

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No.HBC 300 of 2017

BETWEEN : BA HOLDING COMPANY LIMITED

APPLICANT

AND : PUBLIC RENTAL BOARD

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms P. Mataika for the Plaintiff

: Ms. S. Devan for the Defendant

Date of Hearing : 3 July 2018

Date of Judgment : 14 September 2018

JUDGMENT

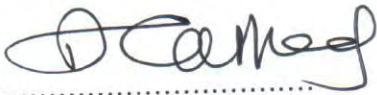
1. This is the Defendant's Summons applying for the Plaintiff's Originating Summons (OS) dated 25 October 2017 to be struck out on the grounds:
 - (1) The OS fails to comply with the requirements of Order 7 rule 3 and O 5 r 4(2)(a) and (b) of the High Court Rules (HCR).
 - (2) It discloses no reasonable cause of action and is otherwise an abuse of the process of the Court.
2. The Summons is supported by the affidavit of Michael Vaurasi, the Acting Development Officer with the Defendant (Board) who deposes as follows:
 - (1) The Plaintiff (Company) submitted its tender offer circa 10 February 2017 and the Board on further consideration increased the bond percentage to 10%.
 - (2) The Board accepted the Company's tender offer subject to the fulfillment of conditions which included the Company providing a performance bond (PB) of 10% within 2 weeks of signing the contract.
 - (3) The Company confirmed in writing on 27 July 2017 by an email that the Company would provide the 10% PB "within a week or 2".
 - (4) Because the Company failed to provide a PB, the Board by its letter of 12 October 2017 informed the Company that because it had failed to provide the 10% PB, the Board was revoking its offer.
3. Counsel for the Company informed the Court that she had decided not to file an affidavit in reply.
4. The hearing commenced with Counsel for the Board submitting. She said the OS was irregular as the documents do not comply with O 7 r 3 HCR. The Company did not provide particulars of the relief sought nor did it show its

cause of action. The Company does not have a reasonable cause of action. Whether the tender was accepted depends on whether the conditions were complied with. The parties did not sign a written contract and if there were no contract the Company cannot claim a breach of contract.

5. Counsel for the Company then submitted. She said the letter of acceptance was conditional and no contract was signed. The Board rescinded the offer because there was no PB. The Board rescinded acceptance of the Company's offer which she submitted it cannot do as there was no breach. She asked for specific performance of the draft contract. This is a reasonable cause of action. There is only one issue before the court and it is whether there is a binding contract.
6. Counsel for the Board in her reply said because there was no PB the Board was retracting the acceptance of their offer, not rescinding it. The Board says it is not legally bound by its acceptance. The Company was not entitled to relief as as it failed to establish a legally binding contract and therefore cannot claim specific performance, nor for breach of contract nor for general damages.
7. At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision.
8. To resolve the sole issue before me, I shall turn to the law. In my view this is expounded in the judgment of the Court of Appeal in : Ministry of Agriculture, Fisheries and Forests AND Ministry of Regional Development And Multi Ethnic Affairs AND Attorney-General of Fiji AND Peter Nand : Civil Appeal No. ABU 0119 of 2006S : dated 10 July 2008 that".....a number of authorities in particular Transit New Zealand v Pratt Contractors Ltd [2002] 2 NZLR 313. Those cases are authority for the proposition that invitations to tender are simply offers to treat with no contractual obligation crystallizing until the tender is accepted".

9. An acceptance of an offer is an indication by the offeree of his willingness to be bound unconditionally to a contract with the offerer on the terms stated in the offer (see Halsbury's Laws of England, 4th edition, para 245).
10. An offer cannot be accepted conditionally, the offeree has power to accept only on the terms stated in the offer. Thus, an attempted acceptance cannot operate as such where it is made subject to some condition or includes some new or different term. (ibidem para 256).
11. In the instant case the Board by its letter of 14 July 2017 to the Company stated that the latter's tender submission has been accepted on the following conditions, the first of which shall be a performance bond of 10%.
12. That this was not part of the offer is clearly stated in the Company's email to the Board of 1 September 2017 which states in para 2 that the "Performance Bond request was raised from 5 to 10% during the tender process and is currently being finalized by FDB".
13. Since there can be no conditional acceptance of an offer (the tender here) it must follow that there was no binding contract concluded between the Company and the Board. Consequently, absent a contract absent any entitlement on the part of the Company to any of the declarations sought in the OS or to an injunction or to specific performance of a contract which was never executed by both the Company and the Board and which could not be breached or to damages.
14. Even if I am wrong in my above conclusion and there were a conditional agreement even that will not avail the Plaintiff because the contract could not have become legally binding until the condition precedent (the PB) had been complied with by the Plaintiff which it never did. (see Chitty on Contracts, Volume 1, para 2- 144)
15. In the result, the Originating Summons filed on 25 October 2017 is hereby dismissed and each party shall bear its own costs of these proceedings.

Delivered at Suva this 14th day of September 2018.



David Alfred
JUDGE
High Court of Fiji