

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Miscellaneous Action No. 02 of 2012

BETWEEN : MUNESH PRASAD businessman of Nacekoro,
Savusavu APPLICANT

AND : NBF ASSET MANAGEMENT BANK a financial
institution having its registered office at Level 3,
Reserve Bank of Fiji building, Pratt Street, Suva
and having the controllership of the Governor of
the Reserve Bank of Fiji.

RESPONDENT

Before : Master Robinson

Appearances : Mr Vere for the applicant
: Mr. S Prasad as agent for Jamnadas & Associates for
the Respondent.

R U L I N G

Introduction

This is a *miscellaneous* application by Summons seeking an order from the High Court for leave to be given to the applicant to institute proceedings against the Respondent pursuant to Section 43 of the *Banking Act. Cap. 212*. Section 43 of the Banking Act allows an applicant to first seek leave from the High Court or from the controller of a licensed financial institution before it could commence or continue any proceedings or counterclaim against the said licensed financial institution.

Generally speaking under the Banking Act, where a licensed financial institution is unable to meet its obligations or suspending payment or is insolvent, the Reserve Bank may with the consent of the Minister for Finance assume control of or appoint a person (*the controller*) to assume control of the business of the said licensed financial institution. Once a licensed financial institution is under the controllership of the Reserve Bank or a controller a general moratorium to all actions or claims against the said financial institution applies and can only be instituted with the leave of the controller or the High Court.

The Application

The Summons was supported by an affidavit and was filed on the 8th of April 2013. The order sought is:-

1. *“That leave be granted to the Applicant to issue proceedings against the respondent; and*
2. *Leave be given to the applicant and the Respondent to rely on affidavits already filed on their behalf in Labasa High Court Miscellaneous Action No: 1 of 2012.*

The application is made pursuant to section 42(1)(a) and (2) of the Banking Act Cap. 212 and Order 5 rule 3 of the High Court Rules on the grounds contained in the affidavits in support. The application was opposed. The application was adjourned on at least two occasions to correct defective service and was eventually heard on the 25 October 2013 and the ruling on notice subject to the receipt of submissions. Both Counsels filed useful submission which will be relied upon in this ruling.

The affidavit sworn by the applicant states so far as is relevant the following:-

- (1). That he has a dwelling house located on a piece of freehold land on CT No: 21229 DP 5321 situated at Buca, Nacekoro, Savusavu.
- (2). That the land originally belonged to his deceased father and the said land was subdivided and mortgaged by the Respondent.
- (3). That the land was later advertised for mortgagee sale by the

Respondent on the 9 July 2005.

- (4). That the applicant tendered for the property and the said tender was accepted and that he paid a deposit of \$19,000:00 together with survey fees of \$8500:00.
- (5). That the Respondent was to prepare an sales and purchase agreement but that due to inconsistencies in the agreement further negotiations took place.
- (6). That the Respondent failed to complete that transfer of the property and a demand notice was served on them.
- (7). That the applicant seeks leave to issue proceedings against the respondent for breach of contract.

The Respondent in its affidavit in opposition states:-

- (1). That it admits that the applicant's deceased father obtained a loan from the respondent and that after various loan variations the applicants deceased father defaulted in his loan payments leaving arrears of \$39,833:66
- (2). That the property was offered for mortgagee sale in July 2005 and that the applicant tendered for the property and the tender was accepted.
- (3). That the respondent later wrote to the applicant accepting its tender and stipulating that acquiring vacant possession was his sole responsibility.
- (4). That the respondent in good faith instituted proceedings to evict an unregistered tenant Ajit Kumar from the land in Civil Action No: 2/07.
- (5). That the said Ajit Kumar later sued the respondent in Civil Action

No: 5/10 and as a result the respondent was not in a position to complete or execute the sale to the plaintiff.

- (6). That the respondent further denies that it had received the sum of \$19,000:00 or \$8500:00 from the applicant but had only received \$9,600:00 from the applicant.
- (7). That it admits that there were several copies of the Sales and Purchase Agreement made but deny any inconsistencies alleged.

The Submissions

The applicant in its submission states very briefly that he has a good case against the Respondent. That they could prove on the balance of probabilities that the Respondent breached its part of the contract of sale of land already reached between the parties. Because of that assertion, the Applicant has the right under the law to seek the Court's intervention in giving the Applicant his right under the doctrine of specific performance for the sale of the land in issue to him. That there are certain legal doctrines arising from contract and equity which could prove that there was a contract in existence between the parties for the purchase of the land by the applicant. That even if the fact that there was no written contract it was the parties behavior during the contractual process which gave rise to an understanding. The rest of the submission relates mostly to these understanding and the legal implications thereof and the evidence available to him.

The Respondent in its submission in opposition addresses firstly that the application is an abuse of process in that, apart of seeking leave it also wants to rely on an affidavit deposed in a matter already disposed of. That the applicant has also filed a supplementary affidavit which has not been replied to by the respondent. That the applicant does not fit the criteria for leave as laid out by Master Udit in NBF Asset Management Bank v Taveuni Estates Ltd & Ors [2009] FJHC 260; HC HBC0543.2004 (7 April 2009). And finally whether the litigation may impede the prompt and efficient execution of the Controller's statutory duty.

Determination

Firstly and before I proceed to looking at the criteria granting leave I must address one point that was raised by the respondent. The point relates to the reliance by the applicant to an affidavit filed in a matter already struck out to support its application. I did indicate to the applicant's counsel when I gave the ruling on the previous matter that they could use the same affidavit in support. I too did not expect them to literally interpret that to mean that they add a paragraph to their affidavit in support of the summons to read "*That I pray to the Master of this Honourable Court to allow me to use all my affidavits that I filed in Labasa High Court Miscellaneous Action 01/ of 2012 to support my new application. To do so would save time and money.*" The applicant then went on in the next paragraph to indicate that he has no objection to the respondent doing the same. This was most unsatisfactory. I thereafter ordered that the applicant file a supplementary affidavit and gave the respondent time to reply but they did not. I was satisfied then that the summons is in order but I must state that I was most disappointed with the approach taken by the applicant's counsel but will exercise my discretion to allow it so that this matter could proceed.

The first question which arises is, what are the criteria or guiding factors for granting leave under section 43 of the Banking Act. Section 43 states:-

Moratorium

- 43.-(1) *Where a licensed financial institution is declared to be subject to controllership, no person shall-*
- (a) commence or continue any action or other proceedings, including proceedings by way of counterclaim, against that licensed financial institution;*
 - (b) issue any execution, attach any debt, or otherwise enforce or seek to endorse any judgement or order obtained in respect of that licensed financial institution;*
 - (c) petition or resolve to wind up that licensed financial institution;*
 - (d) foreclose, enter into possession, sell, or appoint a receiver of the property of that licensed financial institution or property in respect of which the licensed financial institution has an equity of redemption;*
 - (e) exercise or continue any power or rights under, or in pursuance of, any mortgage, charge, debenture, instrument, or other security over the property of that licensed financial institution;*
 - (f) claim or recover, pursuant to any retention of title clause, hire purchase agreement, mortgage, lease, or security, any property in the possession of that licensed financial institution;*
 - (g) determine or forfeit any tenancy, distrain for rent, retake or re-enter any premises, or exercise or continue any power or rights under or in pursuance of any lease, against that licensed financial institution;*

(h) exercise any right of set-off acquired prior to controllership against that licensed financial institution.

(2) Notwithstanding subsection (1) of this Section, an action or proceeding may be commenced or continued against a licensed financial institution for the purpose of determining whether any right or liability exists if the leave of the controller or the High Court is first obtained.

(3) Notwithstanding subsection (1) of this Section a controller may waive the application in whole or in part of that subsection (except paragraph (c) of that subsection) to any creditor or depositor or class of creditors or depositors in respect of the whole or part of any claim of, or security held by, that creditor or depositor or class of creditors or depositors.

(4) Subject to the provisions of this Act, nothing in subsection (1) of this Section affects the existence of any security over the property of any licensed financial institution or its priority over other debts.

(5) Nothing in paragraph (a) of subsection (1) of this Section limits or prevents any person commencing or continuing any action or other proceedings, including proceedings by way of counter claim against a licensed financial institution in respect of any contract entered into, or obligation incurred, by that licensed financial institution after the date on which that licensed financial institution was declared to be subject to controllership.

(6) Nothing in paragraph (b) of subsection (1) of this Section limits or prevents any person issuing any execution, attaching any debt, or otherwise enforcing or seeking to enforce any judgement or order obtained against a licensed financial institution in respect of any contract entered into, or obligation incurred, by that licensed financial institution after the date on which that licensed financial institution was declared to be subject to controllership.

(7) The Reserve Bank, notwithstanding anything contained in this Section, may direct the controller to approve and authorise the making and carrying out of any financial arrangement between the licensed financial institution in controllership and any other person which, in the opinion of the Reserve Bank, is necessary having regard to the considerations set out in Section 42 of this Act.

There is nothing in the section which indicate the criteria to be used in granting leave. The only interests which needs to be taken into account are the Controller's duty under the Act and the right of a person to have his/her grievances determined by a court of law. This right of access to the courts must not be unreasonably withheld. What is clear though is that section 43 (1) allows an aggrieved person to seek leave of the court or the Controller before he/she can continue or initiate any action. The exercise of this power to grant leave is discretionary and must be exercised fairly and justly and in this regard must take into account some factors applicable to individual cases. Although the list is not exhaustive the leading judgment for granting leave to commence action in Australia is that of *Master Lee QC in Re Gordon Grant and Grant Pty Ltd. (1982) 1ALLC 196*. One important consideration or criteria which could be adduced from this decision was that leave could be granted is someone has

commenced an action before the grant of leave if good cause is shown on the merits. In other words the merits of the case is an important factor in the consideration or the exercise of this discretion. The position is similar in the New Zealand authorities for example in *Wilson -v- Auroro Group* [1990] NZLR 61 (per Master Williams QC) and the list of criteria are:-

- (i) strength of the Applicant's case.
- (ii) seriousness of the issue vis-à-vis from the litigant's as well as the institution's perspective.
- (iii) possibility of the resolution of the dispute during the course of Statutory Management.
- (iv) whether resolution of the claim is necessary for the carrying out of the Statutory Management.
- (v) The nature of proceedings and its impact on the statutory Management and entity at large.
- (vi) Delay in commencing the proceedings.

The same criteria are used in this Jurisdiction and the most important consideration is the strength of the applicant's case. Master Udit in *NBF Asset Management -v- Taveuni Estates Ltd* (2009) FJHC 260 in dealing with an application for counterclaim under the same provision used the following criteria in determining whether leave should be granted.

- (a) The strength of the applicant's case. It must be considered in light of the rights or liabilities which the proceeding or action is set to determine.
- (b) The seriousness of the issue to be determined by an action or proceeding.
- (c) Whether judicial determination of the issues in the action is necessary for the controllership and/or for the determination of the issue at large between the parties.
- (d) Delay in commencing or continuing an action or proceeding.
- (e) Whether the issue is likely to be resolved in the ordinary course of controllership.
- (f) Whether the applicant's right to have a claim determined by an impartial tribunal is likely to be defeated at the conclusion of the controllership, especially if the institution is to be wound-up.

(g) Whether the litigation may impede the prompt and efficient execution of the Controller's statutory duty. This must be considered in conjunction with para (c) above.

(h) Further, (which is relevant to the fact of this case but not considered by the Courts in New Zealand) is where there is a counterclaim, the court must pay heed to the statement of defence to the financial institution's claim. Where both the defence and counter-claim are so intertwined, leave merely becomes a formality. A cause of action in a counterclaim which is independent of the plaintiff's claim or the defence thereto, is to be treated in the same manner as a originating claim.

Having arrived at those criteria the then Master Udit dealt with each criteria in the exercise of his discretion, however I do not wish to deal with each criteria in this matter simply because it is totally different. In this case it is a direct application to initiate or issue proceedings not one where a counter claim is considered although the considerations may overlap. I will therefore deal only with the strength of the applicant's case, the seriousness of the issue to be determined and perhaps delay.

The Strength of the applicant's case

It is clear to the court from the various affidavits filed in support of and in opposition to the application and the preliminary evidential documentations in support of these affidavits that the parties were in the preliminary stages of entering into a contract for the purchase of a portion of land in Savusavu. That the applicant had tendered for the property and that the tender was accepted by the respondent and that a sum of money was paid as part of the consideration by the applicant. What transpired after that is very much in issue but what is clear though is that there was a meeting of the minds before certain events overtook their intentions. In my view this needs to be determined. It is precisely this state of affairs which the applicant has sought to bring to light in his application, in other words he is aggrieved by the fact that the sale did not eventuate and he applies to the court to be given an opportunity to pursue the reasons for it and perhaps be remedied. The Respondent on the other hand is of the view that the applicant does not have a good case and therefore leave should not be granted. In *Morris -v- Equiticorp* [1990] 5 NZ CLC 66, 465 (Wylie J), was of the view that it is not desirable to specify a standard for the proposed action as long as the case is not hopeless, leave ought to be granted. In other words the applicant must at least have an arguable case the outcome of which could not be predicted except by the courts. Although this was not presented as an argument by the respondent, I

am also of the view that pursuing this matter would not interfere with the executions of the Controller's functions.

Seriousness of the issue

The respondent is of the view that the issues to be determined by the Court is not serious because even if the applicant succeeds in his claim he will not be able to purchase the property as he is currently under receivership and likely to be declared bankrupt. I am of the view that a person under receivership (if indeed he is) ought not be treated differently in this type of application than any other applicant. It is not his financial status which determines the seriousness of a matter. It is enough in my view that he has a grievance and an arguable case for the matter to be considered serious enough to be given leave.

Delay

The respondent has also submitted that the applicant has delayed the making of the application for seven years and therefore should not be given leave. That is that the alleged contract was executed on 2 August 2005. The affidavits filed in the application shows that one of the reason the transfer did not take place was that the respondent had waited for one Ajit Kumar to vacate the premises. In this regard the respondent themselves instituted proceedings against the said Ajit Kumar to vacate the premises but later sold the same property to him, hence the grievance. I am not satisfied that the delay was attributed solely to the applicant.

Conclusion


For the above reasons I am of the view that the the applicant be granted leave to institute proceedings. I therefore grant him leave under section 43 (1) of the Banking Act to institute proceedings.

Orders

I therefore make the following orders:-

1. That the application made under section 43 of the Banking Act seeking leave to institute proceedings is granted;
2. That the applicant is given 21 days to file a claim; and

3. That each party pay their own costs.



H Robinson
Master
High Court, LABASA

6 May 2014.

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