP.
20. The Plaintiff did not give even an iota of evidence on his own or call any evidence in support of his claim for damages on the, purported, loss of business and customers. His claim for damages on account of the alleged stress, anxiety, distress and embarrassment also remained unproved. If the Plaintiff had resigned as a Director of the Company (Western Wreckers Limited) way back in 2005, as his Senior Counsel suggested to the 1<sup>st</sup> Defendant's witness- Bank Officer during his cross examination, obviously the Plaintiff could not have faced or suffered any damages or stress, anxiety, distress, and embarrassment as he alleges in his Statement of Claim. However, this position that he had resigned in the years 2005 was neither in his pleadings nor in the issues, but was only an afterthought.
21. However, when the Plaintiff has not prayed for any substantial relief touching and affecting the subject matter property and/ or the respective instruments as alluded to in paragraph 16 above, this Court need not be called upon to decide on the propriety of and/ or the genuineness of the 1<sup>st</sup> Defendant's **Instruments of Mortgage, Consumer Guarantee or Offer letters**. The Counsel for the 1<sup>st</sup> Defendant need not have toiled himself in an unwarranted exercise of defending the propriety or the validity of the aforesaid instrument/s relied on by the 1<sup>st</sup> Defendant for the recovery of the arrears of loan payable by the Plaintiff, on account of being a Guarantor for the loan or facilities initially obtained by his Companies, namely, ALBIES MUFFLER HOUSE (FIJI) LIMITED and later by the WESTERN WRECKERS LIMITED from the HABIB BANK LIMITED and thereafter from its successor, the 1<sup>st</sup> Defendant BSP.
22. Likewise, the 2<sup>nd</sup> Defendant also need not have taken trouble in defending the consent given, which is a routine duty on its part in the process, particularly when the impugned consent had already been given prior to the Plaintiff's letter of objection dated 18<sup>th</sup> November 2013 marked as "DEx-6" with the relevant fees for consent being paid on 19<sup>th</sup>

September 2013 as evidenced by “2DEx-3” pursuant to the Application made on 4<sup>th</sup> September 2013 signed by none other than the Plaintiff Rahamat Ali , as evidenced by the annexure marked as “2DEx-2”.

23. With the above analysis and findings that in the absence of any final relief in relation to the subject property and/or the instruments mentioned above, and that the so called damages not being proved by the Plaintiff, though, this Court is of the firm view that the Plaintiff’s action hereof does not warrant any further analysis and should be dismissed, for the sake of completeness, I shall delve into the allegation of fraud advanced by the Plaintiff, particularly, with regard to his position that he did not sign the relevant instrument, namely, 1DEx-1 and it was signed by someone else .
24. The practice of obtaining of financial facilities by the Plaintiff, by pledging the property in question, has a long history, which commenced in the year 1997 firstly by obtaining a facility in the name of an entity called “**Albie Muffler House Fiji Ltd**” as the Mortgagor and the **Habib Bank Limited** being the Mortgagee as evidenced “PEX-3”. This is not disputed by the Plaintiff. Thereafter, 2 further facilities have been obtained by the Plaintiff’s Company from the HABIB BANK LIMITED as evidenced by the “1DEx-3” and “1DEx-4” in the years 2002 and 2004 respectively for which, undisputedly the Plaintiff was a signatory as a guarantor.
25. The practice of obtaining further facilities, while the previous loan amounts remained fully unsettled, has continued unabated as evidenced by the annexures marked as “1DEx-7” dated 22<sup>nd</sup> February 2012, “1DEx-8” dated 1<sup>st</sup> June 2012, “1DEx-9” dated 4<sup>th</sup> June 2012, “1 DEx 10” dated 08<sup>th</sup> October 2012 and finally by the aforesaid “DEX-1 dated 31<sup>st</sup> July 2013, which the Plaintiff is disputing to have signed by him.
26. If the position of the Plaintiff was that he did not sign the aforesaid “DEX-1”, issued by the 1<sup>st</sup> Defendant Bank BSP, it was the onerous duty of the Plaintiff to have disclosed and adduced necessary evidence to substantiate his allegation of fraud so that the Defendants would have appropriately dealt with the same. Obviously, the Plaintiff failed in his duty of proving his allegation against the Defendants.
27. If the Plaintiff was minded to discharge his duty in proving his allegation of fraud and collusion, he should, primarily, have called for an expert report on the disputed signature/s. Although, the Plaintiff in paragraph (a) of the prayers in his Ex-parte Notice of Motion filed on the 7<sup>th</sup> October 2015 and supported before the then Judge of this Court on 8<sup>th</sup> October 2015 had moved for such an expert report, for the reason/s best known to him, he did not pursue for such report.
28. Instead of calling for such an expert report, the Plaintiff found himself comfortable with the Ex-parte injunction order issued in terms of prayer (b) of his Notice of Motion, filed on 7<sup>th</sup> October 2015, on which an inter-partes hearing did not see the light of the day for nearly 9 years as alluded to above.

29. The Plaintiff in his evidence in chief has admitted that he was a Director of the Western Wreckers Limited before the closure of it by selling the business by his Brother Mohamed Hanif, who is said to be in New Zealand now and further admitted that the property in question is his personal one and he was a signatory of the Company (Vide pages 3 & 5 of the Transcript).
30. Under examination in chief, he went further to admit that the Company had taken loan, initially from the HABIB BANK LIMITED and subsequently it was taken over by the BSP the 1<sup>st</sup> Defendant Bank, which offered, among others, the facility evidenced by "1DEx-1". Referring to property in question, he has stated further that he had requested his Brother Hanif to release it as soon as possible. His further evidence goes to the effect ***"I'll speaking to my brother, Western Wreckers has so many properties, I am asking why did this property only..... other properties to take the loan and I believe he has taken all the properties out of the Bank before going in New Zealand and he left this property behind."*** (Vide page 7 of the Transcript). This piece of his evidence alone is a tacit admission on the part of the Plaintiff that he signed the Mortgages and other instruments by pledging his property as a guarantor for the loan facilities obtained by the Western Wreckers Limited. The plaintiff, instead of going behind his own brother, is now behind the Defendants by obtaining an unwarranted ex-parte injunction order against the 1<sup>st</sup> Defendant's process of Mortgage sale.
31. In pages 8 and 9 of the transcripts, referring to the Mortgage marked as "PEX-3" among other things, he stated;
- Q. *There is a signature there Mr. Ali?*  
A. *Yes.*  
Q. *What is the date written there on that document?*  
A. *8<sup>th</sup> December 1997.*  
Q. *Can you verify the signature that's there?*  
A. *it is similar to my signature but...*  
Q. *Mr. Ali I will take you back to the first document.*  
A. ***I don't know, he simply said that for the signature, he did not say anything to me.***
32. The above answers under the examination in chief clearly suggest that the Plaintiff has signed the initial Mortgage Bond in 1997. But, in his further examination in chief, he does not speak a single word denying his signatures to the subsequent instruments, particularly to the Offer letter dated 31<sup>st</sup> July 2013 marked as "1DEx-1" on which the final phase of facility was granted by the 1<sup>st</sup> Defendant BSP unto the Western Wreckers, wherein the Plaintiff signed as a Guarantor.
33. However, under cross examination by the 1<sup>st</sup> Defendant's Counsel, the Plaintiff has directly and tacitly admitted that he was a director / shareholder of the Company, he was aware of the business and he had the joint authority for him to sign the important documents of the Company and he did sign. (Vide page 16).

34. As per page 17 of the transcript, the questions and his answers go as follows, which also demonstrate the Plaintiff's admission that he has signed the instruments concerned as a guarantor ;

Q. *But you aware that the Company had taken loan with Habib Bank?*

A. ***Well, I know that but how much I don't know.***

Q. *Okay, fair enough. At least you knew that the Company had borrowed money from the Bank?*

A. ***From the bank. Yes, ok.***

Q. *The bank also obtained personal guarantees from everyone as a director of the Companies, including yourself?*

A. ***Yes.***

Q. *So, you provided your guarantee for the loan?*

A. ***It's probably yeah. For the loan it could have signed.***

Q. *so, and the bank also obtained security by way of mortgage over this property, which is Housing authority sub-Lease number 226649.*

A. ***my personal property.***

35. Under further cross examination in page 19, by showing signatures in the instruments and asked whether those are his signatures, his answers were "Yes" and "***It is similar to my signature***". He also admitted that he has seen the offer letter dated 31<sup>st</sup> July 2013, it is dated 5<sup>th</sup> August 2013, the Common Seal of the Company is there, and having admitted his brother's signature, in relation to his signature he said "***I don't know***".

36. By his answers under further cross examination, he has admitted that he was a guarantor for the Loans obtained by the Company Western Wreakers, the loan remained unpaid. When he was shown the signature and initials in the instrument, his answers were "***This is looks like my signature***" "***Almost my initials***" "***initial is Yes***" and "***similar to my signature***" as I said before" "***Yeah similar to my signature***" (Vide pages 33 and 34).

37. The witness called by and on behalf of the 1<sup>st</sup> Defendant BSP, namely, **Sanjalesh Lal**, a Bank Officer, with the help of the records available to him, has left no stone unturned in order to prove the facts, inter alia, obtaining the facilities by the Companies represented by the Plaintiff. He confirmed that the initial facility was from the Habib Bank Limited and subsequently from the 1<sup>st</sup> Defendant BSP. He also confirmed the signatures in the instruments by the Plaintiff and other Directors for that purpose, the takeover of the Habib Bank with the liabilities by the BSP and the outstanding amount of debt left to be recovered by the intended Mortgage sale. Though, he was not the officer personally took part in the process as he was in a different section of the BSP Bank, he has given clear and convincing evidence on the vital points. His evidence has withstood the cross examination by the Plaintiff's counsel.

38. The evidence by the witness for the 2<sup>nd</sup> Defendant does not warrant deep scrutiny as this Court stands convinced that the consent by the 2<sup>nd</sup> Defendant has been duly issued for the Mortgaging of the property in question.



39. The Plaintiff is required to provide necessary particulars of his allegation of fraud in his Statement of Claim. Order 18 rule 11(1) (a) of H.C.R. states that;

*"Subject to paragraph 2, every pleading must contain the necessary particulars of any claim, defense or other matter pleaded including, without prejudice to the generality of the foregoing words-*

*(a) Particulars of any misrepresentation, **fraud**, breach of trust, willful default, or undue influence on which the party pleading relies; and*

*(b).....*

40. In my view, the Plaintiff hereof has failed to adhere to the provision of the Order 18 Rule 11(a) of the High Court Rules of 1988

41. **Bramwell L.J. in Philipps v Philipps (1897) 4 Q.B.D.127** observed the object of this rule, where his lordship outlined that

*"The object of the rules is threefold. It is that the Plaintiff may state what his case is for the information of the Defendant, and that the Plaintiff may be tied down to it and not spring a new case on the Defendant; secondly, that the Defendant may be at liberty to say, that the statement is not sufficient in point of law, and to raise the point of demurrer; and thirdly, that the Defendant, instead of being driven to deny everything by an ambiguous and uncertain statement involving conclusions of issue, as well as actual facts, and so going down to try an expensive issue, may be at liberty to single out any one statement, and to answer it".*

### **C. CONCLUSION.**

42. This Court is of the view, that the Plaintiff is not entitled for an interim injunction as prayed for and the Ex-parte Interim Injunction granted on 8<sup>th</sup> October 2015 should be, necessarily, vacated for the reasons, *inter alia*, that the Plaintiff has not prayed for any final relief in relation to the subject property and/ or the instruments executed by the Plaintiff as a Guarantor by pledging his property in question. In any event, facts of this case do not warrant an injunction Order in his favor.

The claims made by the Plaintiff that he did not sign the relevant instrument/s for the financial facilities obtained by his Companies from the HABIB BANK LIMITED & the BANK OF SOUTH PACIFIC LIMITED, and there was fraud and collusion on the part of the Defendants, have not been proved. Thus, his claim for damages on account of alleged loss of business & customers, stress, humiliation, and embarrassment cannot succeed.

Further, the Plaintiff's statement of claim does not contain the necessary particulars of the, alleged, fraud as mandatorily required by O 18 r 11 (a) of the High Court Rules 1988. Accordingly, the Plaintiff is not entitled for any relief. In view of these findings, I hold that the Plaintiff has abused the process of this court by instituting this action, thus the action has to be dismissed with reasonable sum of costs in favour of the Defendants.

All what the 1<sup>st</sup> Defendant prays for is to recover a sum of **\$678,607.59 (Six Hundred Seventy Eight Thousand Six Hundred Seven and cents Fifty Nine)** with statutory interest. As the Ex-parte injunction order is vacated, the 1<sup>st</sup> Defendant is at liberty to carry on with its intended Mortgage sale.

I find that the counter claim by the 1st Defendant wholly emanates in relation to the very loan facilities granted on the Mortgage, guaranteed by the Plaintiff. Thus, the Mortgage sale will effectively and finally grant the reliefs to the 1<sup>st</sup> Defendant.

43. In conclusion, I make the following Orders.

- a. The Ex-parte interim injunction Order obtained by the Plaintiff on 08<sup>th</sup> October 2015 is hereby dissolved.
- b. The Plaintiff's Writ of Summons and the Statement of Claim filed on 7<sup>th</sup> October 2015 are struck out.
- c. The Plaintiff's action fails and is hereby dismissed.
- d. The 1<sup>st</sup> Defendant is at liberty to proceed with the Mortgage sale, in order to recover its dues, together with the statutory interest.
- e. The Plaintiff shall pay the 1<sup>st</sup> and 2<sup>nd</sup> Defendants a sum of \$2,500.00 each, totaling to \$5,000.00 (Five Thousand Fijian Dollars) being the summarily assessed costs, within 28 days from today.



  
**A.M. Mohamed Mackje**  
Judge

At the High Court of Lautoka on this 5<sup>th</sup> day of April, 2024.

**SOLICITORS:**

**For the Plaintiff:**

**Iqbal Khan & Associates, Barristers & Solicitors**

**For the 1<sup>st</sup> Defendant:**

**Messrs. Neel Shivam Lawyers, Barristers & Solicitors**

**For the 2<sup>nd</sup> Defendant:**

**Messrs. Vijay Naidu & Associates, Barristers & Solicitors\***