

IN THE HIGH COURT OF FIJI

[WESTERN DIVISION] AT LAUTOKA

Civil Action No. HBC 201 of 2012

BETWEEN: **KIM YONG CHANG** of Lot 29 Aurora Avenue, Makoi, 8
Miles, Nakasi, Businessman

PLAINTIFF

AND : **RUPENI KOROI** of Lot 10 Vomo Street, Lautoka,
Businessman

DEFENDANT

Appearances: Mr Faktaufon V for Plaintiff
 Mr Vuataki for Defendant

J U D G M E N T

Introduction

1. In these proceedings the Plaintiff claims from the Defendant;
 - (i) The total sum of \$66,325.00.
 - (ii) Interest at the rate of 13.5% from 9th August 2012 to the date of this Judgement and post Judgement interest at the rate of 5% from the date of Judgement to the date of payment.
 - (iii) Costs on solicitor/client indemnity basis; and
 - (iv) Such other relief that the court may deem just.

2. **Statement of Claim**

- 2.1 The Plaintiff states in his statement of claim inter alia that :
he was a businessman interested in purchasing brown sugar for

export to Korea.

- 2.2 At all times the Defendant was a businessman and purported to be a director of companies known as Avikoro Investment Limited and Matalaqere Investment Limited. Avikoro is not a company registered under the companies Act and the Defendant is not a director of Matalaqere Investment Limited.
- 2.3 That the Defendant fraudulently misrepresented to the Plaintiff that he was able to export brown sugar on behalf of the Plaintiff. As such the Plaintiff agreed with the Defendant for the Plaintiff to make payments in instalments and the Defendant to supply 200 tonnes of brown sugar for export to Korea.
- 2.4 Relying on the said representations the Plaintiff did the following;
- (a) Paid a company namely Matalaqere Investment Limited the sum of \$30,000.00 as directed by the Defendant on 13th May 2011;
 - (b) Paid the Defendant the sum of \$20,000.00 as directed by the Defendant on 15th July 2011.
 - (c) Entered into a Memorandum of Understanding with the Defendant for the Defendant to supply 24,000 tonnes of brown sugar over a period of 12 months on 6th August 2011 and
 - (d) Paid the Defendant the sum of \$46,325 as directed by the Defendant on 8th August 2011.
- 2.5 That the Defendant manufactured and forged export license under his name being Export License No 01/2011 purportedly issued on 19th August 2008 and which the Plaintiff relied on.
- 2.6 That to date brown sugar has not been delivered nor has the Defendant returned the monies to him, despite Plaintiffs' several demands and pleas for the same.
- 2.7 That the Plaintiff through his Solicitors served on the Defendant a Demand Notice on 9th August 2012, demanding the sum claimed herein but no payments have been made.

3. **Statement of Defence and Counter Claim**

3.1 The Defendant states in his Statement of Defence and Counter Claim inter alia that :

The Defendant had no knowledge that the Plaintiff was interested in purchasing brown sugar. Defendant knew Plaintiff as being sent to him by one Dai-Yong Kim of Korea and said Dai-Yong Kim wanted to purchase sugar from the Defendant.

3.2 The Defendant was a Director of Avikoro Investment Limited which had exported sugar to Vanuaatu and such Company was registered under the Companies Act.

3.3 The Defendant denies he represented that he was a Director of Mataiaqere Investment Limited. Defendant was purchaser of a house and vendor wanted Defendant to pay deposit to such company and never was he a Director of such company.

3.4 The Defendant denies that he misrepresented to Plaintiff that he would export brown sugar on behalf of the Plaintiff. Defendant had signed agreement with Dai-Yong Kim of Korea for Defendant to directly export sugar to him. Plaintiff later signed Memorandum of Understanding with said Dai-Yong Kim for Plaintiff to be a seller as well.

3.5 Plaintiff then agreed for a 50% share of monthly sugar export profit of \$1 million and in consideration Plaintiff was to advance \$100,000.00 to Defendant to be paid out of such profits for Defendant to incur expenses in obtaining a license for sugar export to Korea, for molasses export license, to seek for a six acre molasses factory site, a 3,000 acre land to plant and raise animals to be fed with molasses mix, and deposit for a house he was purchasing to be used by Plaintiff and other associates for meetings and accommodation in Lautoka.

3.6 The Defendant admits that he was paid \$30,000.00, \$20,000.00 and \$46,325.00 by the Plaintiff and states that it was paid for all purpose of covering the expenses mentioned in the above paragraph and the amount advanced would be paid out of profits.

- 3.7 Defendant denies the Memorandum of Understanding averred and stated that he only had a Memorandum of Understanding with Dai-Yong Kim of Korea.
- 3.8 Defendant states that the Export License No. 01/2011 was valid and it was obtained for export of sample of one metric ton of sugar to Korea and such sample was sent.
- 3.9 In or about December 2011 the Plaintiff unilaterally tried to terminate the agreement entered into and the Plaintiff is estopped by his undertaking to be paid out of profits and that the parties export sugar to Korea as agreed.
- 3.10 The Defendant has not agreed to terminate the agreement as he has incurred exposure to costs and debts in the undertaking and does not wish to lose the profits envisaged. It is further stated by the Defendant that he is willing to settle the sum of profits as agreed.
- 3.11 He denies that he had received any notice from Plaintiffs' Solicitors.
- 3.12 AND FOR COUNTER CLAIM the Defendant states that;
- (a) On or about 6th August 2011 the Defendant entered into a Memorandum of Understanding with one Dai-Yong Kim of Korea for Defendant to sell 2,000 metric tons of brown sugar per month at \$1.00 per kg to said Dai-Yong Kim in Korea and the said buyer sent Plaintiff to Defendant.
 - (b) Plaintiff also had a similar understanding with the said buyer.
 - (c) The Defendant and Plaintiff agreed that they jointly send the monthly order at a profit of \$1 million per month to be shared equally between Plaintiff and Defendant and Plaintiff to advance \$100,000.00 to Defendant for Defendant to incur expenses in obtaining a license for sugar export to Korea, for molasses export License, to seek for a six acre molasses factory site, a 3000 acres land to plant and raise animals to be fed with molasses mix, a deposit for purchase of a house for Defendant and such advance to be paid from Defendants share of profits.

- (d) Acting on such agreement and representation the Plaintiff advances \$96,325.00 to Defendant and Defendant expended the said sum for the aforesaid purposes.
- (e) In breach of the aforesaid agreement and undertaking the Plaintiff unilaterally terminated the agreement which the Defendant refused to accept and the Defendant thereby suffered loss of \$55,000.00 for the 1st shipment.
- (f) To enforce his unlawful termination of the Understanding and in breach of his undertakings and representations the Plaintiff sent three iTaukei men to hassle the Defendant and complained to Police resulting in Defendant staying in a Police cell for one whole night and one whole day and thereby suffered pain and suffering.
- (g) Unless ordered to specific performance of the said agreement to export sugar the Defendant will suffer irreparable harm in loss of expenditure incurred as well as profits.

3.13 The Defendant in his statement of Defence prays for;

- a) An order of specific performance for Plaintiff to perform his obligations of export of sugar to Korea.
- b) A set off \$66,325.00 against Plaintiffs' claim and the Plaintiff to pay balance special damages of \$498,675.00 OR ALTERNATIVELY special damages of \$565,000.00.
- c) General and punitive damages
- d) Costs on indemnity basis

4. **The Reply to Defence**

4.1 In the reply to defence filed by the Plaintiff he denies that there was an agreement with Dai-Yong Kim of Korea. Dai-Yong Kim introduced Defendant to the Plaintiff for the purpose of buying sugar for export to Korea. As a result, the Plaintiff and the Defendant set up a company in September 2011 known as Ossian Exporters (Fiji) Limited for export of sugar to Dai-Yong Kim of Korea. The Company however, did not export any sugar because the Defendant could not even deliver the sugar as agreed with the Plaintiff.

- 4.2 The Plaintiff admits that Avikoro Investment Limited is a Company registered in July 2003 under the Companies Act of which the Defendant is Director. The Plaintiff is not aware of the said company exporting sugar to Vanuatu.
- 4.3 The Plaintiff states that the Defendant misrepresented to him that he was a successful businessman with several businesses in Fiji, one of which was Matalaqere Investment Limited. If the Plaintiff knew that the Company did not belong to the Defendant, he would not have deposited that money into their account. The Plaintiff was only interested in getting sugar and just followed the Defendants instructions on payments.
- 4.4 The Plaintiff states further that there was no agreement between Dai-Yong Yong Kim and the Defendant for sugar export and the agreement was between the Plaintiff and the Defendant and the Defendant is well aware of this because the agreement in the form of a Memorandum of Understanding was executed by both parties in August 2011.
- 4.5 The Plaintiff denies that for 50% share of the profits or the \$100,000.00 advance to be used for the purpose stated in the Defendants statement of defence was ever agreed on. Furthermore, the Plaintiff states that the house the Defendant claims to have paid a deposit on is in a residential zone and as such cannot be used for commercial or business purpose and also that there is no sale and purchase agreement to evidence the purported transaction between the Defendant and owner of the said property.
- 4.6 The Plaintiff states further that the payments were made for the delivery of the 200 tonnes of sugar and maintains that the Export License No. 01/2011 was in fact forged and it was in fact issued to Tuckers Group (Fiji) limited.
- 4.7 That the agreement to export sugar was breached by the Defendant when he refused or was unable to deliver the 200 tonnes of sugar. The Plaintiff called and went several times to see the Defendant and the Defendant stated he could not get the sugar from the Fiji Sugar Corporation.
- 4.8 The Plaintiff states that the agreement has only been terminated

because the Defendant has not been able to deliver the 200 tonnes of sugar as agreed; it is the Defendants breach as the sugar was never delivered by him.

- 4.9 It is also stated by the Plaintiff that the Defendant was personally served with the Demand Notice and he acknowledged the receipt of the same.
- 4.10 In reply to the Defendants Counter Claim, the Plaintiffs states that he has no knowledge of the agreement between him and Dai-Yong Kim of Korea.
- 4.11 The Plaintiff states that Dai-Yong Kim is his relative and was the person that introduced him to the Defendant for the purposes of exporting sugar to Korea.
- 4.12 The Plaintiff is not aware nor does he have any knowledge of three iTaukei men being sent to hassle the Defendant and about a complain to police in resulting the Defendant staying in a Police cell except to say that the Police are currently investigating this issue.
- 4.13 The Plaintiff denies that he owes the Defendant the sum claimed or any sum at all and prays that the counter claim be struck out with costs on the basis that it is frivolous and vexatious and abuse of the court process.

5. **Agreed Facts and Issues**

- 5.1 The Agreed facts are;
 - a) The Plaintiff and the Defendant are both businessman
 - b) The Defendant was a Director of Avikoro Investment Limited a Company registered in Fiji under the Companies Act
 - c) The Plaintiff made three (3) different payments
 - d) The first instalment in the sum of \$30,000.00 was made on 13.05.11 to a company known as Matalaqere Investment Limited.

- e) The Second instalment in the sum of \$20,000.00 on/or about 15.07.11 to the Defendant; and
- f) The third instalment in the sum of \$46,325.00 on/or about 08.08.11 to the Defendant.

5.2 The agreed issues are;

- a) What did each party represent to each other?
- b) What did the parties agree on?
- c) What did the parties do to meet the obligations agreed to between them?
- d) What was the purpose of the instalment payments?
- e) Did any of the parties breach the terms of the agreement between them?
- f) Was the defendant served with a Demand Notice from the Plaintiff?
- g) What remedies is each party entitled to?

6. **Evidence of the Plaintiff**

- 6.1 The Plaintiffs' only witness was the Plaintiff himself. Plaintiff in his evidence stated that he paid \$30,000.00 to Matalaqere Investment to buy brown sugar and that the Defendant signed the acknowledgment receipt marked exhibit P2 as a director of the Company. He stated further that his lawyers found out that the Defendant is only the Secretary of the Company and when the Defendant did not supply 200 tonnes of brown sugar he instituted winding up proceedings case No. HBC 28 of 2012 against the company in Lautoka High Court.
- 6.2 He testified that he paid \$20,000.00 as the second instalment for sugar and produced the bank receipt as exhibit – P3 in proof of the payment. He stated further that when he inquired from the Defendant about the sugar he kept on saying next week, next week and that next week never came. Thereafter the Plaintiff entered into agreement marked P4 with the Defendant to supply sugar and paid the 3rd instalment of \$46,385.00 to the

Defendant. It was also stated by him that a company named "Ossian Exports" was set up with the Defendant to export brown sugar. He said the last payment for sugar was \$46,325.00 and produced exhibit P7, Bank slip in proof of the payment.

- 6.3 He denied that he had any agreement with the Defendant to accept 50% share from Export profits and denied that the payment of \$66,325.00 was made to buy a 6 acre farm land and house for the Defendant. He also stated that he doesn't know of any agreement that the Defendant had with Dai-Yong Kim and that he terminated the agreement he had with the Defendant due to the Defendant's failure to supply sugar. He said that he doesn't know about the Defendant's expenses of \$65,000.00 and that he had no agreement for a project, nor did he sign a Memorandum of Understanding with Dai-Yong Kim.
- 6.4 In cross examination the Plaintiff admitted that Dai-Yong Kim is a relation of his but denied having any knowledge of an agreement with Dai-Yong Kim and that the Defendant had to send brown sugar to Korea. He denied that he told the Defendant about sharing profit of one million on 50,50 basis.
- 6.5 He admitted that as per clause 3 of the Memorandum of Understanding marked Exhibit P4 he had to pay 50% and that 2000 tonnes of sugar costs \$one million which means he had to deposit \$500,000.00. When asked about the profit of \$one million from the transaction he said he doesn't know about it. He also admitted that the Memorandum of Understanding was signed after first two payments were made to the Defendant. While admitting that he and the Defendant met Dai-Yong Kim at Tappoo City Suva he denied knowing anything about a problem in Korea and also denied that the other factory matter was discussed at that meeting.
- 6.6 When questioned about the Defendant spending money to secure 6 acres in Lautoka for a factory and 1000 acre at Ba, spending money on accommodation in Suva, spending for travelling and usage of a rental car to facilitate the new venture the Plaintiff denied having any knowledge of such expenditure by the Defendant.
- 6.7 The Plaintiff also denied that he was supposed to pay for the 2000 tonnes of sugar and said it was only a Memorandum of Understanding but the Defendant had to first supply 200

tonnes.

7. **Evidence of the Defendant**

- 7.1 The Defendant testified that the Plaintiff came to meet him with Dai-Yong Kim. He stated further that they discussed about export of brown sugar, to send a sample of 1000 kg and after testing the samples to supply 2000 tonnes on 50% deposit. He also stated that they discussed about preparing a Memorandum of Understanding.
- 7.2 The export license and the shipping document of the sample of 1000 tonnes of sugar were produced marked D2 and D3.
- 7.3 The Defendant admitted that he was the secretary of Matalaqere Investments and Philippe is the owner. He also stated that he did not discuss about 200 tonnes purchase and that the Plaintiff paid \$46,325.00 to buy a house which amount was to be paid back out of profit from the sugar business. Purchase Order D4 was produced by him which gives the name of the supplier as Fiji Sugar Corporation and the name of the Plaintiff as the contact person in Fiji. He stated that it was given to him by the Plaintiff.
- 7.4 The Defendant stated further that in November or December 2011 Dai-Yong Kim, the Plaintiff and the Defendant had a meeting at Tappoo City and the Plaintiff told him to stop organising exporting sugar until further time as problems arose in Korea due to sacking a person who was handling the business from his job. It was stated by him that the Plaintiff and Kim Dai-Yong were planning to meet the Prime Minister about buying a farm and Rewa Diary and also to form a joint venture with a Korean company and the Defendant's company Ossian. According to his testimony after the Plaintiff and Dai-Yong Kim met the Prime Minister he was told by them to look for 6 acres to build a factory and 3000 acre for a farm. He also produced a project report for a feed processing factory marked as D5 which he said was given to him by the Plaintiff. It was his contention that he spent lot of money to go to Suva to buy meals, to go to NLTB and manage to get a land at Ba. He also stated that 1st shipment was cancelled by the Plaintiff breaching the agreement and that the Plaintiff did not pay him 50% for which he claims from the Plaintiff the share of profit he lost \$500,000.00. He produced marked D6 the breakdown of the

claim against the Plaintiff which includes the expenses incurred to obtain lands, for travelling, food, wages, accommodation, and the sum spent on the export of 1st shipment of brown sugar.

- 7.5 He stated further that the project which the Plaintiff and Dai-Yong Kim were planning failed and thereafter he received the demand letter. He stated that he could not pay him back as the Plaintiff did not pay the deposit to export sugar. He also produced as D8 another demand letter sent by the Plaintiff and stated that the Plaintiff came with two men who said they were soldiers of Fiji Government and that they forced him to pay. It is also stated by him that after two days the Plaintiff sent four men and that he had asked them to see his Lawyer but they came four times.
- 7.6 He testified that he is asking for damages of \$55,000.00 the sum supposed to be spent for loading of sugar.
- 7.7 When suggested to him in cross examination that Mr Kim of Fiji (the Plaintiff) was not aware of the agreement the Defendant had with Mr Kim of Korea (Dai-Yong Kim) the Defendant said he doesn't know whether the Plaintiff knew about it. When it was suggested to him that letter D7 of Vuataki Law addressed to an officer of Fiji Sugar Corporation was not in relation to the Memorandum of Understanding with the Plaintiff dated 13.08.2011 the Defendant replied he doesn't know. When suggested that it had nothing to do with the Plaintiff's export of sugar the Defendant stated he is not sure about it.
- 7.8 The Defended stated that the \$30,000.00 paid by the Plaintiff is a loan from the Plaintiff to purchase a house and that he doesn't have any agreement to that effect. He denied that the said amount was paid to him for 200 tonnes of sugar.
- 7.9 When suggested to the Defendant that purchase order D4 had nothing to do with the Plaintiff, the Defendant stated that the Plaintiff did not pay the deposit.
- 7.10 When questioned about the receipts for the expenses shown in D6 he stated that he did not have any receipt. He admitted that the amount spent on accommodation may be \$2,340.00 not \$2,500.00 as shown in D6. He also admitted that there was no document on the land to be acquired.

8. Analysis and Determination

- 8.1 In analysing the evidence of the Plaintiff he contended that he paid \$96,385.00 to the Defendant for the supply of brown sugar. He stated in evidence that the 1st instalment of \$30,000.00 was paid into the account of Matalaqere Investments Limited which is proved by document P1 and that it was acknowledged by the Defendant as a Director of Korotu Properties Limited is proved by document P2. It was stated by him that due to the Defendant not supplying sugar as agreed, he instituted winding up proceedings later against Matalaqere Company Ltd. According to the Plaintiff he has paid two other instalments of \$20,000.00 and \$46,385.00 to the Defendant and also they signed a Memorandum of Understanding, P4 in respect of this transaction on 6th August 2011 and set up a company known as "Ossian Exports" with the Defendant to export sugar. He contended that the Defendant failed to supply the 200 tonnes of sugar and therefore a demand notice P6 was sent to the Defendant by the Plaintiff's solicitors.
- 8.2 In regard to the Counter-Claim of the Defendant the Plaintiff denied that the Defendant informed him that \$30,000.00 is for a house he is buying and denied having any agreement with the Defendant for a 6 acre land. It was his position that he terminated the Memorandum of Understanding due to the Defendant's failure to supply sugar after the payments were made.
- 8.3 In cross examination he denied that the Defendant asked him to pay \$100,000 for expenses and that he agreed to share profits from sugar business with the Defendant.
- 8.4 He asserted in evidence that he had no knowledge about the Defendant being asked to look for 6 acres land and 3000 acres for factories after they met Dai-Yong Kim at Tappoo City, Suva. He also denied that he had any knowledge of the money being expended by the Defendants for travel, renting cars etc., to facilitate a new venture.
- 8.5 The Plaintiff admitted in evidence that the Memorandum of Understanding is for one year and cannot be cancelled by either party. However, he asserted that he had to terminate the Memorandum of Understanding as the Defendant did not supply

sugar even after one year of the Memorandum of Understanding.

- 8.6 In analysing the oral and documentary evidence of the Plaintiff, I find that the Plaintiff has substantiated his assertion that he had paid \$66,325.00 to the Defendant to supply brown sugar and that the Defendant has failed to supply the same and therefore is in breach of the Memorandum of Understanding P4.
- 8.7 Though the Defendant contended that the Plaintiff told him to stop the supply of sugar and find land to set up factories at a meeting they had with Dai Yong Kim there is no evidence to substantiate his assertion.
- 8.8 Furthermore, though the Defendant asserted that the agreement he reached with the Plaintiff was to share the profits on a 50,50 basis and the Plaintiff to provide \$500,000.00 initially, the Memorandum of Understanding does not reveal of such an arrangement. There is no evidence at all to substantiate such a profit sharing agreement between the Plaintiff and the Defendant.
- 8.9 It was also contended by the Defendant that the Plaintiff paid \$30,000.00 to him to buy a house. In cross examination he stated that it was a loan given to him by the Plaintiff and that there was no agreement for it. It is difficult to believe that the Plaintiff would provide \$30,000.00 to the Defendant as a loan without any agreement to that effect.
- 8.10 According to the evidence of the Defendant, \$46,325.00 was given to him by the Plaintiff to buy a piece of land and the said sum was to be paid back to the Plaintiff from the profits. As determined by me herein before the Defendant has failed to substantiate the fact that there was an agreement to share the profits between him and the Plaintiff. Therefore I cannot accept the Defendants' assertion that the Plaintiff agreed for the \$46,325.00 to be paid back from the profits.
- 8.11 Furthermore the Defendant has also failed to substantiate that he stopped organising sugar exports on the instructions of the Plaintiff. The Plaintiff denied that he gave any instructions to stop supplying sugar under the Memorandum of Understanding.

- 8.12 Due to the above finding I cannot accept the Defendants' assertion that he expanded the \$65,000.00 shown in D6 to find land for a factory project on the request of the Plaintiff. It is clear from the evidence of the Plaintiff that he had no knowledge of such a project and also that he has not authorised the Defendant to spend the money he gave to find lands for such a project.
- 8.13 Paragraph 12 of the Defendants' Statement of Defence refers to the particulars of expenditure amounting to \$65,000.00. Paragraph 13 state that the Defendant suffered a loss of \$55,000.00 due to the Plaintiff terminating the agreement unilaterally. When the two amounts are added its only \$120,000.00 and not \$565,000.00. Therefore I find that the Defendants' Counter-claim is contrary to his own pleadings as well.
- 8.14 In his evidence Defendant stated that \$55,000.00 loss is the amount he was supposed to send for loading. But it is not evidentially proved that the Defendant has spent \$55,000.00 for loading of sugar.
- 8.15 When asked about the share he would have got if the 1st shipment went, the Defendant stated it was about \$500,000.00. Therefore it is my view that his claim for damages on the termination of the Memorandum of Understanding is based on the assumption that he would have got 50% of the profits on the 1st shipment of sugar to Korea. This I cannot accept as I have already held that the Defendant has failed to prove the fact that the Plaintiff agreed to share profits with the Defendant.
- 8.16 For the reasons set out above I hold that the Defendant has failed to substantiate his counter claim against the Plaintiff in this matter.

9. Conclusions

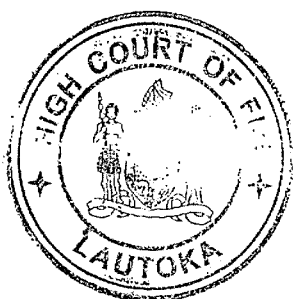
In analysing the evidence led at the trial I find the Plaintiffs' evidence credible and supported by documentary evidence to establish the claim against the Defendant. As such I hold that the Plaintiff has proved his claim against the Defendant on balance of probabilities. I also find that the Defendant has failed to establish the Counter-claim by evidence and therefore it ought to be struck out.

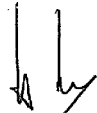
10. Furthermore the interest rate claimed by the Plaintiff was not challenged in cross-examination of the Plaintiff. Therefore I hold that the Plaintiff is entitled to the interest as prayed for by his Statement of Claim.

11. Final Orders:

Accordingly I hold as follows;

- (1) The Plaintiffs' claim of \$66,325.00 from the Defendant granted. Accordingly the Defendant shall pay the total sum of \$66,325.00 (Sixty Six Thousand Three Hundred Twenty Five Dollars) to the Plaintiff together with interest at the rate of 13.5% from 9th August 2012 to the date of this Judgment and post Judgment interest at the rate of 5% from the date of Judgment to the date of payment.
- (2) The Defendants' Counter-claim be dismissed and struck out.
- (3) The Defendant shall pay the Plaintiff costs summarily assessed in a sum of \$3,500.00.




Lal S. Abeygunaratne
Judge

At Lautoka
20th November, 2014