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

CIVIL ACTION NO. HBC 150 OF 2011

BETWEEN:	:	**ENGINEER PROCURE CONSTRUCTION FIJI LTD** a limited liability Company having its registered office at 5 Nagaga Street, Lautoka in Fiji
		PLAINTIFF
AND:	:	**SIGATOKA ELECTRIC LIMITED** a limited liability company having its registered office at Valley Road, C-/P.O.Box 113,Sigatoka, Fiji
		DEFENDANT
BEFORE	:	Hon. A.M. Mohamed Mackie-J.
APPEARANCES	:	Ms. Fatima. G. -for the Plaintiff.
	:	Ms. Fazilat Shah, with Mr. S. Gosai- For the Defendant.
DATE OF TRIAL	:	12th March 2024.
WRITTEN SUBMISSIONS:		Filed by the Plaintiff on 12th April 2024.
	:	Filed by the Defendant on 22nd August 2024.
DATE OF JUDGMENT	:	23rd January 2025.

JUDGMENT

A. INTRODUCTION:

1. The Plaintiff Company, on 22nd September 2011, by way of its Writ of Summons and the Statement of Claim (SOC), filed the above styled action against the Defendant Company, seeking the following reliefs;

    a) *Judgment in a sum of $898,069.82 plus interest of $717,566.57 from 1st January 2007 to 20th September 2011; plus, daily interest of $557.12 from 21st September 2011 to the date of judgment;*

    b) *Judgment for the sum of $228,294.79 being the retention fees;*

    c) *The shortfall in payment as a result of devaluation in the Fiji Dollar in March 2009;*

    d) *Costs on indemnity basis;*

    e) *Such other reliefs as the Honorable court deems just and equitable in the circumstances.*

2. The Plaintiff brought its claim on the basis **THAT;**

    a. The Defendant, who made a Tender to 'Temo Consulting Limited' (TCL) for the Electrical High & Low Voltage Power Line installation for the 'Momi Bay Resort Development", had nominated the Plaintiff as its sub-contractor for "In-ground High Voltage Cable installation" including the supply of necessary materials.

    b. On completion of the supply of materials and the High Voltage in-ground Power Line installation works were in progress, the Plaintiff had raised time-to-time invoices to the Defendant for payment as per the schedule "A" to the SOC. The Defendant, who made payments for some invoices as shown in the schedule (B), after deduction of the commission and retention fees, did not make any payments for invoice numbers 006; 007; 008 and SEL/001.

    c. The Defendant is liable to pay, *inter alia*, the sums shown in paragraphs (a) and (b) of the prayer to the SOC.

Statement of Defence:

3. The Defendant Company filed its Statement of Defence (SOD) on 28th October 2011, whereby, while admitting the averments in paragraphs 1, 2, 4,5, 17,18,19 and 20 of the SOC, took up the position, in paragraphs 3 and in the rest of the paragraphs of the

SOD, that the tender submitted by the Defendant to **Temo Consulting Limited (TCL)** for the "**Electrical High Voltage and Low Voltage Infrastructure Installation"** in the **'Momi Bay Resort Development',** was on behalf of a **joint -venture partnership** between the Plaintiff and the Defendant, as the Plaintiff had the expertise in High Voltage works, while the Defendant had in Low Voltage works.

4. Accordingly, the Defendant, having averred that the Plaintiff was and is well aware that this was a joint-venture contract and it is not liable to pay the Plaintiff, prayed that the Plaintiff's claim be dismissed with costs on indemnity basis.

Reply to Defence:

5. The Plaintiff by its reply to SOD, filed on 08th November 2011, took up the position, *inter alia*, that the tender was submitted by the Defendant not as a joint-venture partnership, there was no such a partnership between the Plaintiff and the Defendant, and the Plaintiff was neither a signatory nor a party to the tender, except for being a sub-contractor to the Defendant in relation to the Momi Bay Project.

6. The Plaintiff also reiterated its position take-up in the SOC and called upon the Defendant to strictly prove that the Plaintiff and the Defendant had a joint- venture partnership for the **Momi Bay project** and moved for reliefs sought in the SOC and to dismiss the SOD.

B. BACKGROUND FACTS:

7. The actual dispute between the parties and the background facts thereto, that led them to the Court, as averred by the Plaintiff, could be found in the Judgment dated 13th November 2013 pronounced by the then Master of this Court Hon. Mohamed Ajmeer (as he then was) on an Application made by the Plaintiff for Summary Judgment. This could be accessed from the PACLII under reference ***Engineer Procure construction Fiji Ltd v Sigatoka Electric Ltd [2013] FJHC 603; HBC150.2011 (13 November 2013).*** However, I will reproduce bellow the summary of it for the sake of easy reference***.***

   a. *One 'Matapo Limited' was the developer of the **Momi BAY Resort Development** (hereinafter referred to as "the Momi Bay Project").*

   b. *The Consulting Engineers and Project Manager for the Momi Bay Project was **Temo Consulting Limited**.*

   c. *By tender dated 5th May 2005, the Defendant submitted a tender with Temo Consulting Limited for the "Electrical High Voltage and Low Voltage Infrastructure Installation" for the Momi Bay Project.*

d. *At paragraph 19.1 on page 65 of the Tender dated 5th May 2005, the defendant tendered for the sum of $6,028,562.00 excluding VAT.*

e. *At paragraph 20 on page 66 of the Tender dated 5th May 2005 the defendant nominated the plaintiff as its sub-contractor of the "In- ground HV Cable installation".*

f. *By tender dated 19th December 2005, the defendant submitted a revised tender to Temo Consulting Limited.*

g. *By tender dated 30th June 2006, the defendant submitted a further revised tender to Temo Consulting Limited.*

h. *By email dated 25th June 2007, Temo Consulting Limited advised the plaintiff that it had a contract with the defendant and that the plaintiff was to direct its enquiries to the defendant rather than to Temo Consulting Limited.*

i. *From July 2005, the Plaintiff was engaged to commence design and material procurement activities.*

j. *Between December 2005 and August 2006, the Plaintiff supplied materials and carried out the works it was engaged for.*

k. *That the plaintiff obtained the material from its supplier, being its parent company, EPC International PTY limited in Australia. EPC International Pty Ltd obtained the materials from Malaysia, Indonesia, Australia and New Zealand, and paid for the same. When the plaintiff received payment for the material, it was then to pay EPC International Pty Ltd.*

l. *That in or about December 2006, the Momi Bay Project was halted as a result of financial difficulties.*

m. *That at the time the Momi Bay Project was halted, the plaintiff had supplied 100% of the material; and carried out approximately 70% of the works it had been engaged to carry out as per the defendant's tender documents.*

n. *That in or about September 2007, with the consent of Matapo Limited and the defendant, the plaintiff removed 1400 meters of 11kv x 70mm2 AL XLPE cables worth $69,665.40 VIP from the Momi Bay Site. The plaintiff had supplied these cables for the Momi Bay Project but these were no longer to be utilized when the project was halted. After the cables were removed the plaintiff gave credit note CRN005 dated 7th September 2007, to the defendant.*

o. *That in or about November 2007, with the consent of Matapo Limited and the defendant, the plaintiff removed ten kiosks [TIA; T2, T3, T4, T5, T6A, T6B, and TI71 worth $534,563.76 VIP from the Momi Bay site. The plaintiff had supplied these kiosks for the Momi Bay Project, but these were no longer to be utilized when the project was halted. After ten kiosks were removed, the plaintiff gave credit note CRN002 dated 28th November 2007, to the defendant.*

p. *The reason that the plaintiff provided credit notes CRN005 [annexure VZ6] and CRN002 [annexure "VZ7"] was that it had already invoiced Matapo Limited and the defendant for these materials; and had received full payment for the cables; and partial payment for the kiosks, that is, it had received payment of $290,141.10 VIP for six [T1A, T2, T5, T6A; T6B; & T9] out of ten kiosks removed.*

q. *That the procedure for submitting of invoices and receiving payments was that the plaintiff would prepare and submit its invoices to the defendant.*

r. *That the plaintiff submitted its invoices to the defendant.*

s. *That defendant was then supposed to pay the plaintiff.*

t. *That defendant made partial payments to the plaintiff.*

u. *The defendant did not make any payments on invoice numbers 006; 007, 008; and SEL/001*

v. *From the payments due to the plaintiff the defendant had deducted Commission; and Retention fees.*

C. AGREED FACTS & ISSUES:

8. As per the Pre-Trial Conference minutes dated and filed on 22nd February 2023, parties had recorded 13 agreed facts, and 3 agreed issues as follows;

AGREED FACTS:
The following matters are agreed:

1. *The Plaintiff is a limited liability company and at the time this action was filed, it's registered office was at 5 Nagaga Street, Lautoka, in Fiji. The Plaintiff's registered office is now at Lot 1, Field 4 Road, Vunato, Lautoka. C/O- P. O. Box 7331, Lautoka. The Plaintiff is in the business of providing Electrical Mechanical, Civil Design and Construction Services.*

2. *The Defendant is a limited liability company having its registered office at Valley Road, c/- P. O. Box 113, Sigatoka in Fiji; and having its Head Office at Main Street, Sigatoka.*

3. *The Consulting Engineers and Project Manager for the Momi Bay Resort Development ("the Momi Bay Project") was Temo Consulting Limited.*

4. *The Developer of the Momi Bay Project was Matapo Limited.*

5. *That the Plaintiff and Defendant did not register a business partnership for the Momi Bay Project venture.*

6. *That the Plaintiff and Defendant did not operate a joint bank account for the Momi Bay Project venture.*

7. *That the Plaintiff and Defendant did not register any partnership or seek a Tax Identification Number or seek a Certificate of Exemption with the Fiji Revenue and Customs Authority for the Momi Bay Project.*

8. *That in or about 2006, the Momi Bay Project was halted as a result of financial difficulties on the part of the owners.*

9. *That the Plaintiff submitted its invoices for the Momi Bay Project to the Defendant.*

10. *That in the event that the Defendant wished to query any part of the Plaintiff's invoices, it would seek clarification from the Plaintiff.*

11. *That the Plaintiff has received partial payment in the sum of $1,607,272.43 for the Momi Bay Project via the Defendant.*

12. *That in or about September 2007, with the consent of Matapo Limited and the Defendant, the Plaintiff removed 1400 meters of 11kv x 70mm2 AL XLPE cables worth $69,665.40 VIP from the Momi Bay site. The Plaintiff had supplied these cables for the Momi Bay Project, but these were no longer to be utilized when the Project was halted. After the cables were removed, the Plaintiff gave Credit Note CRN005 dated 7th September 2007, to the Defendant.*

13. *That in or about November 2007, with the consent of Matapo Limited and the Defendant, the Plaintiff removed ten kiosks (T1A; T2; T3; T4; T5; T6A; T6B; T9 T16; and T17A) worth $534,563.76 VIP from the Momi Bay site. The Plaintiff had supplied these kiosks for the Momi Bay Project, but these were no longer to be utilized when the Project was halted. After the ten kiosks were removed, the Plaintiff gave Credit Note CRN002 dated 28thNovember, 2007, to the Defendant.*

AGREED ISSUES:
The Following are the issues to be tried;

14. *Whether for the Momi Bay Project, was the Plaintiff a sub-contractor of the Defendant, or were the Defendant and the Plaintiff in a joint venture partnership?*

15. *Whether the Plaintiff is entitled to the reliefs it has sought in its Writ of Summons and Statement of Claim filed on 23rd September 2011; and its Reply to Statement of Defence field on 08th November, 2011.*

16. *Whether the Defendant is entitled to the reliefs it has sought in its Statement of Defence filed on 28th October, 2012.*

D. THE TRIAL:

9. At the one-day trial held on 12th March 2024, only the Director of the Plaintiff Company, namely, **Mr. Vijay Mohan Jutshi**, (72 years old) gave evidence for and on behalf of the Plaintiff by marking documents from "**Pex-1" to "Pex-10",** and Mr. Vijay Narayan

(67 years old), Director of the Defendant Company gave evidence for and on behalf of the Defendant by marking documents from “Dex-1” to “Dex-7”.

10. Accordingly, having fixed the matter for judgment on 12th July 2024, the Court directed the parties to file their respective written submissions, simultaneously, within 28 days from 12th March 2024. The Plaintiff filed its submission on 12th April 2024, and the Defendant filed its submissions only on 22nd August 2024, after around 4 months and 2 weeks from the due date. However, due to my absence in Fiji from 8th June 2024 to 8th September 2024 on an emergency medical evacuation , the judgment could not be delivered on due date.

11. It is also pertinent to put on record as to why this case, being filed in the year 2011, remained unresolved till this date. Careful perusal of the record shows that, at the inception, there had been few interlocutory applications, before the then Master and two judges, particularly, an Application for Summary Judgment, which being granted by the then Master Mohamed Ajmeer on 13th November 2013, was appealed against to the High Court and Hon. S.S. Sapuwidha – J (as he then was) set aside the said judgment in the year 2016 by treating it as an irregularly entered judgment.

12. Being dissatisfied of it, the Plaintiff preferred an Appeal to the Court of Appeal, and after hearing the same, the Court of Appeal by its judgment dated 4th March 2022 allowed the Appeal and ordered for the entire matter to be taken up for formal trial.

13. Accordingly, the summons to fix for trial being filed on 22nd March 2023, and the same being fixed for 11th to 15th March 2024, when the Matter had come up for trial on 11th March 2024 before my Brother Judge Hon. A. Tuilevuka, His Lordship, by his Extempore Ruling dated 11th March 2024, recused himself from this matter, as His Lordship had already made a Ruling in this matter, and referred the matter for trial before me. Accordingly, the trial commenced before me on 12th March 2024. The reason for the delay on my part to pronounce the judgment is given in a foregoing paragraph. Thus, delay in the disposal of this matter stands clarified.

E. <u>THE EVIDENCE:</u>

14. P.W 1, in his evidence in chief, *inter alia*, stated that;

   a. *He is the Managing director of the Plaintiff Company.*
   b. *He has his Company ‘Engineer Procure Construct’ (EPC) in Australia and in Fiji, it was from the Australian Company, he borrowed the most of the money to run into this project in Fiji.*
   c. *He came from Australia in 2002 and from that time, for last 25 years, he has done the supply of materials and construction of Power Stations and High Voltage 132 KV & 11Kv transmission lines for Energy Fiji Limited.*
   d. *In relation to Momi Bay Project (subject matter hereof), he had not dealt with Temo Consulting Limited at that time , but Temo knew him as he had met each other on few tenders and when he submitted his resume , their answer was, whether he would like to work with a local company, for which he*

agreed , and that was how being recommended by TCL, he had to work with the defendant , Sigatoka Electricals .

e. *The defendant had by its letter dated 5th May 2005 had thanked Mr. Temo, for recommending his Company as their sub-contractor for high voltage works and this was the 100% arrangement his company had with the defendant Sigatoka Electrical. (Letter marked as "Pex-3)*
f. *As a sub-contractor, he did not engage directly with any other parties, except for the Defendant sigatoka Electrical (Vide pages 2, 3 & 4 of the transcript).*
g. *Mr. Temo by his e-mail addressed to his Manager Tifare Mario, which was also copied to him, had advised that he is not permitted to have any inquiries direct with any other party except for Sigatoka Electrical and Sigatoka Electrical will pass on any inquiries to Mr. Philip Temo , because he (Philip Temo) has an engagement with Sigatoka Electrical.*
h. *All the invoices by his Company were addressed to Sigatoka Electricals and sent to Vijay Narayan, it was they who paid for the invoices and the defendant was given 3% discount (Vide pages 4, 5 & 6 of the transcript). (e-mail was marked as "Pex-4")*
i. *They raised invoice Nos. C05 /MOMI 023/001 to C05/MOMI 023/005, which were paid by the defendant, and then the Invoice Nos- C05/MOMI 023/ 006 to 008 and SEL/001 raised were not paid. (Vide pages 6,7,8 & 9 of the transcript). (All marked as "Pex-5").*
j. *As the project came to be halted, after supply of 100% materials and completion of 70% works, he approached the defendant Company and with the consent of all took back the remaining materials (1800 meters of HV cable and 10 Kiosks) and as the payments for those materials had been made to his company by the defendant through Pex-5 , they issued 2 Credit notes to the defendant marked as "Pex-6" & "Pex-7" , which he thought would have been send back to 'Matapo' as the defendant had the duty to do so.*
k. *In payment receipts and deposit slips, it was stated, as payment advice, that the payment is made for HV/LV* ***sub-contract*** *and his company was referred to as '****Sub-Contractor'*** *in the related documents. He also stated that the retention fees were to be levied against the defendant as it was the* ***principal contractor****, which was supposed to be paid to Matapo. His Company's relationship with the defendant, always remained as a sub-contractor (pages 11 to 18).*
l. *Referring to the defense of "joint- venture" taken up by the defendant in the SOD, the PW-1 stated that there was never a joint- venture as such, as he has worked with elite companies for 25 years , he understands what the joint ventures were , in those instances there always supposed to be joint venture agreements, but nothing of that kind happened here and so he was treated as a* ***normal sub-contractor*** *and it was reflected in all payments that were made to his company. (Page-23).*
m. *That it was always a sub-contract arrangement, his company was working under, the letter of award, clearly refers his company as a sub-contractor to the defendant company.(page 25).*
n. *His several attempts to obtain the payments from the defendant failed.*

PW-1-Under Cross Examination*.*

o. *Agreed that he went into this liaison based on an oral agreement with the defendant and by the email marked as Pex-4, he was advised by Mr. Philip Temo to direct his inquiries to Sigatoka Electrical (the defendant) (page- 27), he was never consulted for the discussions between Temo and the defendant , he was never present there, except for a meeting at the work-site. All invoices were referred to the defendant Sigatoka Electricals,*
p. *He does not accept that the monies were not retained by the defendant, but by Matapo and it was clearly stated by Temo consultants . He, as the sub-contractor to the Sigatoka Electrical, was aware that it would be held by the defendant and not by Metapo. Page 32.*
q. *When suggested that for the defendant to award a sub- contract to the Plaintiff, that the defendant should have had a head contract with Matapo, his prompt answer was "****I hope so, but they never produced it to us, ma' am. That is the lacuna of this entire project ……" (page 34).***
r. *Once again, the "PW-1" referred to a paragraph in the initial letter dated 5th May 2005, marked "Pex-3" address to Temo by the defendant, wherein the defendant company had stated "* ***We would like***

to take this opportunity to thank you for recommending EPC Fiji Ltd to us as our <u>sub-contractor</u> of the high voltage work" (page 35).

s. *Throughout his entire evidence in chief and under cross examination, PW-1" maintained that his company only acted as a sub-contractor, he had only a verbal agreement with the defendant as confirmed by the letter dated 5th May 2005.*

t. *It is observed that, most of the questions put to the PW-1 during the last phase of the cross examination were irrelevant. (Vide pages 40, 41 & 44).*

<u>PW-1 under Re-examination</u>:

u. *Confirmed that the only defense raised by the defendant was about a joint venture, in reference to which the Plaintiff stated that it was only as a matter of convenience since the two entities were separate and had expertise and licenses in different areas'*

v. *They have not given any reason as to why they are not paying.*

w. *It was an option up to the defendant to join Matapo or any other as a party to the action;*

x. *He claims retention money from none other than the defendant; his company acted only as a sub-contractor, the defendant had never asked as to why the invoices should be sent to them and why they should pay on it; they duly paid for the works recorded in the invoices; and Matapo did not ever receive or pay for any of his invoices.*

15. The Defence witness "DW-1" in his evidence in chief, *inter alia*, stated THAT:

a. *He does not have license for from FEA to deal with High Voltage works; EPC deals with both High and Low voltage installation works; the letter marked as Pex-3" was from his Company SEL; and it was a tender document put by him to Temo consultants for the contract for HV and LV; he tendered this in order to get the HV people to join them to do this contract ;*

b. when he was asked as to what he understand by this term joint -venture, his response was, *"**because we, Sigatoka Electric, only do low voltage and the high voltage is not done by us, so we engaged EPC. They came as a tenderer. it was open and they came to do a tender with us**" (pages 60 & 61).*

c. When questioned by the Court, as to who wanted to have it done by a joint venture? His response was "***The project control, Matapo. Even the EFL, FEA wanted to get it done".***

d. *That it was Temo Consultants, who recommended EPC to them; EPC submit their claim to the defendant Sigatoka Electricals, and they include their claim and forward it to Temo consultants for vetting, and from there it goes to Matapo to release the payment.(page 62).*

e. *Since it was a joint venture, claim goes together. (page 63).*

f. *Monies retained by Matapo;*

g. *He relied on the caption of the letter dated 2nd November 2005 marked as "Dex-6" which read as " **Momi Bay Joint Venture electrical Installation contract with Matapo Holdings**" to say it a joint venture. (page 65).*

<u>Cross Examination of "DW-1"</u>.

h. *Witness agreed with all the facts contained in the 5 agreed facts recorded in the PTC minutes.*

i. *He admitted taking of 3% discount, which he interpreted later as management fees, and the WAT was paid separately by both parties. (Page 68).*

j. *He admitted not replying the e-mail marked "Pex-4" received from Temo consultants advising EPC to direct all inquiries to SEL as they do not want to deal with EPC directly . (Page 69).*

k. *When he was asked whether he proceeded to form a new company by bringing two companies together as a joint venture and suggested that did not happen in this case, he did not give any plausible answer, except for saying that the tender was done together. (page 70).*

*l. When he was asked whether he had any quarries or questions to put to Mr. Jutshi, over his invoice nos. 6, 7,8 and 1 (unpaid invoices), his prompt answer was " **No, No, actually, no, we do not have any questions".** (Page 72)*

*m. When he was questioned whether he notified Mr. Jutshi at any time that he is waiting for payment from Matfo or from Temo, or whoever is supposed to pay him, and then he can pay EPC, his answer was **"Yes we told him , because he was ringing for the payment , we (SEL) were asking for the payment , so we said wait for once we get the payment"** (page 72).*

*n. When suggested that any reference to the terms" joint venture" by either party was a matter of convenience because both had different licenses, different expertise, his answer was **affirmative**. (Page 73).*

o. Notably, there was no re-examination of DW-1" by his counsel.

F. THE ANALYSIS:

16. Certainly, the pivotal issue that begs adjudication in this matter is "*Whether for the Momi Bay Project, was the Plaintiff a sub-contractor of the Defendant, or were the Defendant and the Plaintiff in a joint venture partnership?*

17. Before going into the scrutiny of evidence led before me, I am of the view that the answer to the above issue can easily be ascertained to a greater extent from the very agreed facts Nos- 5, 6, 7, 9,10,11,12 and 13 alone.

18. If the Defendant intended to engage in a joint venture with the plaintiff for this project at MOMI BAY, necessarily, it would have required, either forming of a new Company by following necessary formalities or by commencing it as a formal partnership business by adhering to the procedures thereto. The Defendant, being the initiator to procure this contract and who apparently entered into a contract with the TCL or ML, as confirmed by the "Pex-4" e-mail, for the reason best-known to it, did not either incorporate a Company or form a partnership business.

19. On the other hand, had the Defendant company opted not to do any of the above, it could have at least entered into a formal written Agreement with the plaintiff Company, incorporating the key terms and conditions to govern such a joint venture.

20. However, under any of the above options, it would have also required the parties to adhere to several formalities/ requirements, particularly in relation to the payment of VAT, Income Tax, other statutory levies in relation to Health & Safety, Labour, Insurance, Imports and Custom duty etc, for the running of the purported joint venture.

21. If it was a joint-venture, as argued by the defense, there could have been a join Bank account as well, in order to facilitate the transparent and smooth handling of finances of such a joint-venture, which involved a substantial investment and two other entities, namely, "Matapo Limited, the owner of Momi Bay, and "Temo Consulting Limited, the Project Engineers, wherein Mr. Philip Temo was the Project Manager, who apparently had the dealing with the Defendant Company.

22. As per the agreed facts 9, 11, 12 and 13, it is clear that it was the Defendant, who received the invoices from the Plaintiff for submission to TCL, it was via the Defendant the plaintiff had received the partial payment of $1,607,272.43 for its part of performance at this project, and it was to the Defendant, the Plaintiff provided the Credit Notes on account of the removal of remaining Cable and Kiosks from the project site. The above admissions clearly demonstrate that it was none other than the Defendant, who, while holding the position of the Head- Contractor, had dealings with the Temo Consultants and/ or Matapo Limited, by allowing the Plaintiff to function only as a Sub-Contractor to the Defendant.

23. The Defendant, for reasons best-known to it, did not either share with the plaintiff any written contract it had with the TEMO Consulting Limited and/or MATAPO Company Limited, or did not even discuss with the plaintiff any particulars thereof at any stage.

24. It is to be observed that, from the inception itself, the Plaintiff was kept away from the TCL, in relation to the queries pertaining to the contract by the e-mail dated 25th June 2007 marked as "Pex-4" sent by Mr. Philip Temo to the Defendant with copy to the Plaintiff. If a joint- venture, as averred by the Defendant, had existed and was in operation, the Plaintiff would not have been kept away from TCL. Instead, the Plaintiff would have enjoyed equal access to the TCL in relation to the job performed by it.

25. When the marking of the said e-mail was objected by the deface counsel, it was allowed subject to objection, and now I find that the admission of it as evidence need not have prejudiced or taken the defense by any surprise, as they were in possession of it and they were aware of the contents therein. Thus, I admit the said e-mail marked as Pex-4" being evidence for these proceedings.

26. Apart from the admissions through the above agreed facts, the DW-1, in his evidence under cross examination too, as alluded to in paragraph 15 (h) above, has admitted these factors without any reservation. (Vide answers to questions 2, 4, 5 and 6 under cross examination in pages 67 and 68 of the transcripts).

27. A pertinent question that arises here is, can the Defendant escape from its liability towards the Plaintiff, by merely saying that the relationship it had with the Plaintiff was nothing but a "joint- Venture". Even if it is assumed, for the sake of argument, that they had a joint-venture for this project, the Defendant is still under obligation to prove on preponderance of evidence as to the establishment, the existence and viable functioning of such a joint- venture, necessarily, by adducing some cogent evidence to the satisfaction of the Court.

28. Turning towards the evidence of the defense witness in this regard, I find that, as alluded to in paragraph 15 (n) above, when it was suggested to the DW-1 under cross examination by the counsel for the Plaintiff that the reference to the 'joint- venture' in

the relevant correspondence was ***just a matter of convenience***, his response thereto was none other than saying "***Yes, ma'am".*** (Vide page 73 of the transcript).

29. Further, if a joint-venture had existed and practiced in its strict sense, no need would have arisen for the plaintiff to pay the defendant 3%, either as commission or management fees, as admitted by the DW-1 in his evidence. Vide paragraph 15 (i) above and Page 68 of the transcript).

30. If it was a joint-venture, the TCL would, undoubtedly, have required both the Plaintiff and the Defendant to be equally responsible towards the TCL and ML in relation to their respective contractual obligations. Instead, what the TCL did was sending the "Pex-4" e-mail and instructing the plaintiff to raise quarries, if any, only with the Defendant. The Defendant, on the other hand, for reason best-known to it, did not response to the said e-mail.

31. As alluded to above, the Defendant did not at any stage divulge to the plaintiff the contract it had with the TCL/ML. Undoubtedly, the Defendant would not have undertaken a work of such a magnitude in the absence of a formal Agreement between it and the TCL and/or ML, particularly, when it did not have the license for High Voltage Transmission lines.

32. The TCL/ ML also would not have run any risk in the project, in the absence of a fully-fledged Agreement with the Defendant, who, apparently, for its own benefit, did not disclose it to the Plaintiff. The Defendant, in order to avoid such an Agreement being produced in court by TCL, discontinued the third -party proceedings that it had commenced against the TCL. It was none other than the Defendant, who prepared the Tender, signed it through its project Manager and submitted it to the TCL. The Plaintiff had no any role to play in preparation, submission and the execution of it.

33. The Defendant, who took up the only defense of the purported "joint- venture" with the Plaintiff, was under the burden of proving on preponderance of evidence, the establishment and existence of a such a joint-venture.

34. The DW-1's evidence that the TCL, ML and even the FEA wanted to get the job done through a joint-venture, was not supported by any evidence from TCL, ML or FEA. The evidence of the DW-1 to the effect that that the Plaintiff submits its claim to the Defendant and in turn the Defendant includes its claim and then forward it to the TCL for vetting and from there it goes to ML to release the funds, do not necessarily prove the existence of a joint-venture. This arrangement could be found even under a sub-contract claimed by the plaintiff.

35. In my view, had the Plaintiff committed itself to the TCL and/or ML by way of the so-called joint- venture, the TCL and/or ML and particularly, the Defendant would not have permitted the Plaintiff to remove its remaining goods from the Momi Bay site. The

Defendant does not deny the 100% supply of materials by the Plaintiff and completion of 70% works on its part.

36. During his evidence under cross examination, the DW-1 was observed to be taking long time in answering the questions and giving contradictory answers to his pleadings in paragraph 12 (a) of the SOD in relation to VAT. Having pleaded that it was the Defendant who paid the VAT for the joint- venture, in his evidence under cross examination DW-1 stated that the VAT was paid separately by both companies (See the bottom of page 68 and the beginning of the page 69).

37. The DW-1 admitted under his cross examination that he did not reply to the "Pex-4" e-mail dated 25th June 2007 sent by Mr. Philip Temo. If it was in fact a joint-venture, as argued by the defense, the mail could have been replied stating that the Plaintiff was a joint-venture partner to accomplish the project. He did not produce the letter that he had, purportedly, received from TCL on its own letter-head requiring the Defendant to have this contract executed by way of a joint-venture (vide page 70).

38. When asked from the DW-1 as to why he did not form a company as a joint venture and suggested that it did not happen in this case, he did not give a plausible answer as alluded to in paragraph 15 (k) above. (Vide page 70 and the 1st question and answer in page 74).

39. Conversely, the "PW-1, as alluded to in paragraph 14 (a) to (x) above, has given clear and convincing evidence by denying the defense of the, purported, joint-venture taken up by the Defendant. I found that the "PW-1" was very prompt and clear in his answers both under examination in chief and cross examination (*vide my notes*).

40. He confirmed that the money was retained by the Defendant and not by the Metapo Limited (ML), and it was not returned by the Defendant. The defense counsel objected to the production the bundle of correspondences marked as "Pex-10". It is found to be a frivolous objection as the Defendant could not have been prejudiced or misdirected by the production of those documents.

41. It was further observed that under cross examination by the defense counsel, the evidence of the "PW-1" remained un-assailed. He admitted that he had no any written contract with the Defendant and confirmed that his company relied on the "Pex-3" letter, tender papers and other correspondences, including invoices and payment advices for the purpose of his sub-contract with the Defendant. He also confirmed that he did not participate at any subsequent meetings that the Defendant had with TCL/ML and they had all the dealings directly.

42. He admitted the receipt of payments for first 5 invoices raised by his company and confirmed that his company did not have any direct relationship with M.L or TCL. His evidence confirmed the non-existence of a joint-venture and he was observed to be

displaying his candidness through his prompt and clear answers throughout his evidence. He emphasized that he was only a sub-contractor and no such a joint-venture existed between both the companies. I have no reason to disbelieve the PW-1 and his evidence. He was found to be a truthful and trust-worthy witness, in comparison with the DW-1.

43. The Defendant specifically named the Plaintiff as one of its sub-contractors in the tender papers submitted on 5th May 2005. The Defendant also thanked Mr. Philip Temo of TCL, in its covering letter dated 5th May 2005 (Pex-3"), for recommending the Plaintiff as the sub-contractor for High Voltage works. The Defendant clearly included, in all 5 payment Certificates issued by it to the Plaintiff from March 2006 to August 2006, a statement to the effect "This ***is to certify that the sub- contractor is entitled to a payment of …"*** Having admitted the Plaintiff's role as a sub-contractor in the above manner, the Defendant cannot now take a totally contradictory position to state that the plaintiff was in a joint-venture.

44. The Plaintiff in its Reply to Statement of Defense filed on 8th November 2011, has categorically denied the entering into a joint venture with the Defendant and put the Defendant to strict proof thereof. The Defendant has not fulfilled its task of proving the entering into and/or the existence of such a joint-venture. The only contract that been entered into and existed was the contract between the Defendant and TEMO Consulting Limited and/ or Metapo Limited as verified by the Tender dated 5th May 2005; 19th December 2005and 30th June 2006; and e -mail dated 25th June 2007.

45. In the light of the above analysis, I stand fully convinced that the Plaintiff has proved on preponderance of evidence that there was no such a joint-venture arrangement between the Plaintiff and the Defendant, except for a sub-contract under the Defendant, pursuant to which the Plaintiff performed its part of supplying materials and installing in-ground High Voltage Transmissions Power Lines for the Momi Bay project.

Master's Summary Judgment:

46. However, without prejudice to my above finding, and not being influenced by the Master Mohamed Ajmeer's Summary judgment dated 13th November 2013, I hold the view that the Master's finding that there did not exist a joint-venture between the Plaintiff and the Defendant, still remains intact, without its merits being gone into by the High Court or the Court of Appeal.

47. Because, when the Master's said Summary Judgment was appealed against to the High Court by the Defendant, the same was set aside, not on the scrutiny of merits therein, but only on the ground of irregularity that had, allegedly, occurred in the service of summons on the Defendant.

48. Subsequently, when the impugned judgment of the High Court was appealed against to the Court of Appeal by the Plaintiff, the Hon. Judges of the Court of Appeal did not endorse the finding of Sapuvidha -J on the propriety of the service of the Summons on the Defendant, but set aside the the impugned judgment on the ground that Master Ajmeer had failed to justify his decision to grant only 65% of the claim, leaving the balance 35% to be decided by way of the formal trial. Thus, the Court of Appeal also did not go into the merits of Master Ajmeer's finding on the Joint-Venture. Accordingly, the finding of the Master that there did not exist a joint-venture still remains intact.

Plaintiff's Claim on Invoices:

49. The only defense advanced by the Defendant is the alleged joint venture. With the finding on the failure of the said defense as aforesaid, what remains for this Court to decide is the claim of the plaintiff.

50. This Court has already found that the Defendant had a contract with either Temo Consulting Limited and/or Matapo Limited, and the plaintiff had performed its part of the contract by supplying necessary materials and installing the in-ground High Voltage Cables, as a sub-contractor of the Defendant and not as a joint venture partner.

51. The Defendant, by its Statement of Defense, did not dispute the Plaintiff's claim that it had supplied the necessary material for the performance of its part of the contract and it had completed 70% of its work by the time the 'Momi Bay project' was halted.

52. The Defendant, neither in its statement of defense nor through the evidence of its witness DW-1 disputed the receipt of all the invoices from the plaintiff or the correctness of the amounts in those invoices. The Plaintiff's averments in the SOC in this regard have been admitted in paragraphs 10 and 11 of the SOD. The Defendant's claim that it submitted same as joint-venture claim has been rejected by this Court. The Plaintiff claims that sums in the **invoice Nos 006,007, 008 and SEL/001** were not paid. The Defendant has not proved the contrary.

53. The defense of the Defendant in paragraph 13 of its SOD, with regard to the Plaintiff's averments in paragraph 24 of the SOC, is that it has not yet received payments under the joint-venture and hence both the Plaintiff and the Defendant have not yet been paid. The Defendant, who did not proceed with the third-party proceedings against its contractual partner, namely, TCL/ ML, and who had no sufficient evidence to prove the alleged joint-venture, cannot escape from its liability to pay the Plaintiff.

54. During the cross examination, as alluded to in paragraph (15 (l) above, on being asked from the DW-1 whether he had any quarries or questions over the unpaid invoices of the Plaintiff, his prompt answer was "No***, No, actually, no, we do not have any questions***". (Page 72).

55. On further cross examination, as alluded to in paragraph 15 (m) above, when DW-1 was questioned whether he notified Mr. Jutshi at any time that he is waiting for payment from Matafo or from Temo, or whoever is supposed to pay him, and then he can pay EPC, his answer was "***Yes we told him, because he was ringing for the payment, we were asking for the payment, so we said wait for once we get the payment***" (*page 72).*

56. Thus, on the convincing and uncontroverted evidence of the PW-1, and on the tacit admission of the Defendant in its SOD and that of the DW-1 in his evidence, this Court arrives at the inescapable conclusion that the Defendant is liable to pay the Plaintiff the sum shown in paragraph 59 below, being the amount on the unpaid invoices and the amount retained by the Defendant, on account of the plaintiff's performance of the contract as a sub-contractor of the Defendant in the Momi Bay project.

Retention Fees:

57. As per paragraphs 23 and 25 of the SOC and prayer thereto, the Plaintiff claims **$228,294.79**, being the retention fees. In paragraph 12 (b) of the Statement of Defense, the Defendant has not denied the same. In this regard too, the Defendant tries to pass on the liability on the Matapo Limited. The total amount retained for the entire project has been shown as $76,029.09. As the head- contractor, the Defendant should have recovered the Retention money from its counterpart to the agreement, which the Defendant admitted to have entered into with the Matapo Limited as per paragraph 7 of its SOD.

58. Accordingly, the Court decides that the Plaintiff is entitled to recover the said sum of **228,294.79** from the Defendant on account of the retention fees.

59. Thus, the total sum payable to the plaintiff by the Defendant is **$1,098,456.24 (One Million Ninety-Eight Thousand Four Hundred Fifty-Six Dollars and Twenty-four Cents) as** shown below.

a.	On invoice No- CO5/MOMI023/006 dated 5th June 2006 ……$ 769,041.15	
b.	On invoice No- CO5/MOMI023/007 dated 13th July 2006…….$ 507,695.33	
c.	On invoice No- CO5/MOMI023/008 dated 22nd August 2006…$148,829.13	
d.	On invoice No- SEL /001 dated 24th January 2007 …… $ 48,825.00	
	Total	**$ 1,474,390.61**
e.	**Less** Credit Note /005 dated 7th September 2007	$ (69,665.40)
f.	**Less** Credit Note/002 dated 28th November 2007	$ (534,563.76)
g.	Balance debt payable on invoices	**$ 870,161.45**
h.	Add. Retention Fees payable	$ 228,294.79
i.	Total Debt & Retention Fees payable	**$1,098,456.24**

Interest

60. The plaintiff, as per its prayer to the SOC, claimed $717, 56657 as interest from 1st January 2007 till 20th September 2011 and thereafter daily interest of $557.12 from 21st September 2011 till the date of payment on the amount claimed in the prayer. It is not clear on what basis the interest is calculated. Admittedly, there was no agreement in this regard. This does not mean that the plaintiff is not entitled for any interest.

61. The PW-1 confirmed the Plaintiff's position that the said sum had fallen arrears from 2007 and he has been waiting for this for last 18 years. He filed this action in September 2011. He stated that his Company in Australia advanced the funds in AUS Dollars for the importation of the necessary material for this project from various countries. This was not disputed by the Defendant. The Defendant in his evidence has admitted that the plaintiff had been ringing him asking for the payment of the arrears.

62. Accordingly, the Court decides to award interest to the plaintiff at the rate of 3% per centum per annum on the said total sum of **$1,098,456.24,** pursuant to section 3 of the Law Reform (Miscellaneous provisions) (Death & Interest) Act Cap 27 and section 4(1) of its Amendment Act 2011.

63. I decide to grant 4% post judgment interest on the said sum of **$1,098,456.24, or** on any unpaid part of it, to be calculated from 24th January 2025 till the said sum is fully paid and settled.

Costs:

64. The plaintiff in its SOC has moved for cost on indemnity basis and subsequently in its written submissions has limited it to $15,000.00. The Plaintiff has filed this action in the year 2011. It had to oppose few interlocutory applications before the Master & Judge. Also filed an application for Summary Judgment and opposed an Appeal by the Defendant to the High Court and had to file an Appeal before the Court of Appeal and finally proceeded before this Court. Accordingly, considering the circumstances, I decide to grant $10,500.00 being the summarily assessed costs payable by the Defendant.

G. CONCLUSION:

65. The Plaintiff has proved its case on the preponderance of evidence that the Defendant is liable to pay the sums stated above on account of the supply of materials and installation of High Voltage Power Line at the Momi Bay, as a sub-contractor to the Defendant. The Defendant has failed to prove its only defense that the Plaintiff was in a joint-venture with it. Accordingly, I find that the Statement of Defence should be dismissed and the Plaintiff's claim should be upheld to grant reliefs as follows.

H. FINAL ORDERS:

a. The Plaintiff's action succeeds.

b. The Plaintiff is entitled for a total sum of **$1,098,456.24** (**One Million Ninety-Eight Thousand Four Hundred Fifty-Six Dollars and Twenty-four Cents)** on account of 4 unpaid invoices and the retention money.

c. The Plaintiff is entitled to the interest on the said sum at 3% per centum per annum, for the period from 1st January 2007 till this Day of Judgment.

d. The Plaintiff is entitled to post-judgment interest at the rate of 4% centum per annum from 24th January 2025 till the principal sum is fully paid and settled.

e. The Defendant shall also pay the Plaintiff a sum of $10,500.00 (Ten Thousand Five Hundred Dollars) being the summarily assessed costs.

f. This is the judgment of the Court.

On this 23rd day of January 2025 at the High Court of Lautoka.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie.
Judge of the High Court.
High Court (Civil Division)
Lautoka.

SOLICITORS:

Messrs. R. Patel Lawyers – Barristers & Solicitors -For the Plaintiff.
Messrs. Fazilat Shah Legal- Barristers & Solicitors – For the Defendant