

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. 008 of 2018

BETWEEN : SUPERIOR ROOFINGS (FIJI) LIMITED a limited liability company having its registered office at Lot 22 Mariners Reach, Denarau Island, Fiji

PLAINTIFF

AND : MACIU VAKACEGUILOMALOMA NAIVALU ("Matt Naivalu"), roofing contractor, Lot 7 Nasoso Road, Nadi, Fiji.

DEFENDANT

Counsel : Mr. D.J. O'Connor for the plaintiff
: Mr. Mosese Raratabu for the defendant

Date of hearing : Tuesday, 02nd October, 2018
Date of ruling : Thursday, 31st January, 2019

RULING

(A) INTRODUCTION

- (i) This is an application by the plaintiff against the defendant for an order of **committal** for contempt of court pursuant to Order 52, rule 3 of the High Court Rules, 1988.
- (ii) On 24th July, 2018 the plaintiff filed this application by way of notice of motion on the grounds that the defendant had not complied with and indeed had breached the terms of the injunction made against him by the court on 22nd January 2018.

(iii) On 22nd January 2018, the High Court granted the following injunction orders;

(a) *“The defendant be restrained from engaging in the active conduct of any business within Fiji that is in competition with the Plaintiff for a period of six months after his employment contract ended with the Plaintiff”.*

(b) *“The defendant be restrained from recruiting or seeking to employ any of the plaintiff’s current employees on behalf of any other entity in which the defendant may have an interest or by which he may be employed for a period of twelve months following the date his employment contract ended with the plaintiff”.*

(iv) The particulars of contempt were given;

(i) He is carrying out roofing work in breach of the court orders.

(ii) He has contracted the plaintiff’s current employees and offered them employment in breach of the court orders.

(iii) He has employed some of the plaintiff’s employees.

(v) The plaintiff alleges that;

❖ The defendant breached the injunction order by carrying out roofing work for the entire six months of his restraint of trade ended on 06th July 2018.

❖ The defendant deliberately breached the injunction order by employing four roofers who were employed by the plaintiff. The defendant’s restraint on recruiting the plaintiff’s employees ended on 06th January 2019.

(B) CASE HISTORY

The ex-parte motion for leave to apply for an order of committal pursuant to Order 52, rule 2(1) of the High Court Rules was filed and granted on 23rd July 2018.

(C) AFFIDAVIT EVIDENCE

(i) The plaintiff filed five (05) affidavits in support of the committal proceedings.

- (a) The affidavit of Luke Harry Lawson sworn on 20th June 2018.
 - (b) The affidavit of Brennen Lee Henderson sworn on 21st June 2018.
 - (c) The affidavit of Rasakaia Nadumu Heritage Geier sworn on 18th July 2018.
 - (d) The affidavit of Vishal Kumar sworn on 19th July 2018.
 - (e) The Second affidavit of Brennen Lee Henderson sworn on 19th July 2018
- (ii) The court gave directions for the defendant for the filing of affidavit in reply but the defendant did not file an affidavit in reply.

(D) LAW

- (i) The onus of proof in contempt of court proceedings is on the mover of the motion. The proof is to be established to the standard applying in the criminal courts namely proof beyond reasonable doubt.

See; * Barclays de Zoete Wedd Securities Ltd and Others v Nadir
(1992) TLR 141

* Dean v Dean
(1987) FLR 517

* Vijay Kumar v Shiu Raj, & Anor
(unreported) Suva High Court Action No. HBM 0026.005,
(September 2001)

* Shalini v Basanti (2003) FJHC 63

* Natural Waters of Viti Ltd v Crystal Clear Mineral Water
(2005) FJCA 46

- (ii) Where, as here, the contempt alleged is of disobedience to a court order the accused contemnor must be shown to have willfully disobeyed the order. An unintentional act of disobedience is not enough (See, Steiner Products Ltd & Anor v Willy Steiner Ltd (1966) 1 WLR 986, Ali v Chaudary (2004) FJHC 119.)
- (iii) The Court of Appeal in 'Fairclough v Manchester Ship Canal Co. (1897) WN 7 said;

"In these cases, casual, or accidental and unintentional disobedience to an order of the court is not enough to justify either sequestration or committal; the court must be satisfied that a contempt of court has been committed in other words, that its order has been contumaciously disregarded."

- (iv) The power is discretionary and it is to be exercised sparingly.

* Bokini v State
(1999 FJCA 60)

* Shamdasani v King Emperor
(1945) AC 264

(E) CONSIDERATION OF THE APPLICATION

- (i) The plaintiff is an incorporated company having its registered office at Lot 22 Mariners Reach, Denarau Island, Fiji and carries on business as a roofing company. The defendant is a roofing contractor. The defendant was employed by the plaintiff as a site foreman.
- (ii) On 16 February 2017, the defendant signed an employment contract ("employment contract") with the plaintiff. Under clause 5(a) of the employment contract, the defendant could not engage in any other paid employment other than his employment with the plaintiff.

Clause 5(b) of the employment contract imposed a six month restraint of trade on the defendant ("Restraint of trade"):

"Except as otherwise agreed, the Employee shall not, at any time during the term of the Contract and for six (6) months after termination or expiry thereof, engage in the active conduct of any business within Fiji that it in competition with the Employer; provided however, that nothing herein shall be construed as preventing the Employee from investing his assets in such manner as will not cause any conflict of interest with the Employer".

Under clause 5(c) of the Employment Contract, the defendant had a duty not to recruit or seek to employ current employees of the plaintiff either during or for a period of 12 months after his employment ends.

During the term of this Contract and for twelve (12) months following its termination or expiry, the Employee shall not recruit or seek to employ current employees of Superior Roofing Fiji Limited on behalf of any other entity in which the Employee may have an interest or by which he/she may be employed."

(iii) On 4th December 2017, the defendant provided written notice of his resignation.

On 6th January 2018, the defendant's employment with the plaintiff ended.

(iv) On 22nd January 2018 the High Court granted injunction orders restraining the defendant from:

- (a) engaging in the active conduct of any business within Fiji that is in competition with the plaintiff for a period of six months after the date his employment contract ended with the plaintiff; and
- (b) recruiting or seeking to employ any of the plaintiff's current employees on behalf of any other entity in which the plaintiff may have an interest or by which he may be employed for a period of twelve months following the date his employment contract ended with the plaintiff.

On 23rd January 2018, the injunction orders were served on the defendant.

On 27th March 2018, the High Court granted Anton Piller Order to seize the defendant's laptop computer and mobile phone to preserve evidence in this proceeding.

On 28th March 2018, the High Court granted leave to commence committal proceedings against the defendant for contempt for breaching the injunction orders.

On 6th April 2018, Anton Piller order was served on the defendant. The police seized the defendant's mobile and laptop. The defendant acknowledged service of the documents. He continued carrying out roofing work in breach of the court orders and continued to employ the plaintiff's employees.

On 23rd April 2018, the committal proceedings were served on the defendant. The defendant acknowledged service of the documents. He continued carrying out roofing work in breach of the court orders and continued to employ the plaintiff's employees.

The defendant's counsel raised a procedural point that the notice of motion for committal was served out of time (not 8 clear days before the committal hearing). As a result, the plaintiff withdrew the notice of motion. The defendant continued carrying out roofing work in breach of the court orders and continued to employ the plaintiff's employees. Again, another ex-parte motion for leave to apply for an order of committal pursuant to Order 52, rule 2(1) of the High Court Rules was filed and granted on 23rd July 2018.

On 24th July 2018, the court sealed the order granting leave for new committal proceedings to be issued.

On 26th July 2018, the committal proceedings were served on the defendant. The defendant acknowledged service of the documents. (The documents were served within 8 clear days before the hearing on Monday, 6th August 2018).

On 6th August 2018, the court adjourned the matter for hearing on 2nd October 2018. The Court made directions that the defendant file affidavit in response within 21 days (by 27th August 2018) and the plaintiff file any affidavit in reply within 7 days thereafter (by 3rd September 2018).

The defendant has not filed any affidavit in response. His restraint of trade ended on 6th July 2018. He continued to employ the plaintiff's employees in breach of the Court orders which expired on 6th January 2019.

(v) In his affidavit in support of the motion, sworn on 8th July 2018, 'Rasakaia Nadumu Heritage Geier' states that;

1. *I was employed by Superior Roofing as a roofer for about 19 months. I resigned on 4 January 2018.*
2. *On 14 January 2018, Matt Naivalu ("Mat") employed me as a roofer. I worked for Matt as a roofer for about 7 months. I no longer work for Matt. I am currently employed by Vinod Industries as a roofer.*

Injunction Orders served on Matt Naivalu

3. *I am aware that injunction orders were served on Matt on 23 January 2018 and the Court Orders prohibited Matt from engaging in the active conduct of any business within Fiji that is in competition with Superior Roofing for six months after his employment contract ended with Superior Roofing.*

4. *The injunction Orders also restrained Matt from recruiting or seeking to employ any of the Superior Roofing's employees on behalf of any other entity in which the plaintiff may have an interest or by which he may be employed for a period of twelve months following the date his employment contract ended with the plaintiff.*
5. *Matt's employment contract with Superior Roofing ended on 6 January 2018. His six month restraint ended on 6 July 2018.*

Breach of Injunction Orders

6. *Matt has completed the following roofing work in breach of the injunction Orders served on him.*
 - (a) *Roofing and flashings for the Animal Shelter at Legalega. This job started last year and is continuing. Matt was doing the work for himself in secret when he was employed by Superior Roofing and carried on doing the work after he resigned.*
 - (b) *Roofing project for Jack's main department store in downtown, Suva. He started this job in about March and finished about 3 weeks ago.*
 - (c) *Roofing work for the commercial building owned by Damodar City in Suva. He started this in about March 2018 (the same time as the job for Jack's main department store) and finished the job in March.*
 - (d) *Roofing and flashings for a residential house at Sleeping Giant Road in Sabeto. He completed this work in March 2018.*
 - (e) *Roofing and flashings for a residential house at Hides Ville Street in Namaka. He did this work for TM Construction. He started this job in April 2018 and finished the job in about three weeks.*
 - (f) *Roofing and flashings for a residential house at Gray Road in Martintar. He started and finished this job in February 2018.*
 - (g) *Flashings for a residential house at Lot 27, the Peninsula Denarau. The building contractor is Mont Blanc. The work was done in late February and March 2018.*
 - (h) *Roofing work (gutter, flashings), for a residential house at The Links, Denarau. This house is owned by Paula. I do not know her surname. He did his work in March 2018.*

- (i) Roofing work for house owned by Regan Berryman in Naisoso Island.
 - (j) Roofing and flashings for Western Builders on the Motibhai Building at the Naisoso junction. He did the work in late May and in June 2018.
 - (k) Roofing and flashings for Jack's commercial building in Nadi town. This was done in June 2018.
7. I was working for Matt when all the above mentioned roofing jobs were done. I was involved in all the above mentioned roofing jobs. I was Matt's foreman. I communicated with his employees. He had 13 staff (all roofers). I arranged for the roofing materials to be ordered and delivered to site. I was in charge of the time sheets for all Matt's employees. I inspected the roofing work on site. Sometimes, Matt would be with me. Other times, Matt would send me to inspect the roofing work by myself.
 8. Matt has employed roofers, who were employed by Superior Roofing in breach of the injunction Orders. Three of Matt's employees were employed by Superior Roofing, as well as myself. The names of those employees are Tavite Bulakoso, Atunaisa Rakota and Iliesa ("Lee"). He told them to resign and to work for him.
 9. Matt also told me to resign from my job at Superior Roofing and to work for him and I did.
 10. Matt paid his staff in cash. He gave me brown envelopes with cash to give to his employees. Matt provided pay slips to his employees. I have annexed and marked "A" a copy of all my pay slips from Matt for the period 11th April 2018 to 11th July 2018.
 11. Matt has deducted monies from my wages for my FNPF, but has not paid my FNPF over the 7 months I worked for him. I asked him why did not pay my FNPF. He said that he cannot afford to pay FNPF.
 12. Annexed and marked "B" is copy of my FNPF Statement.

Delailomaloma Construction

13. Matt's uncle is Ratu Saurara Baleisuva. He is in his late seventies. He retired decades ago.
14. Matt's uncle has a company named Delailomaloma Construction. His company was not active, had no tax certificate and no licence.

15. *Matt arranged for his uncle's company to become active again and he arranged to renew the company's licence. I was present with Matt when he was doing this.*
16. *On 6 February 2018, the licence was renewed. The licence is annexed and marked "C".*
17. *On 5 February 2018, a tax compliance certificate was issued. The tax compliance certificate is annexed and marked "D".*
18. *Matt has been using his Uncle's company, Delailomaloma Construction to carry out roofing work in breach of the Court Orders. Matt signs all the cheques himself on behalf of his Uncle's company to pay staff wages for the roofing work and roofing materials. Matt completed all the design work for the roofing jobs which he has carried out in breach of the injunction Orders. Matt decided what roofing materials needed to be purchased. Matt communicated directly with all clients. Matt employed all the roofers including myself to carry out the roofing work. Matt supervised the roofing work and carried out roofing work on site. At all times, Matt was in charge of the roofing work done.*

(vi) In his affidavit in support of the motion, sworn on 19th July 2018, 'Vishal Kumar' states that;

1. *I am a sales representative at Bluescope Lysaght ("Bluescope").*
2. *Bluescope is a roofing and profile company. Bluescope sells roofing materials and roofing tools.*
3. *I know Matt Naivalu. Matt ordered materials from Bluescope when he was working for Superior Roofing. He would come to the office and also communicate with me by email and telephone to order materials for Superior Roofing. He communicated with me on a weekly basis to order roofing materials for Superior Roofing.*
4. *When Matt was working for Superior Roofing he told me that he was planning to start his own roofing business.*
5. *On 12 March 2018, Matt asked me whether he could purchase roofing materials on account. I gave an account form to Matt and asked him to complete the form. He said that he needs to talk to his lawyer before he completes the form.*

6. *On 13, 16 and 20 March 2018, Matt came to Bluescope's office and ordered roofing iron, flashings and roofing screws. He paid for the roofing materials in cash. A copy of the sales orders are annexed and marked "A".*
7. *I knew Matt has resigned from Superior Roofing when he ordered the roofing materials from Bluescope on 13, 16 and 20 March 2018. I asked Matt where he was working. Matt said that he had his own construction business now. Matt was wearing a lime green hi viz tee shirt. I had not seen a lime green hi viz tee shirt as a uniform for a roofing company.*
8. *Bluescope arranged for Matt's roofing materials to be delivered to site in Matintar.*
9. *On 19 March 2018, Rasakaia Heritage came to the office to collect some roofing screws on behalf of Matt. He paid for the roofing screws in cash. He was wearing a lime green hi viz tee shirt. I said that tee shirt looks familiar. He laughed and said I am now working for Matt. He said other employees had left Superior Roofing and are now working for Matt.*
10. *Matt has also purchased guttering and flashing roofing materials on behalf of TM Construction.*
11. *Matt told me that he was getting another roofing job lined up at Denarau Mariner.*

(vii) It is clear from the affidavit of 'Vishal Kumar' that the defendant carried out roofing work which is in competition with the plaintiff's business after his employment contract ended with the plaintiff. It is also apparent from the affidavit of 'Rasakaia Nadumu Heritage Geier' that the defendant employed the plaintiff's employees to carry out roofing work after his employment contract ended with the plaintiff.

(viii) The defendant did not file an affidavit in answer. The affidavit of 'Rasakaia Nadumu Heritage Geier' and 'Vishal Kumar' went unanswered. It is fair to say that the defendant should reply if indeed he had a reply. And in the circumstances of this case, in the absence of a reply, I hold the inference inescapable that what 'Rasakaia Nadumu Heritage Geier' and Vishal Kumar' have said to be true. (See; **'Jai Prakash Narayan v Savita Chandra', Civil Appeal No.: 37 of 1985, delivery of judgment 08-11-1985.**)

(ix) It is quite apparent to me from the affidavit evidence that the defendant repeated and persisted in carrying out roofing work after the injunction order was served on him, after Anton Piller order was served on him and after contempt

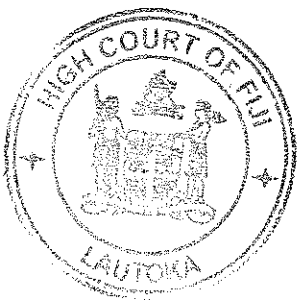
proceedings were served on him. (See; Para 6(j) and 6(k) of the affidavit of 'Rasakaia Nadumu Heritage Geier' sworn on 08th July, 2018.)

- (x) In the light of the defendant's full awareness of the injunction order, Anton pillar order and contempt proceedings, I hold that the disobedience to the orders of the court was not casual, or accidental and unintentional.

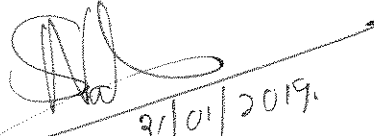
In my judgment the defendant's conduct is intentional and is a far cry from a piece of breath -taking insouciance. There is a deliberate failure to comply with the orders of the court. The evidence of the case demonstrated not only that he acted in wholesale disregard of his obligations under the orders of the court. His wholesale flagrant, repeated and persistent disregard of his obligations under the orders of the court, coupled with an awareness of the consequence can properly be regarded as 'contumelious' conduct. I think, he had, at the least, been reckless as to the consequences of his conduct and on general principles, that was enough to establish that his disregard of his obligations under the orders of the court had been intentional and contumelious. Therefore, the consequences of contumely should follow.

(F) CONCLUSION

- (i) I am satisfied beyond reasonable doubt that the defendant did disrupt the business of the plaintiff company and that he is in contempt of the court's orders on 22nd January, 2018.
- (ii) I invite counsel's submissions on sentence.



At Lautoka
Thursday, 31st January, 2019


..... 31/01/2019.
Jude Nanayakkara
Judge