

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBC No. 139 of 2016

BETWEEN: FIJI DEVELOPMENT BANK a body corporate duly constituted under the Fiji Development Bank Act, Cap 214 and having its principal office at 360 Victoria Parade, Suva in Fiji.

PLAINTIFF

AND: NIU INDUSTRIES (FIJI) LIMITED a limited liability company having its registered office at Shed 3, Fiji Ships & Heavy Industries Yard, Sannergren Drive, Walu Bay, Suva.

1st DEFENDANT

AND: CARL HARVIE PROBERT of 32 Matanikutu Road, Suva, Company Director.

2nd DEFENDANT

AND: CLIFTON JOHN COUGH of 1139 Yasi, Pacific Harbour, Company Director.

3rd DEFENDANT

BEFORE: Hon. Justice Vishwa Datt Sharma

COUNSELS: Mr. Nilesh Lajendra - for the Plaintiff
Mr. Isireli Fa - for the 1st and 2nd Defendants

Date of Decision: 19th March, 2019 @ 10.00 am

DECISION

[Oral application by Plaintiff seeking an amendment to the Writ of Summons]

1. The Plaintiff filed a **Writ of Summons** and sought for the following orders:
 - (i) Judgment against the Defendants jointly and severally in the sum of \$148,021.83 (One Hundred forty Eight Thousand Twenty One Dollars and Eighty Three Cents);
 - (ii) Interest at the rate of 6.00% per annum on the Judgment sum computed from 11 June 2016 until full payment;
 - (iii) Costs of this action; and/or
 - (iv) Such other relief as the Court may deem just and equitable in the circumstances.

2. The First and Second Defendants filed their **Statement of Defence** :
 - (i) Denying paragraph 12-20 of Statement of Claim and putting the Plaintiff to strict proof;
 - (ii) Asking Plaintiff's claim be dismissed;
 - (iii) Costs of this proceedings;
 - (iv) Any other relief this Honourable Court may deem just.

3. Interlocutory Default Judgment was already entered against the 3rd defendant on 31st August 2016.

4. The substantive matter was listed for Hearing on 13th March 2019 and accordingly proceeded to hearing.

5. Plaintiff's First Witness (PW1) was in the process of giving her evidence in chief and about to conclude her examination in chief when the Plaintiff's counsel made an oral application to Court and sought for an amendment to the Judgment sum claimed in his Writ of summons to read \$147,718.05.

6. The essence of the Plaintiff Counsel's application was to seek an amendment to the first prayer and order sought within the Writ of Summons to read "... the sum of \$147,718.05 in lieu of \$148,021.83.

7. The Counsel representing the First and Second Defendants whilst not objecting to the Plaintiff's application for the amendment of the writ of summons, submitted as follows:
 - (a) Not objecting to the amendment application;
 - (b) New evidence now before court;
 - (c) Plaintiff's counsel knew earlier that amendment may be sought;
 - (d) Plaintiff's counsel failed to inform court and defendant's counsel before the hearing proceeded.
 - (e) A short adjournment be granted to allow for Plaintiff's counsel to file and serve a formal application for amendment.
 - (f) To allow Defence time to peruse the application and amend its statement of Defence if required to do so.

8. The Plaintiff Counsels contention was that the case authorities furnished to court gives the court discretion to accede to the oral amendment as sought herein by him.

9. The Court in the given circumstances thought fit and proper to vacate and adjourn the continuation of Hearing and deliver a written Ruling on the Plaintiff's oral application for amendment of the prayer and order sought within the Writ of Summons before this court.

10. The Plaintiff's First Witness (PW1) evidence in chief in terms of the two (2) Bank Statements; exhibit P41 and annexure 'Q' within the affidavit of Hemant Kumar Mahadeo in support of the summary judgment application revealed that the total amount of debt owed by the Defendants to the Plaintiff was \$148,021.83.
11. The evidence in chief of PW1 became crystal clear and indicative of the fact that the debt owed to the Plaintiff should be in the sum of \$147,718.05 and not \$148,021.83 as reflected in the Writ of Summons filed before this court on 14th June 2016.
12. The revelation of this particular fact by the Plaintiff's witness (PW1) evidence to court prompted the Plaintiff's Counsel to correct the figure and hence make an oral application and seek the appropriate amendment of the judgment sum sought in the writ of summons which read 'Judgment against the defendant's jointly and severely in the sum of \$148,021.83'.
13. In light of the Plaintiff's evidence and the oral submissions of both counsels representing the parties to the current proceedings, it is only appropriate and would be just and fair that the Plaintiff files and serves a formal application for the amendment sought by him within 7 days timeframe in terms of Order 20 Rule 5 of the High Court Rules 1988 which provides as follows:


Amendment of writ or pleading with leave (O.20, r.5)"
5.-(1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. (Emphasis mine)
14. Defendants 1 and 2 upon service of such amendment is at liberty to file and serve any appropriate amendment of the Statement of Defence within 7 days timeframe thereafter.
15. Each party to bear their own costs.
16. Both parties to the proceedings, in particular the Plaintiff's Counsel herein is reminded for future reference that applications regarding amendments of the current nature should be made at the very beginning and before the commencement of the substantive hearing in order to avoid any hiccups, leading to counsels being caught by surprise, unnecessary adjournments and vacation of hearings.
17. It would also be appropriate at this juncture to enlighten both Counsels to the fact that the Plaintiff's oral amendments sought herein in terms of the actual total debt sum allegedly owed was **less than and did not exceed the judgment debt sum claimed by the Plaintiff in his original writ of summons** before this court.
18. Therefore it was not necessary and appropriate for the Plaintiff's Counsel to make the current oral application seeking amendment of the total sum of debt from \$148,021.83 to \$147,718.05, rather should have left that evidence at the court's discretion and determination and the Counsel should have continued to complete the PW1's examination in chief instead.

19. However, the Plaintiff's Counsel thought fit to do otherwise.
20. For the aforesaid rational, this court will now proceed to make the following final orders.

FINAL ORDERS

1. The Plaintiff to file and serve a formal application for the amendment of the Writ of summons in terms of the Judgment sum debt within 7 days timeframe [on or before 26/03/2019].
2. Defendants 1 and 2 are at liberty to file and serve any amendment to the Statement of Defence within 7 days thereafter [on or before 02/04/2019].
3. Each party to bear their own costs of this application.
4. Continuation of Hearing date to be assigned.
5. Orders accordingly.




VISHWA DATT SHARMA
JUDGE
SUVA
19th Day of March, 2019