

BETWEEN : FIJI DEVELOPMENT BANK *Plaintiff*

A N D : MOSESE QALITAKIVUNA SORONAKADAVU *Defendant*

Counsel : Ms. M. Vasiti for the Plaintiff  
Ms. T. Leweni for the Defendant

Date of Hearing : 2<sup>nd</sup> June, 2014

Date of Judgment : 19<sup>th</sup> June, 2014

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## DECISION

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[1]. The plaintiff filed an Exparte Notice of Motion under Order 29 of the High Court Rules seeking injunctive relief against the defendant. The said motion was made interpartes and the plaintiff has prayed for the following orders:-

1. **THAT** the Defendant immediately release to the plaintiff the following items:

- (i) *LT40HDD51 Super Sawmil, Serial No. 456C624148NKK2450, Edger Serial No. 456A114198NJA6979;*
- (ii) *1 only Toyota Hilux Twin Cab, Registration No. DX 868, Engine No. 3L-2M01716, Chassis No. JTFDE626800081876; and*
- (iii) *2 only Husqvarna Chainsaws 30" Bar, Serial Nos. 072350405 and 081550199*

2. THAT the defendant and/or his servants or agents howsoever be restrained from selling, transferring or otherwise in any manner disposing the said item until further order of this Honourable Court;
3. THAT the police officers do act and render all assistance required by the plaintiff in the enforcement of the Orders;
4. THE Defendant pay to the plaintiff the costs of this Application on a full indemnity basis; and;
5. ANY further Orders and/or relief as this Court may deem fit.

[2]. The application was supported by the affidavit of Hemant Kumar Mahadeo sworn on 6.2.14. The defendant filed an affidavit in reply. Both parties were given time to file their written submissions. The plaintiff filed on time and the defendant after obtaining the consent of the plaintiff filed the written submission on the date of the hearing. Both counsel made their oral submission at the hearing.

[3]. It is pertinent to note that the defendant has filed an affidavit in reply to the affidavit in support of the interpartes notice of motion. However the said affidavit in the jurat has no date as to when it was sworn. In the rear page of the affidavit in the indorsement too, there is no date given as to when it has been sworn, which makes it a defective affidavit even though under Order 41 Rule 4 and 9 of the High Court Rules an application should be made to obtain leave of court to use such affidavit, no such application was made by the defendant.

#### Plaintiff's Case

[4]. The plaintiff bank had lent money to the defendant under Fiji Development Bank loan account number 301206 and under (SCARF) loan account number 301284 for the sum of \$134,000 and \$65,000.



- [5]. The plaintiff approved the defendant's application for a loan and the loan was granted. The plaintiff among the other things took as security two Bills of Sale over the following:
- (i) *LT40HDD51 Super Sawmil, Serial No. 456C624148NKK2450, Edger Serial No. 456A114198NJA6979;*
  - (ii) *1 only Toyota Hilux Twin Cab, Registration No. DX 868, Engine No. 3L-2M01716, Chassis No. JTFDE626800081876; and;*
  - (iii) *2 only Husqvarna Chainsaws 30" Bar, Serial Nos. 072350405 and 081550199.*
- [6]. The defendant had executed the same. The defendant's loan account has fallen into arrears and the plaintiff had sent a notice on 27.9.2012 pertaining to the two loans. Subsequently the defendant through their solicitors had come to an arrangement with the bank to make a payment of \$2000 per month for six months from October 2012 and thereafter a sum of \$14,000 per month till the amount due is fully settled.
- [7]. However, the defendant failed to honour this arrangement and no payments were done. The plaintiff on 1.10.13 has again sent an arrears notice and when the bailiff tried to seize the items under the Bill of Sale the defendant's brother had objected and not allowed the Bailiff to enter the premises.
- [8]. Annexing the statement of account of the defendant's loan account the deponent Mahadeo had deposed that the arrears of the defendant loan now amount to \$260, 228.94. As the defendant had failed to honour the loan nor allowed the plaintiff to act under the Bill of Sale the plaintiff has filed this application before the court.

### **The Defendant's Case**

- [9]. The defendant in his affidavit in reply has admitted obtaining the loan. The amount of the loan and executing the two Bills of Sales over the property the plaintiff has sought the orders in this application.

[10]. However the defendants submit that they had applied for another loan which the plaintiff had refused to grant and had deposed that the plaintiff had not disclosed about the third loan application which has been rejected by the plaintiff. The defendant further deposes that the properties secured under the Bill of Sale are still in the possession of the defendant.

### Determination

[11]. As per the documents filed and submissions made both parties have agreed to the following facts:

- The defendant had obtained the loan from the plaintiff.
- *The defendant among other securities had executed the Bill of Sale over the items pertaining to which the plaintiff is seeking injunction relief as security.*
- *The defendant has failed to settle the loan.*
- *The items which are the subject matter in this application is in the possession of the defendant.*

[12]. As per the orders sought I find orders 1(i) – (iii) are in the nature of a mandatory orders. Order 2 is a restraining order. The principles for the grant of a mandatory injunction are set out in **Redland Bricks Ltd –v- Morris (1969) 2 All ER 576**.

- 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 damages 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 in fact what he has to do.*

[13]. However the House of Lords went onto say every case must depend essentially on its own particular circumstances.

[14]. In a mandatory injunction case the principles to adhere will change on the circumstance of the case.

[15]. The plaintiff is seeking to get orders 1(i) to (iii) to get possession of goods that they have taken as security in granting the loan. The financial institutions can be considered as the live wire of the economy of a country. If a bank that grants a loan on a security secured by a bill of sale cannot obtain the possession of the said security at the time of an alleged breach of contract, the purpose of obtaining security will be futile. When there is a breach of contract and if the lending party is unable to take possession of the security obtained then there is a probability of suffering grave damage. The bank has departed with the money and can't get the possession of the security taken. It was also submitted that there is a high probability of the good's being disposed by the defendants.

[16]. As per the facts of this case the plaintiff has satisfied court that on the application of general principles of equity damages will not be a sufficient remedy.

[17]. In determining this application the test the court should follow was also laid down in **American Cynamide Co -vs- Ethican Ltd (1975) AC 396.** As per the said case n granting injunctive relief court should consider 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.*

Having this in mind now I will analysis the facts of the case.

### Prima Facie Case

[18]. In the American Cynamide Case, Lord Diplock stated:

*“The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words that there is a serious questions to be tried. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding to his claim for a permanent injunction at the trial, the court should go onto consider whether the balance of convenience lies infavour of granting or refusing the interlocutory relief that is sought.”*

[19]. In this case the plaintiff has submitted the approved loan application and acceptance of the terms and conditions marked Annexure A. The purported items which are the subject matter of this application have been taken as security. The defendant had executed two bills of sales, Annexure B over the items in favour of the plaintiff. Annexure C and D shows the notices of demand on the mortgage and Annexure E shows the statements of accounts of the defendant loan account which depicts that the loan has gone into arrears and there is nonpayment.

[20]. As I had mentioned earlier in the judgment the defendant did not contest the facts that he had taken the loan, execution of the Bills of Sales, nonpayment of the loan and the loan going into arrears.

[21]. The defendant’s contention was that he had applied for another loan but the plaintiff has failed to grant it. I do not think the said defence is sufficient to answer the plaintiff’s application.

[22]. When a loan application is made each bank has its own procedures for approval. If the bank is satisfied only, the bank will grant the loan. It is the discretion of the bank. A prudent banker will always among other requirements consider each loan application on



its merits taking into account the credit worthiness of the applicant and the repayment capabilities. One cannot as of right demand a loan from a banking institution.

- [23]. I also think the said rejected loan application has no bearing to the present application before the court. Here the plaintiffs have come to injunct certain items which have been pledged as security for two specific loans. The defendant too conceded that the said loan had gone into arrears. The plaintiff has got the pledged securities secured by way of Bills of Sale. Still the defendant had resisted the plaintiff taking possession of goods that are secured under the bills of sale. Considering the due facts in my view plaintiff has passed the threshold of establishing the prima facie case.

### **Balance of Convenience**

- [24]. The consequence of granting an injunction and the consequence of refusing the injunction is considered by court. As per the Bill of Sale Act Cap 225 section 2 once a bill of sale is executed the holder has the power with or without notice to seize or take into possession of the goods, the said section states:

*“This act shall apply to every bill of sale whereby the holder or grantee has power, either with or without notice, at anytime to seize or take possession of any present chattels comprised in or made subject to such a bill of sale.”*

- [25]. As per the said provision the plaintiff as the holder of the bill of sale does not need to come to court to get possession of the secured property. However his attempt to do so has met with resistance. The defendant did not deny this fact. In fact at the submission stage it was admitted that the defendant still has the possession of goods. The defendant is aware that he is in default of the loan, that as per the bill of sale executed by him in the event of default the property secured, can be taken into possession by the plaintiff. The defendant conceded that they have got a notice of demand, but still they resisted the Bailiff's attempt to take custody of the goods.

- [26]. The purposes of obtaining security when granting a loan is to recover or minimize the loss if in default. The defendant argues whether damages would be an adequate remedy. I

decline to accept this objection. Considering all these facts court is of the view that the balance of convenience is heavily in favor of the plaintiff.

- [27]. The defendant's only objection was that there was suppression of facts by the plaintiff in not denying paragraph 7 of the affidavit in response, by not filing an affidavit in reply.
- [28]. I have considered the authorities cited by the defendant namely **Douglas and Williams – v- Cammack and Votualailai Limited –vs-Capital FNPF Board and Others, Lautoka Civil Action Number 272 of 1998**. I decline to accept the said cases as the circumstances of the cases differ from the present case.
- [29]. In my view a mere non-disclosure of facts is not sufficient to challenge this injunction. It should be non-disclosure of material and relevant facts. The plaintiff has made the application seeking specific orders pertaining to bills of sale arising out of two specific loan accounts. The defendant has failed to submit any documentary proof to say that the rejected 3<sup>rd</sup> loan application had any bearing on the repayment of the existing two loans which is the subject matter in this case.
- [30]. The defendant also argued that there is no sufficient undertaking as to damages. The plaintiff has pleaded that it is a reputable financial institution and has given an undertaking as to damages.
- [31]. In any event as submitted the defendant thought the plaintiff to be a reputable financial institution when applying and obtaining the loan. The defendant had already obtained the funds under the loans from the plaintiff.
- [32]. Plaintiff is seeking orders pertaining to items that are secured to him under the Bills of Sale. As per the provision of the Bills of Sale the plaintiff has the right to have possession of the said properties. The defendant has not challenged this. In my view by this application the plaintiff is seeking to obtain goods that he is statutorily entitled to take into his possession. In the absence of the Bills of Sale pleaded as security being challenged, and as per the admission that the defendant had obtained the loan and



defaulted, the defendant had failed to satisfy court as to why the prayed orders should not be made.

[33]. The defendant has relied on *Natural Waters of Viti Ltd -vs- Crystal Clear Mineral Waters (Fiji) Ltd [2004] FJCA 59*, case in support of the contention that there should be sufficient undertaking as to damages for plaintiff to succeed. The circumstance of that case differs from the circumstance of the application before me.

[34]. Given the facts that have been submitted to this court, I think the plaintiffs undertaking to damages in this particular instance suffices the requirements stipulated in the American Cynamide case.

[35]. In view of the above I am inclined to accept that the plaintiff has satisfied this court to obtain the orders sought in the interpartes notice of motion dated 6.2.14. Since the plaintiff has succeeded in this application he is entitled for costs. I award a cost of \$750 summarily assessed. Accordingly I make the following orders:

1. **The defendant is ordered to immediately release to the plaintiff the following items:**

(i) *LT40HDD51 Super Sawmil, Serial No. 456C624148NKK2450, Edger Serial No. 456A114198NJA6979;*

(ii) *—1 only Toyota Hilux Twin Cab, Registration No. DX 868, Engine No. 3L-2M01716, Chassis No. JTFDE626800081876; and;*

(iii) *2 only Husqvarna Chainsaws 30" Bar, Serial Nos. 072350405 and 081550199.*

2. **The defendant and/or his servants or agents howsoever are restrained from selling, transferring or otherwise in any manner disposing the said items until further orders of this Honourable Court.**

3. The plaintiff to get the assistance of the Police Officers if required for the enforcement of this order.
4. The plaintiff is awarded a cost of \$ 750.
5. Case to take its normal course.



*Mayadunne Corea*  
Mayadunne Corea

**JUDGE**

19.6.2014