

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 60 of 2003

BETWEEN : **KRISHNA SAMI NAIDU**(father's name Shiu Sami Naidu) of
Malau Road, Labasa in the Fiji Islands, Businessman.

PLAINTIFF

AND : **BP SOUTH WEST PACIFIC LTD** a limited liability company
having its registered office at Level 4 Vanua
House, Suva.

DEFENDENT

COUNSEL : Mr. Sharma T for the Plaintiff
Mr Pillay W for the Defendant

Date of Trial : 7 November 2012

Date of Judgment : 5 July 2013

JUDGMENT

1. In the Statement of Claim filed in this case, Plaintiff states that, the Plaintiff and the Defendant entered into an arrangement evidenced in writing by a Memorandum of Understanding dated 1 June 2001 whereby Plaintiff agreed to operate a Service Station on a Crown Lease No. 12610 on Malau Highway Labasa under the name of K Naidu Service Station and Defendant amongst other things agreed to supply of fuel.
2. Defendant is a limited liability company incorporated in Fiji and having its registered office at Level 4, Vanua House, Victoria Parade, Suva amongst other things in the business of supplying petroleum.

3. Statement of Claim proceeds to state that on 21 February 2012 petrol pump at the Service Station on Malau Highway was damaged due to floods and Plaintiff bowser became inoperable and upon request of the Plaintiff, Defendant took the damaged petroleum pump for repairs on or around 23 February 2002 and in breach of the Memorandum of Understanding, Defendant has failed to repair and return the said pump to the Plaintiff to operate his bowser until to date.
4. The Plaintiff further stated that Defendant by Memorandum of Understanding has agreed to supply fuel for a period of 5 years with an option to increase the supply for further period of 5 years.
5. In his Writ he claims, inter alia damages for breach of the Memorandum of Understanding in the form of loss of income from fuel sales.
6. The Defendant, in its Statement of Defense, denies the claim and stated that it had signed a Memorandum of Understanding with the Plaintiff but as per the clause in the Memorandum of Understanding, which both parties had agreed to enter into a separate fuel supply agreement and payment terms shall be on fill to fill basis. Defendant states that the Plaintiff has failed to pay the Defendant monies owed to the Defendant for the supply of fuel to Plaintiff's bowser.
7. The Counter Claim proceeds to state that Plaintiff owes a sum of \$20, 292.19 for fuel supplied between the period of June 2001 to 14 December 2001 which debt has been expressly admitted but willfully and or neglected to pay the money owed to the Defendant and a judgment in the of \$20,292.19 and interest.
8. The Plaintiff in its reply to the Counter Claim denies each allegation contained in the Defendant's Counter Claim and puts the Defendant to strict proof thereof. Both counsel on the day of trial submitted to court that no pre-trial conference was held after the amended Statement of Defense was filed and further submitted that neither party is relying on the minutes of pre-trial

conference held before the amended Statement of Defense was filed and further submitted that neither party is now relying on the minutes of pre-trial conference of Defense as it does not serve any purpose at this stage.

9. Thus, the court dispensed with the pre-trial conference and proceeded to trial. Krishna Sami Naidu, the Plaintiff in the instant action gave evidence on behalf of Plaintiff where as Nemani Kobiti, Business Manager of Pacific Energy gave evidence on behalf of the Defendant.

The Hearing

The Plaintiff testified that on 1 June 2001, he entered into a Memorandum of Understanding with the defendant subject to the Terms and Condition setout therein. He stated that he commenced the operation of the Service Station as per the terms of the Memorandum of Understanding after signing, until 21 February 2002, where the petrol pump of the service station was damaged due to the floods in that area. Damages to the petrol pumps, has been reported to the Police Station on 21 February 2002, confirmed by the letter issued by the Fiji Police Force by its letter dated 25 February 2012 which is part of the agreed bundle of documents. The letter issued by the Fiji Police Force states that police assistance was provided to the Plaintiff and had to reach the premises by boat. The police officers visited the premises had observed that Service Station was under about 5ft of water and evacuation of the occupants and few salvaged items were carried out by boat.

The letter issued by the Fiji Police Force has approximately assessed the damages caused to the fixtures and fittings what was there at the time of the floods.

He further testified that after the flood receded, he informed the Defendant about the damages caused to the petrol pump at the Service Stations and wanted the Defendant to repair and return the pump. Plaintiff stated the Defendant removed the pump,

upon his notification of the damages to the pump but never returned even up to date to commence the operation of the Service Station whereby has suffered direct and indirect losses. He testified that he claims special damages, general damages for breach of contract, general damages under the Fair Trading Decree, interest on damages and cost.

The Plaintiff in the examination in chief admitted that one of the conditions in the Memorandum of Understanding was that the supply of fuel to his stations was on fill to fill basis and he is obliged to settle the bills of previous supply of fuel before the next supply is given to him.

He stated that at the time of floods and removal of pump by the Defendant, he owed an outstanding bills amounting to \$20,130.92 to the Defendant. The Plaintiff's position was that the amount outstanding was not due to the non-settlement of immediate previous supply but accumulation of the balances to be paid over a period of time. He stated that the Defendant continued to supply fuel to the Plaintiff despite payments were in arrears. The position of the Plaintiff is that pursuant to the Memorandum of Understanding, the Defendant took the damaged pump for repairing and wrongfully and in breach of the Memorandum of Understanding has failed to repair and return and that was not due to the non settlement of arrears of previous supplies. He testified and at no time, the Defendant has informed stoppage of fuel was due to non settlement of fuel supplied.

In cross examination, Plaintiff stated that although the Memorandum of Understanding between parties had been entered in to, the supply agreement for period of 5 years had not been entered as per the clauses of the Memorandum of Understanding. He admitted that supply of fuel by the Defendant on fill to fill basis and the pumps and tanks were owned by the Defendants.

Exhibit 1 of the Defendant, *i.e.* the Statement Accounts for the period that the business was operation, was admitted and payments made and receipts of fuel too was admitted by the Plaintiff including the arrears at the time of removal of pump.

The Plaintiff further admitted in the cross examination that there had been negotiation between parties with regard to recommencement of operations but denied the existence and the content of Exhibit 2. It was suggested that pumps and trucks were owned by the Defendants and it has a right to refuse supply of fuel, as there was default in payment.

Mr Nemani Kobiti, Business Manager, of the Defendant Company gave evidence. He stated that Memorandum of Understanding was entered into between Plaintiff and Defendant for supply of fuel to Plaintiff's Service Station and fuel tanks and pumps were owned by the Defendant but installed in the Plaintiff's Service Station free on loan basis. He explained the terms and conditions in the Memorandum of Understanding. He further explained what he exactly means by fill to fill basis. He stated that Plaintiff is obliged to settle the dues for the 1st supply before the 2nd fuel supply is given. He stated that the outstanding balance at the time of removal was \$20,130.80. He stated that the Plaintiff was not honouring the terms of Memorandum of Understanding and there had been several negotiations between parties in regard to the continuation after removal of the pump. He further stated that the policy of the Defendant was to repossess tanks and pumps whenever there is a default in payments. He explained the contents of the Exhibit 2 and stated that discussion as stated in Exhibit 2 took place between him and the Plaintiff for recommencement of operation subject to the payment of arrears as acceptable installments which Plaintiff never eventuated. He stated that Defendant has all the right to refuse fuel and repossess equipment in the event of default of payment.

In cross examination he stated that Memorandum of Understanding was only a guideline for the execution for the main agreement and clause 8 was the reason for the non execution of the agreement. He admitted that both parties performed the agreement until the floods hit the area despite defaults in payments. In answering to a question under cross examination he stated that Defendant probably would have supplied fuel if floods had not hit the area. He admitted that there is loss of income to Plaintiff from the shops in the premises due to non operation of the Service Station.

In re-examination, he stated that Memorandum of Understating was to observe as to how the Plaintiff was going to operate the station prior to the execution of the main agreement. He stated that although Defendant removed the pump upon notification, BP has the right to repossess equipment whenever there is a default.

The Determination

The matters for determination before me are; the claim of the Plaintiff for the damages suffered to him as s result of non installing of the pump by the Defendant after removal and the counter claim of the Defendant for unsettled vouchers for the fuel supplied to the Plaintiff.

As there was no pre-trial conference held between parties, the main issues for determinations in this case are as follows:

1. Is there is a valid and enforceable agreement between parties.
2. If so, whether there is breach by the defendant by non installing the pumps and /or breach by Plaintiff for default in payments for fuel supplied? And to assess

the damages if there is a breach of terms of the Memorandum of Understanding, by either or both parties.

At the outset, in order to consider the validity and enforceability of the Memorandum of Understanding, the terms and conditions set out there is re-iterated as follows:-

1. *The rental arrangement with the current operator shall cease from 1st June, 2001.*
2. *The site will be operated by the landlord as K. Naidu's Service Station.*
3. *The current facilities will continue to be utilized by the new operator. Details of the inventory will be carried out by Territory Manager West/North within a month.*
4. *BP will check the operation of the pumps to ensure proper operation.*
5. *The current rebate of \$0.01 per litre to be maintained by BP and reviewed against the volume of sales at the end of the year.*
6. *K.Naidu's Service Station will sign a 5 year supply agreement with BP with an option to increase for a further 5 years agreed by both parties.*
7. *Payment terms shall be on a fill to fill basis.*
8. *The site upgrades will be discussed between both parties in 2002 after a year to gauge the volume uplifted from the site.*

It is clear from the above clauses in the Memorandum of Understanding that both parties intended to enter in to main fuel supply agreement for 5 years which never took place. The explanation of the witness from the Defendant company was that Memorandum of Understanding was to observe as to how the Plaintiff is going to carry out operations prior to the execution of the new agreement. The Plaintiff and the Defendant both admitted the existence of the Memorandum of Understanding and testified that both parties commenced their obligations as per the Memorandum of Understanding over period of time. The performance as per the terms and conditions of the Memorandum of Understanding by both parties and nature of the Memorandum clearly demonstrates that there is valid and enforceable contract between parties.

However this court is unable to accept the assertion of the Plaintiff that the Memorandum of Understanding is for the period of 5 years with an option to increase for further 5 years as the period has to be stipulated in the new agreement and not the period of validity of Memorandum of Understanding. Clause 6 of the Memorandum of Understanding states that “*K Naidu’s Service Station will sign a 5 year supply agreement*”

In view of the above, period of the Memorandum of Understanding is not stipulated and therefore uncertain. However, it is noted that Memorandum of Understanding was only till the execution of main agreement between the Plaintiff and the Defendant.

The second issue for this court to consider and determine is whether there is breach either by Plaintiff or Defendant or both in their obligations as per the terms of Memorandum of Understanding.

It is admitted in the documents in the agreed bundle of documents (Doc 13) and in the evidence of the Plaintiff that he had defaulted in payments for the fuel supplied to him at the time of removal. It was further admitted that there had been several negotiations between both parties with regard to the recommencement of the business pursuant to Memorandum of Understanding. Although the Plaintiff has denied the existence of the Defendant’s Exhibit 2 which was the minutes of the negotiations held between them, negotiations were mainly focused on the settlement of outstanding payments and other modalities for recommencements.

Defendant’s Exhibit 2 states as follows:-

Attendees: Krishna Sami Naidu – Mobile – 9224616

Nemani Kobiti

Time : 10.15am-12.15pm

Discussion & Notes

- *No dispute on pluscard account*
- *Went through bulk account transactions and agreed that the amount owing is \$20,130.80*
\$20,292.19 Bulk Account
1,343.48 Pluscard Account
(537.93) Card reimbursement not appearing in statement
(966.94) Rebate due – 96,694 litres @\$0.01cpl

\$20,130.80

- *Will sign deed of acknowledgement for debt, however repayment plan suggested by Drishna is \$400 per month which is too little. Have asked him to review this figure as re-opening service station will see an increase in turnover on the shop which could be used to reduce debt.*
- *Willing to sign a five year agreement with BP Oil with a step rebate.*
- *Service Station to purchase fuel on COD basis.*
- *Rebate of \$0.01cpl to be retained by BP and to contra against debt.*
- *Krishna will fix canopy.*
- *BP to provide Weights & Measure certified Measuring can, 200 litre oil pump, 20 litre oil pump, BP Green and white paint for canopy.*
- *Krishna to arrange meeting with Basrath Deanon next trip to Labasa.*

In view of the contents of Exhibit 2 of Defendant, payment of outstanding dues was a pre-requisite for recommencement and certain concessions too was given to Plaintiff

in relation to settlement in installment basis subject to monthly installments acceptable to the Defendants.

As the outstanding amount at the time of removal was amounting to \$20,130.80 and there was no evidence of payment of any money by the Plaintiff clearly demonstrates that the Plaintiff has not settled the outstanding amount thereafter. However the Plaintiff in his letter to Defendant dated 28 October 2004, requested to write off the debt as a condition to recommence the operation of the service station.

The Plaintiff's position in the examination in chief and cross examination was that the defendant knew that Plaintiff's account was in arrears but continued to supply fuel and therefore raised a concern as to why pump was not removed prior to floods and removal was upon his notifications of the floods.

The Defendant's position in relation to the above was that the Plaintiff's service was the only flag ship service station in that area and continued to supply fuel until floods. However he stated that continuation of fuel at that time did not prevent the Defendant to repossess the pump due to arrears in payments.

Having considered the evidence given before the court, documents in the agreed bundle of documents and Exhibit 1 and 2 of the Defendant, the court is of the view that Defendant has a right to not repair and return the pump until and unless the amount in arrears is settled by the Plaintiff. Clause 7 of the Memorandum of Understanding clearly stipulates that payment terms shall be on fill to fill basis and default in payment was admitted in oral and documentary testimony of the Plaintiff. This court is unable to accept the position of the Plaintiff that the Defendant cannot

remove, repossess or not returning after repairs, merely because of continuity of supply of fuel despite the default in payments by the Plaintiff.

The Plaintiff's entire claim for damages is founded upon the Defendant's failure to repair and return the pump. It is important to state that Plaintiff has not submitted any evidence to court either by oral or documentary evidence to establish his intention to settle the outstanding dues to the Defendant. I am unable to agree with the contention of the Plaintiff, that the failure to repair and return of the pump by the Defendant does give rise to Plaintiff to claim damages from the Defendant as prayed for in the statement of Claim.

The Counter Claim of the Defendant

As already noted in the above paragraphs, outstanding amount payable to the Defendant by the Plaintiff for the fuel supplied was not disputed in oral and documentary evidence placed before the court.

Hence in my judgment the Defendant has established its right to claim the unsettled vouchers in respect of the fuel supplied. The Defendant's counter claim against the Plaintiff in a sum of \$20,130.80 succeeds. The Defendant has claimed interest on this sum. In the absence any express terms for the payment of interest; the applicable interest rate on the judgment sum should be pursuant to Section 4(1) of the Law Reform (Miscellaneous) (interest) Act which is 4% per annum as amended by Decree No. 46 of 2011.

On the question of Costs, the Defendant's have been successful and are entitled to costs. The trial lasted only one day. I am prepared to fix professional costs summarily in the amount of \$2,000.00.

The **Orders** of the Court are:

- (i) The Plaintiff's claims are dismissed.
- (ii) The Defendant is entitled to be paid by the Plaintiff \$20,130.80 and interest at the rate of 4% per annum until the judgment is satisfied together with costs summarily assessed in a sum of \$2,000.00.

SUSANTHA N BALAPATABENDI
JUDGE

5 July 2013
at Suva

