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

Civil Action No. **61** of **2013**

BETWEEN : **ROTOMOULD (FIJI) LIMITED** of Aliz Pacific, 8th Floor, BSP Life Centre, 3 Scott Street, Suva, in the Republic of Fiji.

PLAINTIFF

AND : **DEO CONSTRUCTION DEVELOPMENT CO. LIMITED** of 11 Industrial sub division, Denarau Island, Nadi, in the Republic of Fiji.

DEFENDANT

RULING

Counsel : Ms B. Narayan for the Plaintiff
: Mr. A.K. Narayan (Jr) for the Defendant

BACKGROUND

[1]. In 2011, the plaintiff, Rotomould (Fiji) Limited ("**Rotomould**"), a company well known in Fiji for its plastic water tank products, engaged its Architects, Design Hut Architects ("**Architects**") to design a building for the company. The Architects did draw up a design after which tenders were called for the construction of the project. In due course, Rotomould, in consultation with a Mr. Sanjay Patel of the Architects, was to accept the tender of Deo Construction Development Company Limited ("**DCDCL**") as contractor. DCDCL's tender was worth $655,059.52.

[2]. Under the contract, work was to proceed for 26 weeks from 03 January, 2011 to 04 July, 2011. These dates were critical to Rotomould. And this, allegedly, was clearly set out in Rotomould's letter of acceptance to DCDCL. But, for one reason or another, completion of the work was delayed. That became an issue between the parties. Ultimately, the parties would agree to sever their contractual relationship due to issues relating to the delay. The issue then arose as to how much DCDCL was to be paid for work it had completed. Rotomould, DCDCL and Patel (the Architect) were unable to reach agreement on that. The parties then agreed to go to Arbitration on the issue. The Arbitrator appointed for that purpose was a Mr. Fraser Clark. Both parties made submissions to the Arbitrator and

almost a year after the Arbitrator's appointment, the award was handed down.

[3]. According to Rotomould, Mr. Clark went beyond his Terms of Reference. His Reference required him to deal only with the monetary value of work that DCDCL had completed. However, Clark proceeded to assess, and later to make an award, on the loss of profit allegedly suffered by DCDCL. Rotomould is adamant that the award is so perverse and needs the interference of this court. For the record, I am unable to find a copy of the Terms of Reference in question in any of the affidavits filed.

[4]. Rotomould then filed an Originating Summons in this Court pursuant to Order 7 Rule 2 of the High Court Rules 1988, sections 12 and 13 of the Arbitration Act [Cap 38], and to the inherent jurisdiction of the Court. It seeks the following Orders:

(a) that the award be set aside. In the alternative, this Court decides the correct amount to be remunerated to DCDCL for the work carried out; and

(b) a declaration that the Arbitrator misconducted himself when determining the Award and improperly procured the Award upon the following grounds:

  (i) he failed to properly consider all evidence presented by the plaintiff.
  (ii) he failed to accept any verbal argument from both the plaintiff and the defendant when both parties insisted on the same.
  (iii) he failed to consider that there was no "Stop Work Notice" issued by the Lautoka Rural Authority at any point prior to or during the duration of the contract period.
  (iv) he failed to order the transfer of all materials offsite and onsite to the plaintiff or give credit to the plaintiff for the said materials.
  (v) he went beyond his powers by inter alia awarding loss of profit to the defendant pursuant to a breach of contract without any evidence of loss of profit provided by the defendant nor this being an issue to be determined, the contract being mutually terminated.
  (vi) he took into account irrelevant considerations and made errors in law.
  (vii) he unnecessarily delayed in handing down the award and refused to obtain terms of reference.

(c) that there be a stay of the award and the winding up proceedings initiated by the defendant against the plaintiff and that an injunction restraining winding up proceedings be granted on the basis that the plaintiff is a solvent company.

(d) that there be a stay of the enforcement of the Arbitration Award pursuant to section 13 of the Arbitration Act [Cap 38].

(e) costs; and

(f) any other order(s) that this Court may deem just.

[5]. Rotomould relies on an affidavit of one Prakash Chand and of one Sanjay Patel.

SUMMONS TO STRIKE OUT

[6]. On 06 June 2013, DCDCL, through its solicitors, filed a summons to strike out Rotomould's Originating Summons under Order 18 Rule 18 of the High Court Rules 1988 on the ground that it discloses no reasonable cause of action; is scandalous, frivolous or vexatious and/or is an abuse of process. DCDCL also alleges that the proceedings are irregular, that no proper ground for challenge of the Award has been demonstrated, and that the proper procedures to challenge the Award have not been followed.

[7]. Mr. Narayan for DCDCL raises two key objections. First, he argues that the affidavits filed for Rotomould are false and misleading and amount to perjury and accordingly, should be struck out or dismissed. Second, he submits that this Court lacks jurisdiction to hear Rotomould's Originating Summons.

JURISDICTION

[8]. On the jurisdiction issue, Mr. Narayan argues that Rotomould's application, in its current form, is really an appeal which masquerades as an application to set aside the Award under section 12(2) of the Arbitration Act [Cap 38]. It is an appeal because Rotomould is seeking an Order that this Court decides the correct amount to be remunerated to DCDCL for the work carried out. As such, Rotomould's application should have been brought under Order 55 of the High Court Rules 1988. He then examines Order 55 Rules 1, 2 and 4 in detail and then proceeds to unearth how Rotomould's application fails to measure up.

[9]. I have considered Mr. Narayan's submissions on the point. In my view, the foundation on which all his arguments rest is rather weak. My reasons follow. Firstly, the provisions of Order 55 (see below) only apply to appeals which lie to the High Court by or under any enactment. The enactment in question here is the Arbitration Act. This Act confers no right of appeal to the High Court of or from any Arbitration Award.

Application

1.-(1) Subject to paragraphs (2) and (3), this Order shall apply to every appeal which by or under any enactment lies to the High Court from any court, tribunal or person.

(2) This Order shall not apply to –

(a) any appeal by case stated; or

(b) any appeal under any enactment for which rules governing appeals have been made thereunder, save to the extent that such rules do not provide for any matter dealt with by these rules.

(my emphasis)

[10]. In light of the above, it is superfluous to even begin to consider whether or not an Arbitrator appointed under a contract is a "court, tribunal or person" within the contemplation of Order 55 (see above). For the record, Mr. Narayan did make submission on this point.

[11]. Secondly, and following from the above, section 12(2) (see below) of the Arbitration Act merely confers a right to apply to the High Court to set aside an Award.

Power to set aside award

12.-(1) Where an arbitrator or umpire has misconducted himself, the court may remove him.

(2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.

[12]. Thirdly, and flowing also from the above, the jurisdiction to set aside an Award under section 12(2) is not an appellate jurisdiction. This point was canvassed in more detail by the Fiji Court of Appeal in **Ports Authority of Fiji v C&T Marketing Ltd (No. 2)** [2001] FJCA 41; [2001] 1 FLR 340 (18 October 2001].

> .....the Arbitration Act (Cap. 38) currently in force in Fiji contains no such provision. Section 12 provides simply that the High Court may set aside an award. O.73 r.1(1)(b) of the High Court Rules requires that an application to the Court to do that be made by origination (sic) motion, as occurred in the present case. The High Court dealing with such an application made by originating motion is doing so as a court of first instance and not exercising an appellate jurisdiction.

[13]. Hence, whether or not the High Court, sitting as a court of first instance, is entitled to consider and determine afresh the issue of the correct amount to be remunerated to DCDCL for work carried out, is something that may be raised in the hearing proper of this application. I have not really considered the issue in such great depth but I would say that it is best postponed at the hearing of the substantive matter because Rotomould is

really pleading in the alternative in seeking to invoke the jurisdiction of this court to consider the issue afresh (see para [4] (a) above).

[14]. I agree though with Ms Narayan that Order 73 of the High Court Rules 1988, and not Order 55, is the governing procedure relevant to any *section 12(2) application* to set aside an Arbitrator's Award:

> **Matters for a judge**
> 1.-(1) every application to the Court –
>
> (a) to remit an award under section 11(1) of the Arbitration Act (Cap 38) or
> (b) to remove an arbitrator or umpire under section 12(1) of that Act, or
> (c) to set aside an award under section 12(2) thereof,
>
> must be made by originating motion to a judge in court.

[15]. I note that Order 73 Rule 3(2) appears to suggest that an application to set aside an Award under section 12(2) may also be made by Originating Summons. I highlight this because Mr. Narayan did go to great lengths to labour the argument that Rotomould's Originating Summons is irregular, and which irregularity is incurable, because Order 55 stipulates an Originating Motion.

> **Special provisions as to applications to remit or set aside an award**
> 3.-(1) An application to the Court –
>
> (a)to remit an award under section 11(1) of the Arbitration Act, or
> (b)to set aside an award under section 12(2) of that Act or otherwise
>
> must be made, and the summons or notice must be served within 21 days after the award has been made and published to the parties
> (2) In the case of every such application the notice of originating motion or, as the case may be, the originating summons, must state the ground of application; and where the motion or summons is founded on evidence by affidavit, a copy of every affidavit to be used must be served with that notice.

[16]. Clearly, the two grounds, under section 12(2) on which an Award may be set aside are – firstly, where the arbitrator or umpire has **misconducted himself**, or, where an arbitration or **award has been improperly procured**.

[17]. To reiterate the Fiji Court of Appeal's observations in **Ports Authority of Fiji v C&T Marketing** (supra), the jurisdiction conferred upon this Court by section 12 of the Arbitration Act is not an appellate jurisdiction and this Court sits as a Court of first instance under section 12. The fact that Rotomould seeks, in the alternative, that this Court decides the

correct amount to be remunerated to DCDCL, merely raises the issue whether it is within the powers of this Court to conduct such an inquiry as a Court of first instance in the particular context of section 12(2).

OBJECTIONS ON THE PLAINTIFF'S AFFIDAVIT

[18]. Mr. Narayan has picked up some irregularities in the affidavits filed for and on behalf of Rotomould. He argues that the effect of these are to render the affidavits *"false and illegal"*.

[19]. The first point of contention raised by Mr. Narayan is that Prakash Chand, whose affidavit was sworn on 11 April 2013 and filed on 12 April 2013, makes reference, as follows, to Sanjay Patel's affidavit which was sworn later on 22 April 2013 and filed on 23 April 2013:

> Paragraph 15 of the Affidavit in Support of Prakash Chand , which states:
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> *That I also rely on the Affidavit of Sanjay Patel filed herein.*
>
> Paragraph 4 of the Affidavit in Reply of Prakash Chand, which states:
>
> *I also read and rely on the Affidavit in Reply of Sanjay Patel. The Affidavit in Reply of Sanjay Patel answers paragraphs 20 to 25 of the Defendant's Affidavit.*

[20]. Mr. Narayan submits:

> 1.1 .....Prakash Chand relies on an affidavit that was not only sworn on that date, but compellingly and contrarily not filed on the same date as referred to in the offending part. These are affidavits made on oath which is false and illegal.
>
> The Defendant refers this Honourable Court to the date of swearing of the said affidavits. The Affidavit in Reply of Prakash Chand is sworn on 28th June, 2013 whereas the Affidavit in Reply of Sanjay Patel is sworn on 2nd July, 2013.
>
> 7.4 Therefore Prakash Chand relies on an affidavit under oath, which did not even exist at that stage. This is not an accurate affidavit, it is false. The offence of swearing false affidavits is compounded.

[21]. Rotomould was filing two affidavits which were meant to bear each other out in various aspects. The affidavits do appear to bear each other out in that regard.. Ms. Narayan attempts to explain that a draft of Patel's affidavit would have been shown to Chand, hence, Chand's reference to Patel's "affidavit". The tone of that submission appeared to be one of regret at the lawyer's oversight in having Patel's affidavit sworn and filed some 4 days later. Ms Narayan did not sound like she was regretting Chand's reference to Patel's affidavit, which, it appears, was meant to be. I

am of the view that the best way to deal with this irregularity is to have Chand swear and file a supplementary affidavit to explain things. I say that because, Patel's affidavit seems perfectly in order. Also, it is common ground between the parties that Patel was/is Rotomould's architect on the project in question and that Chand was/is the director of Rotomould who worked closely with Patel in the project. It is also common ground between the parties that Chand and Patel, together, were instrumental in Rotomould's decision to terminate the contract. This, DCDCL appears to embrace without issue in its written submissions.

[22]. Mr. Narayan also submits as follows:

> Paragraph 9 of Sanjay Patel's Affidavit in Support says that
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> > *"the Defendant did not accept the Progress Payment Certificate and therefore rejecting my valuation of the work carried out."*
>
> Yet in his Affidavit in Reply, Mr. Patel at paragraph 8 says that
>
> > "I deny the contents of paragraph 24 of the Defendant's Affidavit and say that the Defendant's previous claims as determined by me were paid and no other payment was to be made.
>
> 7.5 This is a clear example of a falsity that the Plaintiff relies on to further his case. The two Affidavits clearly show the evidence given under oath is false and therefore illegal. The authorities relied on later will support this and the other falsities.
>
> Paragraph 4 of the Affidavit in Support of Sanjay Patel, states:
>
> > *"An acceptance form dated 06/12/10 was executed by all parties together with the Fiji Standard Form of Building Contract without Quantities, Private Edition 1978 ("FSFBC") which formed part of the services agreement. Annexed hereto and marked "SP1" is a copy of the said acceptance form." (Emphasis Added)*
>
> The said annexure is false. It is not the acceptance form that was signed "by all parties" and in addition to that, the completion date of the contract was also tempered with. The Affidavit in Reply of Sanjay Patel then goes on in attempt to clarify the issue at paragraph 5 wherein he says on oath that the annexure marked as "SP7" in his affidavit in support filed on 23/04/13 is the correct one" (as a side issue annexure "SP7" is in itself wrong as "SP7" actually refers to an unrelated document).

[23]. The allegations made by Mr. Narayan are serious. But they go to issues of credibility and which are not matters of preliminary objection to strike out the affidavit. Obviously, if his allegations are borne out, they will lead to more serious consequences, but it is not ground to strike out the affidavits.

OBSERVATIONS

[24]. Apart from the above, I am of the view that Rotomould's Originating Summons discloses a reasonable cause of action and is not an abuse of process, nor is it scandalous, frivolous or vexatitous. The term "misconduct" in the context of section 12(2) is really a question as to whether or not the Arbitrator had in fact mishandled the arbitration process to such extent as to amount to a miscarriage of justice. In **William v Walters and Cox** [1914] 2KB, Atkin J opined that:

> *"[t]he term ['misconduct'] does not really amount to much more that* (sic) *such mishandling of the arbitration as is likely to among to some substantial miscarriage of justice*

[25]. A breach of natural justice is likely to amount to such "substantial miscarriage of justice". In **Trustees of Rotoaira Forest Trust v Attorney-General** [1999] 2 NZLR 452, Fisher J of the New Zealand High Court said as follows:

> The basic requirements for a fair hearing are usefully summarised by Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* as follows:
>
> 1 Each party must have notice that the hearing is to take place.
> 2 Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.
> 3 Each party must have the opportunity to be present throughout the hearing.
> 4 Each party must have a reasonable opportunity to present evidence and argument in support of his own case.
> 5 Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.
> 6 The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."
>
> In addition the arbitrator must confine himself to the material put before him by the parties unless the contrary is agreed. ... This extends to the arbitrator's own opinions, ideas and knowledge where either party might otherwise be taken by surprise to that party's prejudice. If the arbitrator unexpectedly decides the case on a point which he has invented himself he creates surprise and deprives the parties of their right to address full argument to the case which they have to answer... (citations omitted)

[26]. In **R v Deputy Industrial Injuries Commissioner, ex parte Moore** [1965] 1 QB 456, Diplock Lord Justice Diplock said as follows at pages 488 to 490:

> ... the rules of natural justice which he must observe can, in my view, be reduced to two. First, he must base his decision on evidence, whether a hearing is requested or not. Secondly, if a hearing is requested, he must fairly listen to the contentions of all persons who are entitled to be represented at the hearing.
>
> In the context of the first rule, "evidence" is not restricted to evidence which would be admissible in a court of law.
>
> .....
>
> These technical rules of evidence ... form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.
>
> The second rule simply requires that a deputy commissioner, in determining an appeal, must give fair consideration to the contentions of all persons who are entitled under the Act and regulations to make representations to him.
>
> .....
>
> Where ... there is a hearing, ... the second rule requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any "evidence" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigations; (c) to allow each person represented to comment upon any such "evidence" and, where the "evidence" is given orally by witnesses, to put questions to those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case. This in the context of the Act and the regulations fulfiis the requirement of the second rule of natural justice to listen, fairly to all sides ...

[27]. In the case of **R v Deputy Industrial Injuries Commissioner Ex parte Moore,** [1965] 1 All E.R.81 CA, in which Wilmer, LJ, said as follows of natural justice at page 87.

> *"It is also involves that the Commissioner must be prepared to hear both sides, assuming that he has been requested to grant a hearing, and on such hearing must allow both sides to comment on a or contradict any information that he has obtained. This would doubtless apply equally in the case where a hearing had been requested, but refused, for in such a case it would not be in accordance with*

natural justice to act on information obtained behind the backs of the parties without affording them an opportunity of commenting on it."

[28]. In the same judgment, Diplock, LJ discussed the requirements of natural justice in detail at page 95:

> *"Where, however, there is a hearing, whether requested or not, the second rule requires the deputy commissioner (a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him; (b) to inform every person represented of any" which the deputy commissioner proposes to take into consideration, whether such "evidence" be proffered by another person represented at the hearing, or is discovered by the deputy commissioner as a result of his own investigations; (c) to allow each person represented to comment on any such "evidence" and, where the "evidence" is given orally by witnesses, to put questions to those witnesses; and (d) to allow each person represented to address argument to him on the whole of the case."*

[29]. In the case of **Chee v Stareast Investment Limited HC Auckland Air 2009 – 4004-5255** NZHC 1011 (1 April 2010), court held:

> *"Again, this process was unsatisfactory and in breach of the principles of natural justice. Without the express agreement of the parties, the Tribunal should not have accepted further evidence after the hearing had been concluded. If it required further evidence, it should have reconvened the hearing, sworn the witnesses, asked them to confirm their additional material, and given the parties the opportunity to test it and respond to it...."*

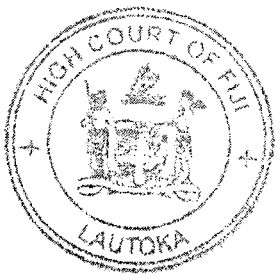
CONCLUSION

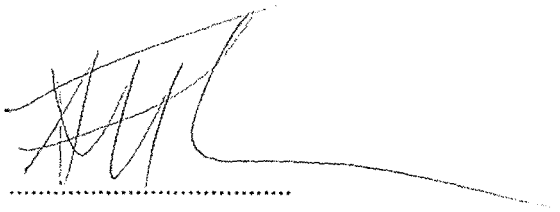
[30]. In light of all the above, I dismiss the application to strike out the Originating Summons and the affidavits filed for and on behalf of Rotomould. While costs normally follow the event, I am not inclined to Order costs in this case in favour of Rotomould because the objections raised by Mr. Narayan needed to be raised, if anything, to alert lawyers of the need for more care in overseeing and supervising the drafting of affidavits.

[31]. Rotomould is to file a supplementary affidavit of Prakash Chand within 7 days hereof to explain how he came to make references to Sanjay Patel's latter affidavit in his (Chand's) earlier affidavit. I make this direction to drive home the point that the irregularities in Chand's affidavit, though curable, is not lightly treated.

[32]. I feel I should Order costs in favour of the defendant simply because the sloppy drafting of Chand's affidavit has brought about this diversion from the normal course and which no doubt will cost DCDCL. Accordingly, I order $500-00 (five hundred dollars) costs in favour of the defendant.

[33]. Case adjourned to **17 April 2014 at 10.00 a.m.** for further directions.





Anare Tuilevuka
JUDGE
10 April 2014