

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

CIVIL ACTION NO. HBC 212 OF 2016

BETWEEN : **BULA BARGAINS LIMITED** a limited liability company
having its registered office at 115 Vitogo Parade, Lautoka.

PLAINTIFF

AND : **NAREND PRASAD** aka **NARENDRA PRASAD, SAILESH PRASAD** and **VIMLESH PRASAD** all of Lautoka and
Businessman respectively.

DEFENDANTS

Appearances : Mr J. Prakashan for the plaintiff
Mr S. Krishna with Mr N. Kumar for the defendants

Date of Hearing : 2 May 2019

Date of Ruling : 2 May 2019

R U L I N G

[on notice of discontinuance]

[01] On 3 April 2019, the plaintiff files a summons supported by an affidavit of Pravina Devi, the Managing Director of the plaintiff company and seeks leave of the court to withdraw in its entirety the whole of the within action (*'the notice of discontinuance/the application'*). The ground for seeking such leave is that the defendants have now closed the shop and converted approximately \$117,000.00 worth of stocks by way of distress and sale without notice to the plaintiff company.

[02] There is no counterclaim by the defendants.

[03] The application is made under Order 21, Rule 3 of the High Court Rules, as amended ('HCR') and under the inherent jurisdiction of the court. Rule 3 states:

Discontinuance of action etc with leave (O 21, R3)

3 (1) Except as provided by Rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him or her therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

[04] In terms of R 3, a party may withdraw his or her claim against any or all of the parties against whom it is brought with the leave of the court. The court may grant such leave on such terms as to costs, the bringing of subsequent action or otherwise as it thinks just.

[05] Mr Krishna of counsel appearing for the defendants submits that the defendants seek costs on indemnity basis for defending this action in that the defendants had filed considerable number of documents, had made considerable number of appearances by counsel and the plaintiff obtained interim injunction and dragged on. Further, he submits that there should be an inquiry as to damages because they gave an undertaking as to damages when they obtained the interim injunction.

- [06] On the other hand, Mr Prakashan on behalf of the plaintiff sought orders in terms of the application while submitting that the issue of cost is the matter for the court to decide exercising its discretion.
- [07] I would accept the defendants' submission that they incurred considerable legal costs in defending the action. The defendants seeks costs in the sum of \$7,500.00. However, having considered all I summarily assess the costs at \$6,000.00.
- [08] I granted an interim injunction against the defendants on the application made by the plaintiff. The interim injunction effectively restrained the defendants from proceeding with the distress warrant for the recovery of the arrears of rents from the plaintiff. Having obtained the interim injunction the plaintiff stopped paying the monthly rent of \$9,810.00. Initially, the court granted the interim injunction on *ex parte* basis on 5 October 2016. On 12 October 2016, the court made it as an interim injunction retraining the defendants from interfering with the business operation at the premises and from issuing further distress warrant.
- [09] It is notable that the interim injunction was granted because of the consent and undertaking given by counsel appearing for the defendants, Mr Aman Ravindra Singh on 12 October 2016 that: '*we will not issue any further distress, and we will not disturb the plaintiff's business.*'
- [10] When obtaining the *ex parte* interim injunction, the plaintiff gave undertaking that they will pay any damages that would be caused to the defendants as a result of the injunction. Where an interim injunction is granted, but is subsequently discharged, the defendant may well have suffered damage by

reason of having had to comply with the injunction in the meantime. The defendant may then seek to enforce the undertaking which the plaintiff gave at the earlier hearing.

[11] The defendants would be entitled to damages if they can establish that they suffered damages between the date of granting the interim injunction and the date of its dissolution. In order to enforce the undertaking, the damage sustained must be assessed by means of an inquiry as to damages. At the inquiry the onus is on the defendant to prove both the fact of damage and its causation. I would allow the defendants application that there should be an inquiry as to damages as the plaintiff had given an undertaking to the court as to damages when they obtained the injunction against the defendants.

[12] Generally, a plaintiff who wishes to discontinue proceedings must file a notice of discontinuance. The general rule is that once a claim is discontinued, the plaintiff has to pay the defendant's costs in defending the action.

[13] The defendants seek also an order that the plaintiff remove their chattels in the shop as they are second hand items and no one is willing to buy. The application appears to be reasonable. I would, therefore, make an order directing the plaintiff to remove the chattels from the shop within 7 days for the date of this ruling.

[14] In conclusion, I am prepared to grant leave to the plaintiff to withdraw its claim subject to costs of \$6,000.00 and an inquiry as to damages, if any, arising out of the undertaking given by the plaintiff when obtaining injunction. Such assessment of damages is to be heard before the Master.

[15] Subject to the terms imposed by the Court in granting leave, the fact that the plaintiff has discontinued or withdrawn its claim made by it therein shall not be a defence to a subsequent action for the same, or substantially the same cause of action (see HCR, O 21, R 4).

The outcome

1. Leave granted to the plaintiff to withdraw whole of its claim.
2. The plaintiff shall file and serve notice of discontinuance within 7 days of this ruling.
3. The plaintiff shall pay summarily assessed costs of \$6,000.00 to the defendants.
4. The plaintiff shall remove the chattels from the shop within 7 days of this ruling.
5. Damages, if any, arising out of the undertaking given to the court by the plaintiff when obtaining injunction is to be assessed before the Master.

M. H. Mohamed Ajmeer
27/5/19

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M. H. Mohamed Ajmeer

JUDGE



At Lautoka

2 May 2019

Solicitors:

For the plaintiff: M/s Fazilat Shah, Legal, Barristers & Solicitors

For defendants: M/s Krishna & Co, Barristers & Solicitors