

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. ABU 0034 of 2019**  
**(Labasa High Court Civil Action No: HBC 34 of 2013)**

**BETWEEN** : **VUNIMOLI SAWMILL LIMITED** *Appellant*

**AND** : **MOHAMMED SHAMSHOOD** *1<sup>st</sup> Respondent*  
**HOME FINANCE COMPANY LIMITED** *2<sup>nd</sup> Respondent*

**Coram** : Almeida Guneratne, JA  
Jameel, JA  
Gunawansa, JA

**Counsel** : Appellant absent and unrepresented  
Mr G.O'Driscoll for the 1<sup>st</sup> Respondent  
Mr N Lajendra for the 2<sup>nd</sup> Respondent

**Date of Hearing** : 19<sup>th</sup> September, 2022

**Date of Judgment** : 30<sup>th</sup> September, 2022

**JUDGMENT**

**Almeida Guneratne, JA**

[1] In this matter the Court delayed ascending the bench until 10.00am since there was no appearance for the Appellant. The Court was then informed by the Court Officer that a lawyer who was supposed to appear for the Appellant was seated in another Court. This Court thereafter adjourned, having asked the Court Officer to communicate with the said

lawyer and inform him that this Court was ready to hear the matter. However, upon resuming at 10.15am, there was still no appearance for the Appellant. Consequently, Counsel for the Respondents having agreed, the Court decided to determine the appeal on the written submissions filed of record.

### Factual Background

- [2] This was an action based on breach of contract and conversion filed by the 1<sup>st</sup> Plaintiff (hereinafter referred to as the 1<sup>st</sup> Appellant) who, at all material times, had been carrying on a Sawmill business on an iTaukei land, and the 2<sup>nd</sup> Plaintiff, (hereinafter referred to as the 2<sup>nd</sup> Appellant) who was the 1<sup>st</sup> Appellants' managing director.
- [3] The Appellants had entered into a Sale and Purchase Agreement (SPA) with the 1<sup>st</sup> Defendant (hereinafter referred to as the 1<sup>st</sup> Respondent) whereby the 1<sup>st</sup> Respondent had agreed to purchase from the Appellants "*the property in question.*" (the subject matter of the impugned action).
- [4] While the said SPA was subsisting, the 1<sup>st</sup> Respondent had purchased another Sawmill and as averred in the Appellants' statement of claim, the 1<sup>st</sup> Respondent is said to have removed items of the Appellants' Sawmill.
- [5] Consequently, the Appellants instituted the present action for breach of the provisions of the SPA (1<sup>st</sup> cause of action) and conversion (2<sup>nd</sup> cause of action). The Appellants' statement of claim is at pages 143 – 149 of the Copy Record.
- [6] The 1<sup>st</sup> Respondent in his amended statement of defence pleaded that, when he left the mill of the Appellants, all the items which the Appellants claim to have gone missing were at the mill and that the Appellants had filed a similar action in the High Court bearing No.8 of 2007, and had obtained judgment for a monetary sum being the purchase price of the Sawmill and the assets. The Appellants claim in the present action was to return part of the assets. Consequently, the 1<sup>st</sup> Respondent pleaded *res judicata*.

(the 1<sup>st</sup> Respondent's amended statement of defence is at pages 132 to 134 of the Copy Record).

[7] At this point, I refer to the Appellants' grievance pleaded in the statement of claim against the 2<sup>nd</sup> Defendant (hereinafter referred to as the 2<sup>nd</sup> Respondent)

[8] That grievance is pleaded in paragraphs 14 to 15 of the said statement of claim which I reproduce as follows:

*“14. THE 2<sup>nd</sup> Defendant is liable in tort for conversion, constructive or otherwise, as follows:-*

*(a) by accepting or adopting the 1<sup>st</sup> Defendant's security under a mortgage and/or by debenture which the 2<sup>nd</sup> Defendant knew or ought to have known, the 1<sup>st</sup> Defendant had no authority or colour of right use and obtain the mortgage.*

*(b) in ratifying the 1<sup>st</sup> Defendant's conversion.*

*(c) in failing to exercise due diligence in not enquiring or finding out and cite documents and proof of ownership whether the said items proffered by the 1<sup>st</sup> Defendant to be security under a mortgage and/or by debenture, is owned by the 1<sup>st</sup> Defendant or otherwise.*

*(d) in failing to exercise due diligence in not enquiring or finding out whether the 1<sup>st</sup> Defendant is financially sound.*

*(e) in failing to exercise due diligence in not enquiring or finding out whether the 1<sup>st</sup> Defendant is known to the Fiji Police as responsible for changing engine and chasis numbers of vehicles secured under a loan with Credit Corporation Ltd and is facing criminal charges for the same.*

*15. AS a result of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's conversion, the Plaintiffs suffered loss and damages.”*

[9] The 2<sup>nd</sup> Respondent's Statement of Defence is at pages 126 – 130 of the Copy Record and as would be apparent from the factual matrix in the case, its defence was focused on the allegation based on collusion.

[10] On the pleadings in the case (as recounted above), after a lengthy trial which had lasted several days, (where several witnesses had given evidence for the contesting parties), the High Court delivered Judgment dismissing the Appellants' action (the Judgment of the High Court is contained at pages 5 to 92 of the Copy Record).

The Judgment of the High Court – pages 5 to 92 of the Copy Record

[11] After recording the chronology of events (pages 6 to 12 of the Copy Record), the learned Judge reflected on the evidence led on behalf of the appellants (from pages 12 to 62 of the Copy Record (CR) followed by the case for the Respondents which he recounted at pages 62 to 85 of the CR.

[12] Having traversed the aforesaid aspects that needed to be assessed, the learned Judge proceeded to make his discussion and analysis thereon, the essential features of which I extract as follows.

Re: The Orders made in the earlier Civil Action No.8/07 referred to in paragraph [06] above

[13] In that action, the High Court had made the following orders:-

- a. The plaintiffs have breached the sale and purchase agreement by terminating the same on the 23<sup>rd</sup> Day of December 2006. The said termination was unlawful and of no legal effect. As such, the only remedy that the plaintiffs are entitled to is the purchase price which calculates to \$795,000.*
- b. The defendants must pay this sum of \$795,000 to the plaintiffs, in lump sum, in exchange of the transfer of all the properties agreed to be sold vide the sale and purchase agreement.*
- c. The settlement must take place within three months from the date of the order, that is, on or before the 15<sup>th</sup> day of March 2012.*

- d. *The parties to work out a suitable date for settlement within the given time frame.*
- e. *All other claims of the parties are unsustainable and are thus dismissed.*
- f. *The High Court Registry must forthwith pay to Mr Bashir Khan the remaining sum of \$50,000 deposited in the High Court Registry.*
- g. *Each party to bear their own costs.*
- h. *Orders Accordingly.*”

[14] Having noted the said orders in that earlier case, the learned Judge proceeded to make the following observations on the contested issues, which I recorded earlier in a prefatory stage of this Judgment.

[15] The learned Judge observed thus:

*“125. The Order for payment of \$795,000.00 being balance purchase price for Sawmill and equipment payable by 1<sup>st</sup> Defendant and his spouse to Plaintiffs pursuant Sale and Purchase Agreement is to be paid in exchange for tractor of Sawmill and equipment to 1<sup>st</sup> Defendant and his spouse.*

*126. There is also no order for vacant possession of Sawmill against the 1<sup>st</sup> Defendant in CA No.8/07.*

*127. This Court takes the action of P2 and/or their Solicitors to be unconscionable and in total disregard the law and rule of Court in issuing FIFA and Writ of Possession.*

*128. This Court also fails to understand on what basis the High Court Registry in Suva issue FIFA and Writ of Possession without there being an unconditional Order for payment of a sum by Defendant to Plaintiff and without there being an Order for Vacant Possession.*

*129. The Sheriff Officer, Setoki (PW1) and Rakesh Sharma (PW7) totally relied on FIFA and Writ of Possession issued by Suva Registry as they were without the benefit of Judgment in CA 8/07.*

*130. It is evidently clear from evidence of PW8 (2<sup>nd</sup> Plaintiff) and 1<sup>st</sup> Defendant that:-*

- (i) *2<sup>nd</sup> Plaintiff had no intention of enforcing the Order in CA 8/07;*

- (ii) *This Court accepts 1<sup>st</sup> Defendants evidence that 2<sup>nd</sup> Plaintiff told him that he will not sell the Sawmill at Vunimoli to 1<sup>st</sup> Defendant or his father;*
- (iii) *2<sup>nd</sup> Plaintiff sat on the Order in CA 8/07 for almost two (2) years;*
- (iv) *It is then 2<sup>nd</sup> Plaintiff who engaged Police Department to seize certain items from 1<sup>st</sup> Defendant when Police did as per Fiji Police Force Minute dated 24 and 26 June 2013 (Exhibits P22 and P23);*
- (v) *After Police seized the items and refused to release it to Plaintiffs, Plaintiffs then through their lawyer filed FIFA and Writ of Possession;*
- (vi) *2<sup>nd</sup> Plaintiff with the assistance of Sheriff Officer, Setoki and Police Officers tried to seize items from 1<sup>st</sup> Defendants Namara Sawmill alleging to be his.*

131. *There is no doubt that 2<sup>nd</sup> Plaintiff through Sheriff Officer and Court Officers were trying to get items he alleged to be his which is not what is the purpose of FIFA.*

132. *This Court accepts that bench saw and accessories seized by Sheriff Officer and released to Plaintiffs were brought by 1<sup>st</sup> Defendant from Vunimoli Sawmill.*

133. *PW1 (Setoki) and PW7 (Rakesh Sharma) on the face of the Judgment in CA 8/07 and Recovering Order against 1<sup>st</sup> Defendant accepted and acknowledged that FIFA and Writ of Possession should not have been issued or executed.”*

134. *This Court therefore holds that FIFA and Writ of Possession issued and executed in CA 8/07 was unlawful and an abuse of court process by Plaintiffs and their former Solicitors in CA 8/07.”*

[16] The learned Judge consequently held as follows.

*“137.It is quite apparent that Plaintiffs used FIFA and Writ of Possession to take possession of the Sawmill and to terminate the Agreement (Exhibit P22).*

138. *The dispute in respect to Agreement (Exhibit P22) was before the Court in CA 8/07.*

139. *IT is unconscionable and totally wrong for Plaintiff to have commenced this proceeding to claim for the items in Schedule 2 of the Sale and Purchase Agreement (Exhibit P18) on the face of Order in CA 8/07 whereby Madam Justice Wati ordered for those items to be transferred to Defendants in that action in exchange for payment of \$795,000.00.”*

[17] Those were strong findings of fact. Apart from that, the learned Judge made the following findings of fact on the basis of the evidence and demeanour of witnesses which are in paragraph 140 of the Judgment.

[18] Time and again it has been judicially laid down that, an appellate Court should be slow to interfere with such findings of fact.

Trial Judge's findings on the alleged conversion

[19] The trial judge held as follows:

*“141. No evidence has been established to prove that 2<sup>nd</sup> Defendant in any way converted any of Plaintiffs items for its own use and benefit.*

*142. Mere fact that certain items in Namara Mill were not in valuation list held by 2<sup>nd</sup> Defendant, does not establish that those items belonged to Plaintiffs and not 1<sup>st</sup> Defendant.*

*143. General Lien is a floating security on chattels and intangible property of Lienor which in this case is 1<sup>st</sup> Defendant and becomes fixed when Lienee serves Demand for payment of debt.*

*144. 2<sup>nd</sup> Defendant was absolutely right when it asked Plaintiffs or any other person claiming to have ownership of items in possession of 1<sup>st</sup> Defendant to provide proof of ownership before 2<sup>nd</sup> Defendant could release the items to third parties.*

*145. This Court also accepts 1<sup>st</sup> Defendant and 2<sup>nd</sup> DW's evidence that 1<sup>st</sup> Defendant was in financial position to purchase Vunimoli Sawmill pursuant to Sale and Purchase Agreement (Exhibit P18).”*

[20] I have gone through the written submissions of the Appellants' carefully in the light of the grounds of appeal urged.

[21] Testing the same against the judgment of the High Court, I could not find any reason to interfere with the said Judgment.

**Jameel, JA**

[22] I agree with the reasons, conclusions and proposed orders of Guneratne JA.

**Gunawansa, JA**

[23] I agree with the conclusions reached, reasons given and the proposed orders by Guneratne JA.

Orders of Court:

- 1) *The Appeal is dismissed.*
- 2) *The Appellants shall pay jointly and severally as costs of this appeal \$7,500.00 to the 1<sup>st</sup> Respondent as well as \$7,500.00 to the 2<sup>nd</sup> Respondent within 14 days of notice of this Judgment.*
- 3) *The said costs shall be in addition to the costs ordered by the High Court in its judgment.*



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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

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**Hon. Justice Farzana Jameel**  
**JUSTICE OF APPEAL**

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**Hon. Justice Asanga Gunawansa**  
**JUSTICE OF APPEAL**