

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 234 of 2013

BETWEEN : TOTAL (FIJI) LIMITED a limited liability company having its registered office at Suva in  
Republic of Fiji.

PLAINTIFF

AND : VILIAME KASANAWAQA of Lot 4, Naganivatu Road, Wailoku, Tamavua in the Republic of Fiji.

DEFENDANT

BEFORE: Master V. D. Sharma

COUNSEL: Ms. Rakai - for the Plaintiff  
No Appearance - for the Defendant

Date of Ruling: 12<sup>th</sup> July, 2018 @ 9 am

RULING

[Summons for Assessment of Damages pursuant to Order 37 Rule1 (1)  
and Order 59 Rule 2(d) of the *High Court Rules, 1988*]

A. INTRODUCTION

1. This is the Plaintiff's **Summons for Assessment of Damages** filed on 07<sup>th</sup> November, 2013 wherein the following orders are sought-

(i) *An order that pursuant to Judgment entered against the Defendant on 27<sup>th</sup> September, 2013, damages be assessed and costs be taxed in this action against the Defendant.*

2. The application is made pursuant to *Order 37 Rule 1(1) and Order 59 Rule 2(d) of the High Court Rules 1988* and the *Inherent Jurisdiction of this Court*.

B. THE LAW

3. The provisions of Law dealing with the **Assessment of Damages** can be found at *Order 37 of the High Court Rules, 1988* which states as follows-

**Assessment of damages (O.37, r.1)**

*1.(1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment may, after obtaining the necessary appointment from the Registrar and, at least 7 days before the date of the appointment, serving notice of the appointment on the party against whom the judgment is given, proceed accordingly.*

*(2) Notwithstanding anything in Order 65, rule 9, a notice under this rule must be served on the party against whom the judgment is given.*

*(3) Without prejudice to the powers of the Registrar under Order 32, rule 12, the attendance of witnesses and the production of documents before the proceedings under this Order may be compelled by writ of subpoena, and the provisions of Order 35 shall, with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at a trial.*

**Certificate of amount of damages (O.37, r.2)**

*2. Where in pursuance of this Order or otherwise damages are assessed by the Registrar, he shall certify the amount of the damages and file the certificate in the Registry.*

4. The Summons also relies on *Order 59 Rule 2(d)* which says:

*Jurisdiction of the Master (O.59,R.2)*

*"2. The Master shall have and exercise all the power, authority and jurisdiction which may be exercised by a judge in relation to the following causes and matters -  
(d) Assessment of damages where liability has been determined."*

C. ANALYSIS and DETERMINATION

5. The **issue** for this court to determine are the following-
  - (i) *To assess Damages pursuant to Judgment entered against the Defendant on 27<sup>th</sup> September, 2013, and*
  - (ii) *To tax Costs in this action against the Defendant.*
6. I have perused the Court Record in the within Action and find that the substantive claim against the Defendant was "Breach of Confidence" and sought for Special and General Damages with interests and Costs.
7. The Defendant was served with the Writ of Summons and the Statement of Claim on 26<sup>th</sup> August, 2013.
8. He only filed his Acknowledgment of Service but failed to file and serve his Statement of Defence. This resulted in the Plaintiff obtaining the Default Judgment on 27<sup>th</sup> September, 2013 against the Defendant and the General Damages to be assessed with interest on the award at the rate of 13% per annum and costs of this proceedings accordingly.
9. The Summons for Assessment of Damages was filed by the Plaintiff on 08<sup>th</sup> November, 2013 and served personally on the Defendant on 12<sup>th</sup> November, 2013.
10. The Defendant did not file any Response to the Summons but proceeded with a Motion to seek an order to set aside the Default Judgment entered against him, which was refused and dismissed on 29<sup>th</sup> July, 2014 with costs.
11. Subsequent to this Ruling, on 21<sup>st</sup> September, 2015, the Plaintiff then proceeded with his current application for Assessment of Damages and produced Rupeni Inoke as his only witness to testify in this proceeding.
12. By this time the Defendant had neither appealed the Ruling and/or the Orders made by this Court dated 29<sup>th</sup> July 2014 nor did he make any appearances to defend and/or counter the current Summons for the assessment of Damages for hearing and determination before this court.
13. Hence, the Plaintiff relied on the Default Judgment entered and sealed against the Defendant on 27<sup>th</sup> September, 2013 for the sum of \$4,666.66 being Special damages from 17<sup>th</sup> October 2012 with interest accruing at the rate of 5% per annum till the date of full payment and further that the Defendant pay the Plaintiff General damages with interest on the award at the rate of 13% per annum and costs of this proceedings on an indemnity basis.
14. **PW1- Rupeni Inoke** gave the following evidence:
  1. *Formerly, a Vice President/Operations in Total Fiji Limited and looked after operations in both Fiji and Tonga, total staff of about 40 people in 7 terminals. This included supervising the Engineering Section.*
  2. *Began working at Total Fiji Limited from December 2006 until he retired on or about end of December 2014.*

3. *Total is a French company was previously present only in French islands. However, when shell sold its business in the Pacific, Total tendered and purchased the business in Tonga and Fiji in November 2006.*
4. *Total PW1 gave evidence that Total is one of the biggest oil companies in the world and is in more than 300 countries and has more than 90 plus staff worldwide.*
5. *Viliame Kasanawaqa the Defendant joined Total as an engineer and was responsible for the technical aspects of the projects, etc.*
6. *The Defendant was subsequently appointed Terminal Manager and looked after 18 staff for 24 hours, 7 days a week at both Rodwell and Walu Bay. He was being paid an annual salary of \$56,000.00 (Fifty Six Thousand Dollars). This letter of offer dated 9<sup>th</sup> November 2010 is marked as "Exhibit 1".*
7. *PW1 read out the terms of Exhibit 1 and stated that each of the terms were very clear especially, the termination notice period which was 1 month as shown on page 4.*
8. *All employees including the witness are required to sign a Confidentiality Agreement which meant that they were not disclosed privileged information or do outside work to contradict the interests of the Employer.*
9. *This meant that Total came first and this is what this Agreement enforced. This Agreement was marked and exhibited as "Exhibit 2" which showed that the Defendant agreed to:*  
  
*"In consideration of my employment by TOTAL (Fiji) Ltd. I will not disclose to anyone outside of TOTAL, or use in other than TOTAL's business, any confidential information or material relating to the business of TOTAL, either during or after my TOTAL employment, except with my employer's prior written permission. I will not use my position, or confidential information obtained in the course of my employment for my personal advantage."*
10. *In 2011 the Nauru government's fuel supply was advertised for tender. Total needed someone to go to Nauru and collate the necessary information required by looking at their depot and assess it and its equipment. The Defendant was appointed to Nauru to be the person to go and collate the information which would form the basis of their tender submissions.'*
11. *Total sent the Defendant to go and gather data and collate data to assist with Total's submissions to the Nauru government. He was sent on or about 2011 to work on Total's submissions for the tender.*
12. *The Defendant returned from Nauru and submitted a report by email dated 4<sup>th</sup> of July 2011 with the subject Nauru Report. This email was marked and exhibited as "Exhibit 3" which contains the findings by the Defendant.*
13. *It was after the Defendant's return from his Nauru that Total through its former CEO, Mr Esseo received an email report from a former staff, Epeli Koroi who used to be in the Engineering section. This former staff had joined another oil supplier, Pacific Energy who was also in Nauru to collate information for their tender for the Nauru Government.*
14. *This former staff informed Total that the Defendant was conducting third party works and he advised the Engineering department.*
15. *PW1 says that Total's former CEO, Bernardo Eseo sent the email to him and they also discussed its contents. PW1 was the Defendant's immediate supervisor so this report was discussed between PW1 and management. A copy of this email is marked and exhibited as "Exhibit 4" email dated 15<sup>th</sup> November 2011 at 6.47 pm.*
16. *Total began looking into the complaint when it received the resignation letter by the Defendant giving immediate notice in breach of the Letter of offer. This letter is marked and exhibited as "Exhibit 5".*
17. *PW1 says he was disappointed in the manner in which the defendant issued his resignation notice. It was not handed to him personally or even the HR Division.*

18. *Total did not accept the notice and sent an immediate response on the same date, 28<sup>th</sup> November 2011. This letter was personally delivered to Wailoku the home of the Defendant. This letter is marked and exhibited as "Exhibit 6".*
19. *Total also made several calls to the Defendant to return to work. Several messages were also left by the staff but no response was received. This note is marked as Exhibit 7".*
20. *Total wrote another letter dated 2<sup>nd</sup> December 2011 to the Defendant reiterating its non-acceptance of his resignation notice and that he was required to report and of the numerous calls made to him. This letter is marked and exhibited as "Exhibit 8".*
21. *After the above, Total instructed its lawyers, Sherani & Co to take over the matter and send out a Demand letter to the Defendant. This was done by letter dated 17<sup>th</sup> May 2012 which is marked as "Exhibit 9".*
22. *Total instructed its lawyers to send another demand letter dated 17<sup>th</sup> October 2012 outlining the breached by the Defendant for invalid notice, for conflict of interest by conducting third party work from 29<sup>th</sup> June 2011 - 30<sup>th</sup> September 2011 whilst still being employed with Total for the Nauru Government tender and breach of confidence in giving confidential information to a company called JEVK which caused Total losses. This letter is marked and exhibited as "Exhibit 10".*
23. *Total lost the tender for the supply of fuel to the Nauru government. Further, between July - September 2011, the Defendant was still an employee of Total who had sent him to Nauru paid his fare as well as his wages through-out this period until the Resignation notice was received.*
24. *Total through its lawyers conducted a business search of the business "JEVK" and found it to be an individual application for registration of business name.*
25. *This business registration was lodged by the Defendant, Viliame Kasanawaqa whose wife's initials are the JE in the entity's name. This was registered on the 19<sup>th</sup> December 2011. This is marked and exhibited as "Exhibit 11" in the Plaintiff's Bundle of Documents before the Court.*
26. *This registration appears consistent with Invoice dated 4<sup>th</sup> July 2011 for \$1,600.00 (Australian Dollars). This invoice which is titled JEVK Engineering Consultancy services is marked and exhibited as "Exhibit 12".*
27. *This registration would be consistent with the Invoice dated 31<sup>st</sup> August 2011 for \$1,694.00 for Nauru where the beneficiary name is Viliame Kasanawaqa in the details given. This invoice which is titled JEVK Engineering Consultancy Services is "Exhibit 13".*
28. *The Defendant's lawyers, Messrs Vakaloloma responded by letter dated 12<sup>th</sup> November 2012 denying all 3 claims by Total. This is "Exhibit 14".*
29. *Total's lawyers responded by letter dated 13<sup>th</sup> February 2012 reaffirming its position that the notice was improper with proof of evidence of monies being received by the Defendant from the Nauru Government was also put to them. This is marked as "Exhibit 15".*
30. *Total and its lawyers have not received a further response after this correspondence.*
31. *Total seeks from the Court and he replied that it seeks special and general damages of 1 month's salary, interest at the rate of 5% on \$4,666.67 from 17<sup>th</sup> October 2012 when the first demand letter was sent out and general damages.*
32. *Further, Total seeks costs for this application as Total has incurred expenses to send out several demands and file numerous applications in Court. The Plaintiff seeks costs of \$3,000.00 for having pursued this legal action in addition to interest and the claim for breach of contract.*

33. *Since, Total lost out the tender to another competitor but cannot ascertain how much loss was made. However, the Defendant has breached its agreement by giving third party information whilst being gainfully employed by Total.*
34. *Total was placed in a difficult position of having to find alternative staff to cover for the Defendant. It also had to re-advertise the position.*
15. Upon a careful analysis of PW1's evidence, it can clearly be ascertained that the Defendant was in his current employment with the Plaintiff's Company and signed a Confidentiality Agreement whereby he was not to disclose privilege information or do outside work to contradict the interests of the employer Total (Fiji) Limited.
16. Whilst the Defendant was assigned with the duty and responsibility to collate data to assist with Total's submissions to the Nauru Government on the fuel supply tender, Defendant was reported by the former CEO of the Company Total (Fiji) Limited that the Defendant was conducting third party works.
17. Therefore, there was a conflict of interest when the Defendant conducted the third party work from 29<sup>th</sup> June, 2011 to 30<sup>th</sup> September, 2011 whilst still being employed with Total for the Nauru Government tender and as a result was in breach of Confidence in giving confidential information to a Company called "JEVK" which caused total losses to the Plaintiff Company. *Reverence is made to Exhibit '10'.*
18. As a result of the Defendant's actions and obviously breaches, Total lost the tender for the fuel supply to the Nauru Government.
19. Further, whilst the Defendant was still in employment with the Plaintiff Company Total (Fiji) Limited, between July to September, 2011, the Plaintiff had paid the Defendant's fare and wages during this period of employment until the Plaintiff received his resignation notice.
20. The business search of the Company "JEVK" revealed that the Defendant, Viliame Kasanawaqa had in fact lodged the business registration and his wife's name initials were "JE" in the entity's name with the Company's registration office.
21. The Plaintiff has already obtained a Default Judgment for **special damages** in the sum of 1 month notice period of **\$4,666.00** with **interest** at the rate of **5%** from 17<sup>th</sup> October 2012 to the date.
22. Therefore, in the **result**, I make the following findings-
- (a) That the **Defendant, Viliame Kasanawaqa** had **breached the contract, the Confidentiality Agreement** and further caused **business losses** to the Plaintiff Total (Fiji) Limited;
- (b) The **Plaintiff** is entitled to and awarded damages for **breach of confidence** by the **Defendant** in enriching himself by JEVK Invoices dated 4<sup>th</sup> July 2011 and 31<sup>st</sup> August 2011 in the total sum of **\$3,294.00 (Three Thousand Two Hundred and Ninety Four Dollars)**;

- (c) The Plaintiff is entitled to damages for **loss of business**. However, in terms of the evidence before this court the Plaintiff is entitled to and accordingly awarded **nominal damages** in the sum of **\$2,500.00** since PW1 was not able to ascertain how much loss it caused apart from the above.

#### FINAL ORDERS

- (i) The Plaintiff's Summons for Assessment of Damages filed pursuant to *Order 37 Rule 1(1)* and *Order 59 Rule 2(d)* of the *High Court Rules 1988* hereby Succeeds;
- (ii) The Plaintiff is awarded Special Damages in the sum of \$4,666.66 for 1 month notice period with interest at the rate of 5% from 17<sup>th</sup> October, 2012 to the date of conclusion of the hearing on 27<sup>th</sup> October, 2015;
- (iii) The Plaintiff is also awarded Damages for Breach of Confidence by the Defendant in the total sum of \$3, 294.00;
- (iv) The Plaintiff is further awarded Damages for Loss of Business in the sum of \$2,500.00; and
- (v) There will be an order for summarily assessed costs against the Defendant in the sum of \$650 at the Discretion of this Court, to be paid within 14 days;
- (vi) Orders accordingly.

Dated At Suva This 12<sup>th</sup> Day of July, 2018



Master  
VISHWA DATT SHARMA

cc: *Sherani Solicitors, Suva.*  
*Viliame Kasanawaqa, Wailoku, Tamavua, Suva.*