

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBC No. 406 of 2019

BETWEEN : THE BILALEVU INVESTMENT (FIJI) LIMITED
PLAINTIFF

AND : ASERI TOLALAULEVU
RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. W. Rosa for the Plaintiff
: Ms. R. D. S Lal for the Respondent

DATE OF HEARING : 23 December 2019

DATE OF JUDGMENT : 27 December 2019

RULING

1. Before me is an *inter parte* notice of motion filed by the Plaintiff on 20 December 2019, seeking certain interlocutory orders against the Defendant. In short, these orders seek to restrain the Defendant from approaching within 100 meters of the Plaintiff's saw mill site at Calia, Off Queen's Highway in Navua; to restrain the Defendant from interfering with the Plaintiff's use of the saw mill machine LT 35 Wood Mizer or with its saw mill operations; to order the Defendant to return to the Plaintiff the Single Edger machine, a component of the Saw Mill machine LT 35 Wood Mizer; and, to order the Defendant to assist the police to locate the Single Edger machine and return it to the police. Counsel for the Plaintiff supported the motion on 23 December 2019. Counsel for the Defendant opposed the motion.
2. This action was instituted by a writ of summons filed on 26 November 2019. The Plaintiff pleaded that among other businesses it has a saw mill business in Navua; the Defendant supplies the Wood Mizer LT 35 saw mill machine and its Single Edger machine; that the Defendant had represented the machines to be in perfect working order; the Plaintiff and the Defendant entered into a hire agreement; the Plaintiff paid the Defendant a sum of \$7,000.00; the Defendant delivered the machine without the Single Edger, and did not carry out a machine test; as a result the Plaintiff was unable to operate the saw mill and the machines were lying idle at the mill site; that the Defendant threatened to remove the machines from the site; the Plaintiff suffered losses in a sum of \$200,000 from 1 September 2019, and the Plaintiff claimed special damages in a sum of \$7,000.00 and general damages in a sum of \$200,000.00. Relief (e) was for "*the Defendant to be restrained as per paragraph 15*", which states, "that the Defendant had threatened to remove the said machines from the saw mill site and must be restrained till the Defendant had compensated the Plaintiff for its loss due to the Defendant's machines".
3. "The Plaintiff pleaded that due to the failures and false assurances by the Defendant, the Plaintiff could not commence any sawmill work from the defective machine and that the Defendant had failed to obtain the necessary mill license and approvals; that these failures had placed the plaintiff at great risk of

closure of the saw mill business; that between 20 November and 26 November the Defendant had illegally trespassed into the Plaintiff's saw mill site and unlawfully removed the Single Edger machine from the Saw Mill LT 35 Wood Mizer.

4. The Plaintiff pleaded that due to the urgency of the matter, the Plaintiff had initially filed its application by way of notice of motion dated 26 November 2019 but that the Court had adjourned the matter to 30 January 2020.
5. The Counsel for the Respondent submitted that the Plaintiff's application for an injunction was misconceived as damages were an adequate remedy even if the Plaintiff was ultimately successful; that the Application was flawed as no undertaking was given by the Plaintiff as to the payment of the damages to the Defendant; that the Defendant had removed the component of the machine in order to repair such component following an oral complaint that there was a defect in the machine and that this component has been taken for repair with the full knowledge of the Plaintiff.
6. Counsel for the Plaintiff replied stating that the Defendant did not inform the Plaintiff about the removal of the machine's component, and submitted that there was a danger of the Defendant removing further parts of the machine by entering the Plaintiff's Saw Mill site, and, therefore, that it was appropriate for the Court to grant the orders sought by the Plaintiff.
7. An examination of the agreement dated 30 August 2009 relied upon by the Plaintiff reveals that the Plaintiffs agreement is with AI Access Technology. This appears to be a limited liability company with a separate and distinct personality from that of the Defendant named in this Application in the notice of motion. The Agreement spells out the various obligation of the machine owner, including its representations in regard to the Environmental Impact Assessment (EIA) (EIA) and its responsibility for providing clearance from the Ministry of Employment, Industrial and Productivity as well as the necessary license from the Forestry Department. The Agreement refers to the arrangement as a Dry Hire Agreement and mentions the obligations of the hirer as well. The machine owner represented to the Plaintiff that the machines are in good workable condition.

8. Clearly the Plaintiff's complaint is that the undertakings of the Defendant have not been complied with and that there is a breach of the agreement. When this matter came up before Sharma, J on 12 December 2019, orders were made setting timelines for the filling of affidavits by both parties and the matter was to be mentioned on 31 January 2020. Thereafter, the matter came up before me on 23 December 2019, following an application by the Plaintiff seeking injunctive relief stating that the Plaintiff feared that parts of the machine may be removed by the Defendant during the holiday period.
9. Although the Plaintiff has averred that an important component of the machine was removed by the Defendant, the Counsel for the Defendant admitted and explained that such removal was for the purpose of repair consequent to an oral complaint by the Plaintiff. Counsel for the Plaintiff did not deny that oral complaints were made to the Defendant regarding the defects in the machine. However, counsel has not been able to satisfy Court that there is an imminent threat of the Defendant unlawfully removing parts of the machine from the Plaintiff's premises. The Plaintiff is required to establish some *prima face* evidence of such a threat. There is no evidence before Court that the Plaintiff made a complaint to the police that the Defendant criminally trespassed and unlawfully removed parts of the machine. It appears that this is part of a larger dispute between the parties as regards the breach of their obligations, and in regard to which Sharma, J has already issued directives to the parties. Counsel for the Plaintiff has not been able to satisfy Court that damages would not be an adequate remedy for the Plaintiff. It is necessary for a party moving to obtain the discretionary remedy of an injunction to be able to satisfy Court that damages alone will not suffice.
10. The Plaintiff has sought an order for the Defendant to assist the police at the to locate the whereabouts of the Single Edger machine and the same be returned and delivered to the Plaintiff' with assistance of the Police. But there is no evidence that the Plaintiff has made a police complaint. The Plaintiff has not satisfied Court as to why the Defendant should be restrained from being 100 meters near the Plaintiff's saw mill site. Nor is there any evidence to suggest that the Defendant is interfering with the Plaintiff's use of the saw mill machine or with its saw mill operations. In the affidavit submitted on behalf of the Plaintiff,

it was averred that the Plaintiff could not conduct any saw mill business as a result of the Defendant's breach of obligations. The Plaintiff's plea for an order to return the single Edger machine does not arise as it was removed following an oral complaint by the Plaintiff, which was also conceded by the Plaintiff's counsel at the hearing. The Plaintiff does not appear to have taken any steps on the basis that it was illegally removed or that the Defendant had trespassed into the Plaintiff's premises.

11. For these reasons, I am unable to grant the orders sought by the Plaintiff's notice of motion dated 20 December 2019. This appears to be a case in which the Plaintiff's complaint concerns the breach of undertakings by the Defendant. In the absence of evidence of an imminent threat or risk to the property of the Plaintiff, it would appear that this is a matter where the Plaintiff could be compensated by damages. It would also seem from the affidavits tendered on behalf of the Plaintiff, that the Plaintiff's business is not in operation. In these circumstances, injunctive relief cannot be granted by Court.

ORDERS

- (a) Plaintiff's notice of motion dated 20 December 2019 is dismissed.
- (b) The Plaintiff is directed to pay the Defendant costs assessed in a sum of \$500.00

Delivered at Suva this 27th day of **December, 2019**



M. Javed Mansoor
Justice M. Javed Mansoor
Judge of the High Court