

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 97 of 2015

BETWEEN : **PACIFIC ENERGY SOUTH WEST PACIFIC LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at level 7, Vanua House, Fiji.

PLAINTIFF

A N D : **CORPORATE DEVELOPERS (FIJI) LTD** a limited liability company duly incorporated in Fiji and having its registered office at Main Street, Lautoka, Fiji

FIRST DEFENDANT

A N D : **MAYUR KHAN** and **PRANEEL KRISHNEEL DASS** both of Ba, Company Directors.

SECOND DEFENDANT

Counsel : Mr R Singh for plaintiff
No appearance for defendants

Date of Hearing: 24 June 2015

Date of Ruling: 24 June 2015

R U L I N G

[1] This is an ex parte notice of motion seeking injunction restraining the defendant from selling his business and/or leaving the country [‘the application’]. The application is supported by an affidavit sworn by Lusiana Tokalau, Credit & Customer Care Manager of the plaintiff. The application is made pursuant to section 6 of the Debtors Act, Cap 32, Order 111 and Order 29 of the High Court Rules of 1988 (‘HCR’) and the inherent jurisdiction of the court.

[2] HCR, O.29, r.1 (2) permits the plaintiff to make ex parte application where the case is one of urgency and the delay cause by proceeding in the ordinary way would entail irreparable or serious mischief.

[3] On 19 June 2015 the plaintiff filed its ex parte application seeking the following orders:

(1) *An injunction restraining the second defendants from leaving the jurisdiction of this Honourable until the determination of the within proceedings;*

(2) *An injunction restraining the defendants from selling and /or disposing of and/or transferring and/or dealing with and/or removing from the jurisdiction of this Honourable Court any and all assets and monies of the First Defendant until further Order of this Court;*

(3) *That defendants do file full statement of the First Defendant's asset wherever located, with this Honourable Court within fourteen (14) days of service of this Order;*

(4) *That a Writ of Ne Exeat Civitate shall be issued forthwith commanding and conveying the Second named Defendants forthwith before a judge of this Honourable Court unless the Defendants shall deposit a sum deemed appropriate by the Court or surrender their passports or travelling documents and/or give to the plaintiff a Bond executed by the Second Defendants for security satisfactory to the plaintiff that the Second Defendants will not leave the jurisdiction without notice to this Honourable Court.*

[4] The claim against the Defendants is just little over \$15,000. The plaintiff alleges that amount is due from the defendants on credit transactions, i.e. goods sold and delivered.

[5] The plaintiff also applies for an absconding debtors warrant (Writ of *Ne Exeat Civitate*) to issue forthwith commanding and conveying the second named defendants before a judge unless the defendants shall deposit a sum deemed appropriate by the court or surrender their

passports or travelling documents and/or give to the plaintiff a Bond executed by the second defendants for security. This application is made pursuant to HCR, O.111, r.1 which provides as follows:

'An application under section 6 of the Debtors Act for an order for a warrant to issue for the arrest of a defendant who is about to abscond may be made by the plaintiff in the action ex parte, supported by an affidavit, to a judge in chambers.' [Emphasis added].

- [6] Debtors Act s.6 empowers the court to issue a warrant against the defendant in any action for the recovery of a sum **exceeding \$10** is about to abscond to be arrested and detained until security is given. That section provides as follows:

'6. If it is shown to the satisfaction of the court that the defendant in any action for the recovery of a sum exceeding ten dollars is about to abscond, the court may, in its discretion, issue a warrant to arrest the defendant and commit him to prison, there to be kept until he shall have given bail or security in such sum, to be expressed in the warrant, as the court thinks fit, not exceeding the probable amount of debt or damages and costs, for his appearance at any time when called upon while the action is pending and until execution or satisfaction of any judgment that may be made against him in the action; and the surety or sureties shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against him in the action with costs:

- [7] In **Westpac Banking Corporation v Satish Chandra** [1991] HBC 365/91 Scot, J held that Debtors Act s.6 is void for unconstitutionality –violating freedom of movement.

- [8] Fiji Court of Appeal in **Sundarjee Brothers Ltd v Geoffrey John Coulter** [1987] 33 FLR 74 held that Debtors Act s.6 which provides for absconding debtor summons for a mere \$10 on a contract which may be frivolously and fraudulently made, is inconsistent with 1970 Constitution s.14 (now repealed) vis-a-vis freedom of movement and void as failing to meet public interest limitation, to the extent of excluding actions on a contract from Debtors Act.

[9] At this point in time, it is to be noted that there is no judgment against the defendants. It would be unreasonable for the plaintiff to stop a transaction of \$700,000 for a claim of \$15,000 in the absence of any judgment against the defendants. At this stage the court will not issue any order restraining the defendants from going ahead with that transaction.

[10] Issuance of absconding warrant or stop departure order would certainly deprive the defendants of their personal liberty. If this court issues an order of this nature that would violate the defendants right to personal liberty guaranteed under section 9 of the 2013 Constitution. Section 9 – (1) (c) of the Constitution provides as follows:

***‘A person must not be deprived of personal liberty except-
... for the purpose of executing an order of a court made to secure the fulfilment of an obligation imposed on the person by law; ..’*** [Emphasis provided].

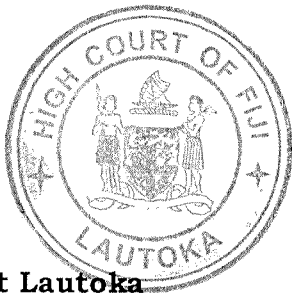
[11] The above provision in s.9-(1) (c) has been further qualified by **s.9-(2)** of the Constitution which provides as follows:

‘(2) subsection (1) (c) does not permit a court to make an order depriving a person of personal property on the ground of failure to pay maintenance or a debt, fine or tax, unless the court considers that the person has wilfully refused to pay despite having the means to do so.’ [Emphasis added].

[12] As the supreme law of the country constitutional provision will supersede any other provision of law. As such, 2013 Constitution section 9 overrides Debtors Act s.6.

[13] In the absence of a judgment against the defendant, one cannot say the application for warrant under HCR, O.111, r.1 or stop departure order has been made for the purpose of executing an order of a court made to secure the fulfilment of an obligation imposed on the defendant by law.

[14] For the foregoing reasons, I decline to issue any orders ex parte against the defendants. However, I order the notice of motion is to be served on the defendants returnable at 9.30am on 29.6.15.



At Lautoka
24.6.15

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M.H. Mohamed Ajmeer
JUDGE