

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 340 of 2024

**BETWEEN:**

**GOLDHOLD SOLAR PTE LTD** a company duly registered in office and having its  
registered office at 211 Ratu Sukuna Rd, Suva, Fiji

**PLAINTIFF**

**AND:**

**KANKAN LI** of City Apartment, Huon St, Toorak, Suva

**DEFENDANT**

**BEFORE:**

**Banuve, J**

Counsel:

Mr. K. Jamnadas for the Plaintiff

Mr. A. Ram for the Defendant.

Date of Hearing:

2<sup>nd</sup> July, 2024

Date of Ruling:

8<sup>th</sup> July, 2024

# RULING

## Introduction

The Plaintiff instituted these proceedings on 2<sup>nd</sup> February 2024 to recover the sum of \$79, 069.00 allegedly misappropriated from its bank account by the Defendant together with interest and an additional amount of \$38,351.00 representing stock missing in the control of the Defendant, with interest, specific and general damages and costs on an indemnity basis.

An Ex Parte Notice of Motion was also filed by the Plaintiff on 2<sup>nd</sup> February 2024 seeking inter alia;

- (i) An injunction restraining the Defendant from leaving the jurisdiction of this Honorable Court, until the determination of proceedings.
- (ii) An injunction from selling and/or disposing and/or dealing with and/or removing from the jurisdiction of this Honorable Court any and all of assets and monies of the defendants until further order of this Court.
- (iii) That the Defendant file a full statement of their assets whenever located with this Honorable Court within fourteen (14) days of the service of the order.
- (iv) That a writ of Ne Exeat Civitate shall be issued forthwith and directed to the Sheriff of the High Court of Fiji and his deputy and all his constables and/or police officers and all customs and immigration officers commanding them that in the event that the defendant should seek or attempt to depart from the jurisdiction of the Honorable Court they should arrest him and bring him before a judge of this High Court as soon as possible until the defendant shall deposit a sum deemed appropriate by the court or surrender the passport and travelling documents and/or give the plaintiff a bond executed by the defendant for security satisfactory to the plaintiff that the defendant will not leave the jurisdiction without notice of this Honorable Court.
- (v) That the Defendant shall deposit the sum of \$79, 069.00 with the High Court until determination of these proceedings
- (vi) Costs

1. On 2<sup>nd</sup> February 2024, order in terms were granted by the Court pursuant to the Ex Parte Notice of Motion.

#### A. NOTICE OF MOTION

2. A Notice of Motion was filed by the Defendant on 26<sup>th</sup> March 2024<sup>1</sup> seeking the following orders;
  - (i) *That the ex parte orders made on the 2<sup>nd</sup> of February 2024 be set aside unconditionally with an assessment of damages suffered by the Defendant due to the illegal actions of the Plaintiff company and its director, Mr Shen.*
  - (ii) *That the costs of this Application be paid by the Plaintiff to the Defendant.*
3. The Notice of Motion was heard on 3<sup>rd</sup> July 2024.
4. Both parties provided written submissions to the Court, which it found of utmost assistance.
5. The Defendant's position in summary were;
  - (i) *The ex parte orders granted on 2<sup>nd</sup> February 2024 did not have a return date. If it had the ex parte orders would have been addressed earlier by the Defendant.*
  - (ii) *The Defendant raised certain preliminary objections, firstly, the Writ of Summons issued on 2<sup>nd</sup> February 2024 had not been authorized by the Plaintiff company by resolution but by a Director without knowledge of the other Directors. The sanction of the company was essential given the disputes were between Directors. Secondly, the affidavits filed by the Plaintiff were defective and ought to be struck off, in that no authority had been given by the company for the affidavits to be deposed on its behalf. Further, an affidavit filed on 24<sup>th</sup> May 2024 by the company's solicitor contravenes section 53 of the Companies Act and Order 41, r 5 of the High Court Rules, as the facts deposed in it are not within the solicitor's information and belief, contains a fraudulently altered document and moreover breached the hearsay rule.*

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<sup>1</sup> In the meantime pleadings in the substantive Writ proceeding were filed by the parties in accordance with the *High Court Rules* (Cap 13A) and a Summons for Directions was set to be heard before the Acting Master of the High Court on 5<sup>th</sup> August 2024.

- (iii) Pursuant to section 3493) of the 1997 Constitution every person lawfully in Fiji has the right to move freely throughout Fiji and the right to leave Fiji. There was no evidence before the Court that the Defendant was about to abscond, rather he had a return ticket to Fiji with a return date. No absconding debtor's warrant had been issued.
- (iv) The debt claimed by the Plaintiff was fraudulent. The inventory claim was not substantiated and the amount of \$38, 351 was not sought by the Plaintiff to be deposited also with the High Court.
- (v) The resolution to terminate the Defendant, as a Director of the Plaintiff did not comply with article 20(1) of the Articles of Association.
- (vi) There is no serious question to be tried, damages would be an adequate remedy and the balance of convenience favors the Defendant.

6. The Plaintiff's response in summary, were;

- (i) No proper notice was provided by the Plaintiff to the Defendant in the Notice of Motion filed on 26<sup>th</sup> March 2024, on the grounds he relies on, to set aside the ex parte orders granted on 2<sup>nd</sup> February 2024. The Notice of Motion contains a bare assertion that the application was premised on the illegal actions of the Plaintiff and on the grounds raised in the Affidavit of the Defendant. This lack of notice amounts to a breach of natural justice. In any event, the allegation of illegality cannot be determined at an interlocutory stage, but at trial.
- (ii) What the Defendant seeks to do under the guise of a setting aside application, is to seek summary judgment against the Plaintiff, at an interlocutory stage of proceedings, in relation to the manner the Defendant was removed as a Director. This is a matter that cannot be determined without a hearing at a trial proper.
- (iii) The Defendant has admitted taking the amount of \$79, 069.00 using a counter cheque, not the company cheque book.
- (iv) The Plaintiff raises certain preliminary objections, firstly, in the information raised by the Defendant to rebut the allegations in paragraphs 9 (c),20 and 23 of the Plaintiff's Affidavit in Support could not have been in the direct knowledge of the Defendant and ought to be struck off as not complying with Order 41 Rule 5(2), secondly, paragraphs 4, 5,6, 7 and 11(3)(b) and (c) of the Defendant's

*Affidavit in Reply do not comply with Orders 41, Rules 5(2) and (3) of the High Court Rules (Cap 13A).*

- (v) *The assertion by the Defendant that the Shen, a Director did not have the authority to depose an affidavit on behalf of the Plaintiff company as contravening Order 41, Rule 5 is baseless based on the Court of Appeal authority of R.B Patel Group Ltd v. Central Board of Health[2023] FJCA 246, where it was affirmed that subject to 3 exceptions, a deponent of an affidavit in support including where it is sworn on behalf of a company, does not need any written authority from the company to swear an affidavit.<sup>2</sup>*
- (vi) *The position outlined in (v) same would apply to the affidavit of Dilip Jamnadas filed on 24<sup>th</sup> May 2024, although in this affidavit an authority has been attached. One may assume that a person is held out as an officer or agent of the company (the latter being a legal entity) in accordance with section 54 of the Companies Act as alluded to by the Supreme Court in Paul v Director of Lands [2020] FJSC 3*
- (vii) *In terms of the fraudulent document the Defendant's version is neither signed nor acknowledged in contrast to that produced by Dilip Jamnadas which contains the company seal and the signatures of Chongliang Shen and the Defendant, as Directors. Further, the latter affidavit identifies the source of information or indeed where this was lacking.*
- (viii) *The Defendant's bare assertion in its Notice of Motion that the Plaintiff's actions were illegal was not substantiated in the Defendant's Affidavit in Reply, despite admitting that he had removed the sum of \$79, 069.00 and/or the missing inventory belonging to the company.*
- (ix) *The Plaintiff has made out a good and arguable case for the maintenance of the mareva injunction against the Defendant to prevent him from removing his assets from the jurisdiction. The only justification advanced by the Defendant for the removal of the injunction appears to be that as a director and signatory of the*

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<sup>2</sup> Relied on an exhaustive analysis conducted by Master Azhar ,(as he then was), in *Sharma v Prasad* [2018] FJHC 250

*company account he was allowed to remove funds belonging to the company, for his own purposes.*

- (x) *With regard to the Writ Ne Exeat Regno the Court has the power to grant such a Writ to support of a mareva injunction. The purpose of the writ is not to prevent departure simpliciter but to require the Defendant to preserve those assets before the he departs from the jurisdiction.*
- (xi) *In relation to the allegation of material non-disclosure by the Defendant which warrants the removal of the injunction, the Defendant's response to the causes of action raised by the Plaintiff against him amounts to bare denial which Order 18, Rule 12(3) construes to be an admission of the allegation made against him – NBF Asset Management Bank v Taveuni Estates Ltd [2011] FJHC 755. The issue of the Defendant's removal as a Director is not material to the issue of the subsistence of the injunction and is a matter for the trial proper.*

## **B. ANALYSIS**

### **Preliminary Issue**

7. The preliminary objection raised by the Defendant that the setting aside application was delayed because no return date was allocated for the Court to review the ex parte orders of 2<sup>nd</sup> February 2024, appears to be well made, until relevant facts are scrutinized, ;
  - (i) The Defendant did not disclose to the Court that the restriction placed on him from travelling out of Fiji on 2<sup>nd</sup> February 2024, was not due to the orders granted *ex parte* on 2<sup>nd</sup> February 2024 rather, the restriction was placed by the Police, as a consequence of subsisting criminal investigation against him. The Court had been informed by the Plaintiff during the *ex parte* hearing of 2<sup>nd</sup> February 2024 that the Police would ensure that the Defendant would not leave the jurisdiction, although it was not aware of the actual steps that the Police would take,<sup>3</sup>necessitating the Plaintiff's

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<sup>3</sup> Paragraph 26 of the **Affidavit of Chongliang Shen in Support of the Plaintiff's Application for Injunction** filed on 2<sup>nd</sup> February 2024.

approach to the Court. No evidence has been placed before the Court on the status of the criminal investigation against the Defendant.

- (ii) Pursuant to ex parte order (iv), granted on 2<sup>nd</sup> February 2024, the Defendant would have had to be *arrested by the Police should he seek to depart the jurisdiction, and brought to the Court as soon as possible, until* certain arrangements were made to address the security concerns of the Plaintiff, before he could leave the jurisdiction. The Defendant was not arrested and brought before the Court, in accordance with this order, when seeking to depart the jurisdiction, affirming that the travel restriction imposed on the Defendant was placed by some other means.
- (iii) The purpose of assigning an early return date is to ensure that the *ex parte* orders be reviewed expeditiously. There was nothing to prevent the Defendant from urgently filing a Motion to address the lack of a return date. It did this on 26<sup>th</sup> March 2024, and a return date was assigned to the Motion on 3<sup>rd</sup> May 2024. On that date, the Defendant agreed to have a hearing date set for 3<sup>rd</sup> July 2024. No sense of urgency was displayed by the Defendant to have the ex parte orders of 2<sup>nd</sup> February 2024, set aside earlier nor, has it complied with the order that it deposit the sum of \$79,069.00 with the High Court until determination of these proceedings.

- 8. The Court finds there is little merit in the preliminary objection raised by the Defendant.

### C. NO ARGUABLE CASE

- 9. The Defendant did not specify the grounds it relied on in the Notice of Motion filed on 26<sup>th</sup> March 2024, to set aside the *ex-parte* orders of 2<sup>nd</sup> February 2024. The general nature of the prayer and relief relied on by the Defendant, did not comply with Order 8, Rule 3(2) of the *High Court Rules* [Cap 13A], entitled the *Form and issue of a notice of motion-*

*(2) The notice of motion must include a concise statement of the nature of the claim made or the relief or remedy required*

10. Pursuant to Order 32, Rule 6, the Court has an inherent jurisdiction to set aside orders granted ex parte in the interest of fair administration and justice<sup>4</sup>, however, the general nature of the relief sought by the Defendant in the Notice of Motion did not assist the Court in its determination of the application to set aside.
11. The written submissions of the Defendant discloses 3 grounds as the basis for the ex parte orders of 2<sup>nd</sup> February 2024 be set aside (although the written submissions did not follow a coherent format).
  - (i) The Plaintiff does not have an arguable case (there is no serious question to be tried.)
  - (ii) Damages would be an adequate remedy.
  - (iii) The balance of convenience favors the Defendant against the continuation of the interlocutory injunction.
12. “It is not part of the Court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts which either party may ultimately rely on, nor decide difficult questions of law which call for detailed argument and mature consideration. Those are matters to be dealt with at trial”.<sup>5</sup>
13. The Plaintiff, a limited liability company, involved in the sale, supply and installation of solar equipment alleges that the Defendant, a Director, in breach of his fiduciary duties, unlawfully removed a sum of \$79, 069.00 from the Plaintiff’s bank account, without the knowledge and approval of other Directors, for his own benefit. In addition, the Plaintiff alleges a discrepancy between the actual stock in the possession and control of the Defendant and sales recorded by the Plaintiff, with a value of \$38, 351.00.
14. The Defendant denies the claim and states that the said monies were owed to him and he paid himself from company accounts, to clear these outstanding dues. Further, the Defendant denies any discrepancy in the stock in his control and possession and the sales recorded by the Plaintiff. The Defendant counter-claims that he was unlawfully terminated from his position as a Director of the

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<sup>4</sup> *Prabha Wati v Administratrix of the Estate of Vijay Singh v Satya Wati & Others* [2015] HBC 144 of 2014

<sup>5</sup> A well known passage from the judgment of Lord Diplock in *American Cyanamid v Ethicon (1975) 1 ALL ER 504* at 510, cited by Fatiaki J in *Merchant Bank of Fiji v Raniga* – Civil Action No 210 of 1993.

Plaintiff, and has suffered harassment, loss and damages due to a false complaint to the Police and the illegal ex parte orders of the Court which prevented him from departing the jurisdiction on 3<sup>rd</sup> February 2024.

15. The allegations raised by each party relating to the internal management of the Plaintiff company are serious in nature, specifically, the competing position of the parties on the authority required for the withdrawal of company funds, the initiation of proceedings, the deposition of evidence on behalf of the company, or the termination of a Company Directorship and cannot be assessed, much less determined, on the basis of the opposing affidavits and, contrary to what the Defendant asserts, raises disputed issues of fact and law that needs to be tested fully, at trial-*Merchant Bank of Fiji Ltd v Raniga* –Civil Action No 210 of 1993 (per Fatiaki J).

*Writ Ne Exeat Civitate*

16. The Defendant asserts that under section 34(3) of the 1997 Constitution, ‘every person has a right to move freely throughout Fiji and to leave Fiji and that the *Writ Ne Exeat Civitate* (the Absconding Debtor’s Warrant), was *illegally* issued by the Court on 2<sup>nd</sup> February 2024, since there was no return date on the orders granted and there was no evidence that the Defendant would abscond and not return. The Defendant relies on the authority of *Devi v Rizwan*-Miscellaneous Action No 29 of 2009, for the proposition that where there was no evidence before the Court that a debtor was about to abscond, the issue of the *Writ Ne Exeat Regno* was illegal or a nullity, as held by the Court in *Rizwan*. The Court notes the following ;

- (i) The ratio of *Rizwan v Devi* was that the Magistrates Court did not have the jurisdiction to grant the prerogative *Writ Ne Exeat Civitate*, under the *Magistrates Courts Act* [Cap 14], therefore its purported grant was a nullity. The ratio and facts of that case, clearly distinguish it from this case.
- (ii) At the *ex parte* hearing on 2<sup>nd</sup> February 2024, the Court was informed that the Defendant could not be located, necessitating the Plaintiff contacting

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<sup>6</sup> Reference ought to be section 21(3) of the **Constitution of the Republic of Fiji 2013**

his wife in China by *We Chat*, who then affirmed that the Defendant would be departing Fiji on 3<sup>rd</sup> February 2024.<sup>7</sup>

17. There was no evidence before the Court *then, nor* is there any now, that the Defendant would not abscond. The provision of a return ticket, for example, does not amount to sufficient assurance for this purpose.

*Non-Disclosure by the Plaintiff*

18. The Defendant asserts in the Affidavit in Support filed on 26th March 2024, that there was material non-disclosure by the Plaintiff at the ex parte hearing on 2<sup>nd</sup> February 2024 of the circumstances leading to the payment of the amount of \$79,069.69 from the company account, that ought to justify the setting aside of the orders granted on that day. This allegation is premised on the primary dispute on the nature and propriety of the payment from company funds, which the Court has ruled as a matter that can only be dealt with at trial.
19. The Court finds rather, that the Defendant did not at any stage reconcile the inconsistency in his position that the restriction placed on him on 3<sup>rd</sup> February 2024, from departing Fiji, was not due to the alleged *illegal ex parte* orders of the Court of 2<sup>nd</sup> February 2024 but due to a *Stop Departure Order* placed separately by the Police<sup>8</sup>, nor has it provided any evidence on the status of the investigation and the departure order.
20. The Court finds there is no merit in the Defendant's argument that the Plaintiff does not have an arguable case to warrant the setting aside of the *ex parte* orders of 2<sup>nd</sup> February 2024.

**D. DAMAGES AN ADEQUATE REMEDY AND BALANCE OF CONVENIENCE**

21. The Defendant's submissions is premised on the issue that the debt is highly questionable, damages would be an adequate remedy and he owns assets within the jurisdiction which would sound adequately in damages, as a remedy, if

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<sup>7</sup> Paragraph 20 Affidavit of Chongliang Shen (in Support of the Plaintiff's Application for Injunction) filed on 2<sup>nd</sup> February 2024

<sup>8</sup> Paragraphs 22(f) and 25 of the Affidavit in Reply of Kankan Li filed on 27<sup>th</sup> June 2024

warranted, and therefore the *ex parte* orders of 2<sup>nd</sup> February 2024 ought to be set aside in its entirety as sought.

22. The Court finds little assistance in the material placed before it, in support of the Notice of Motion filed by the Defendant on 7<sup>th</sup> March 2024, to warrant it setting aside the *ex parte* orders granted on 2<sup>nd</sup> February 2024, that the Defendant's share in the Plaintiff company, when weighed against its liabilities, makes it unsuitable to consider it as an asset that warrants a finding on adequacy of damages on his behalf.
23. It is also not possible to weigh whether the balance of convenience favors the Defendant given the unresolved conflict in evidence, to warrant the setting aside of the *ex parte* orders of 2<sup>nd</sup> February 2024.

## **ORDERS**

1. The orders sought in the Notice of Motion filed by the Defendant on 26<sup>th</sup> March 2024 are refused.
2. Costs summarily assessed at \$1,500.00 to be paid by the Defendant to the Plaintiff within 7 days of this order.

**Savenaca Banuve  
Judge**

**At Suva  
8<sup>th</sup> July 2024**