

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

CIVIL ACTION NO. HBC 139 OF 2018

BETWEEN : **MUNESHWAR GOUNDER** trading as Sunrise Rentals, Taxis & Tours of Malolo, Nadi, Businessman.

APPLICANT/ ORIGINAL DEFENDANT

AND : **PUSHPA KARAN NADAN NIACKER** aka **PUSHP KARAN NAICKER** of Votualevu, Nadi, Businessman.

RESPONDENT/ ORIGINAL PLAINTIFF

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. Chand K, for the Defendant- Applicant
Mr. Zoyab M, for the Plaintiff -Respondent

DATE OF HEARING : 15th March 2024

DATE OF RULING : 22nd March 2024

RULING

1. Before me is a Summons filed by the Original Defendant-Applicant (“the Applicant”) on 12th March 2024, moving for same to be heard Ex-parte, which the Court heard inter-partes on 15th March 2024.
2. By the said Summons, the Applicant seeks for the following orders against the Original Plaintiff- Respondent (“the Respondent”).
 1. *An Order to stay the Writ of Fieri Facias filed on 23rd February 2024, pending the resolution of this matter, to prevent the immediate liquidation of the Applicant’s rental car business namely Sunrise Rentals, Taxis & Tours and the potential severe consequences on his livelihood and that of his family.*
 2. *An order that the Applicant be allowed to pay the judgment debt to the Respondent through the proposed payment plan, which includes an initial payment of \$5,000.00 on or before the 30th of March, 2024, followed by subsequent monthly payments of \$600.00, due at the end of each month, commencing from 30th April 2024, until the entire debt is fully paid.*
 3. *An order allowing the Applicant to explore the sale of his business at its market valued, with a commitment to promptly remit any excess payment to the Respondent in accordance with the proposed payment plan.*

4. *That an Order made on the 11th day of March 2021 stopping the sale of the vehicle (ND 0914, LR 2309, LR 2308, LR 2310, LR 2344, and LR 2333) be varied to allow the Applicant to sell the vehicles and replace with new vehicles for the better operation of the rental business with prior consent of this Honorable Court.*
5. *Such Further or other orders as this Honorable Court may deem fit to grant in the circumstances.*
3. At the inter-partes hearing held on 15th March 2023, learned counsel for the Applicant and Respondent made submissions respectively in support of and against the Summons.
4. The Summons is supported by an Affidavit sworn on 11th March 2024 by the Applicant MUNESHWAR GOUNDAR and filed on 12th March 2024, along with annexures marked as “MG-1” to “MG-7”.
5. The substantial action hereof was filed by the Respondent against the Applicant on 5th July 2018, seeking, inter alia, a sum of \$ 68,250.00, being the sum that the Respondent claimed that he had lent and advanced to the Applicant at various instances.
6. The Applicant by his statement of Defence filed on 1st August 2018 disputed the claim and moved for the dismissal of the Respondent’s action.
7. After the trial, my predecessor judge by his judgment dated 18th September 2020 granted relief to the Respondent in a sum of \$ 63,500.00, together with the costs in a sum of \$3,750.00.
8. Being dissatisfied with the judgment, the Applicant took an Appeal and the Court of Appeal by its judgment dated 30th November 2023, dismissed the Appeal with an Order for costs in a sum of \$2,500.00 payable by the Applicant.
9. In the meantime, when the Appeal was pending, the Respondent by his summons filed on 5th March 2021 had obtained an order against the Applicant, inter alia, restraining him from selling, transferring , dealing with, gifting or disposing the 7 Motor Vehicles owned by the Applicant in his Taxi business, however, leaving the Applicant at the liberty of running his day-to-day taxi business and granting him leave to apply on notice to set aside the orders of the court, which reliefs were granted by my predecessor judge on 11th March 2021.
10. Thereafter, pursuant to the Judgment of the Court of Appeal delivered on 30th November 2023, the Respondent’s Solicitors filed **Writ of Fieri Facias** on 28th February 2024 for the execution of the judgment which was affirmed by the Court of Appeal.
11. It is against the said execution of the said judgment; the Applicant has filed the Summons in hand seeking the aforesaid reliefs. In addition to this, the Applicant has also said to have commenced a separate proceedings before the Nadi Magistrate Court under

Miscellaneous action No-02 of 2024 (as per “MG-4”) seeking reliefs, inter alia, to stay the liquidation proceedings of the Applicant’s Rental business and prohibiting the Respondent from enforcing the High Court order dated 18th March 2021, until the debt is settled in the manner proposed by him.

12. Order 47 (1) of the High court Rules of 1988 stipulates as follows;

Power to stay execution by writ of fieri facias (O.47, r.1)

1.-(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution-

(a) that there are special circumstances which render it inexpedient to enforce the judgment or order, or

(b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.

(2) An application under this rule, if not made at the time the judgment is given or order made, must be made by summons and may be so made notwithstanding that the party liable to execution did not acknowledge service of the writ of originating summons in the action or did not state in his acknowledgment of service that he intended to apply for a stay of execution under this rule pursuant to order 13, rule 9.

(3) An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant’s inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his.

(4) The summons and a copy of the supporting affidavit must, not less than 4 clear days before the return day, be served on the party entitled to enforce the judgment or order.

13. The main submission of the learned Counsel for the Applicant at the hearing was based on the Order 47 (1) (a) of the High Court Rule, wherein the existence of special circumstances enables the Court to make an order staying the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.


14. The, purported, special circumstances adduced on behalf of the Applicant was in relation to his family background / hardship , wherein he states that he being at the age of 35 have to feed two young children bellow the age of 5 and he is under obligation to look after his sick elderly mother and grand-father. It is also submitted that his wife is currently unemployed. Having a family, with young and elderly members to feed and look after, will not constitute a special circumstance. The Applicant, being at his young age of 35 , in the absence of evidence to the effect that his Rental business is running at a loss , and by

merely stating that he is in dire financial difficulties , cannot fall under Order 47 Rule (1) (a) or (b) to evade or delay the payment.

15. What the Applicant intends by prayer 2 of his Summons is for an Order allowing him to pay the judgment Creditor Respondent through the proposed payment plan, which includes an initial payment of \$5,000.00 on or before the 30th of March, 2024, followed by subsequent monthly payments of \$600.00, at the end of each month, commencing from 30th April 2024, until the entire debt is fully paid.
16. The above relief, if allowed, is bound to take around 9 years for the satisfaction of the judgment of this Court pronounced in the year on 18th November 2020, which now stands affirmed by the Court of Appeal by its recent judgment. This undoubtedly, will deprive the Respondent from the fruits of his judgment obtained through a laborious, time and money consuming litigation for over 6 years.
17. The Applicant, on top of being an electrician by profession, is also engaged in Taxi business for several years, with a fleet of Cars. He cannot be allowed to escape from or cause delay in satisfying the judgment entered against him. The payment plan proposed by his Summons, if allowed, could amount to ridicule the judicial process and the outcomes of it in the eyes of the Public, which in turn could lead to undesired consequences.
18. After the pronouncement of the Court of Appeal judgment on 30th November 2023, the Applicant had a sufficient time to move this Court for the vacation or variation of the restraining Order made by the High Court on 11th March 2021 in order to enable him to dispose his vehicles for the settlement of his liability. When he had not taken further Appeal, if he really intended to pay and settle the adjudged sum of \$63,500 with the costs ordered, he could have moved this Court promptly after the Court of Appeal Judgment.
19. By the paragraph 4 of the Summons, what the Applicant prays for is to vary the Order for him to sell the subject vehicles and to replace with new vehicles for the better operation of his rental business, which in turn is not going to benefit the Respondent promptly and considerably. The proposed payment plan remains the same.
20. By the paragraph 3 of the prayer to the Summons, what the Applicant moves is to sell his business at its market value, with a commitment to promptly remit any excess payment to the Respondent, which if granted would defeat the Court process so far taken for the execution and would also cause undue delay in full materialization of the judgment.
21. The proposed payment plan is highly unreasonable, bound to cause delay and finally will frustrate the Respondent, who does not have the benefit of recovering interest on the principal amount as per the judgment.

22. This Summons in hand was heard inter-partes on 15th March 2024 and the Ruling on it was fixed for today 22nd March 2022. In the meantime, the Applicant's Solicitors have on 21st March 2024 filed a supplementary Affidavit sworn by the Applicant, with further annexures, without obtaining the leave of the Court. This I see as a calculated move to delay the process. Thus, I refuse to accept the Applicant's supplementary Affidavit filed on 21st March 2023 and proceed to pronounce the Ruling.
- a. The Summons filed by the Applicant on 12th March 2024 is dismissed.
 - b. No order made for costs.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 22nd day of March, 2024.

SOLICITORS:

For the Applicant:

Messrs. Pillai Naidu & Associates- Barristers & Solicitors

For the Respondent

Messrs. Zoyab Legal- Barristers & Solicitors.