

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No.: HBC 04 of 2019**

**BETWEEN** : **VODAFONE FIJI PTE LIMITED** a duly incorporated limited liability company in Fiji and having its registered office at 168 Princes Road, Tamavua, Fiji

**PLAINTIFF**

**AND** : **TEBARA TRANSPORT LIMITED** a duly incorporated limited liability company in Fiji and having its registered office at C/- Sea Lark Hill, Edinburgh Drive, Suva, Fiji.

**FIRST DEFENDANT**

**AND** : **GEORGE TRANSPORT LIMITED** a duly incorporated limited liability company in Fiji and having its registered office at 8 Carpenters Street, Raiwai, Suva, Fiji.

**SECOND DEFENDANT**

**Counsel** : **Plaintiff: Ms. S.Devan**  
**Defendant: Mr. S. Parshotam**

**Date of Hearing** : **18 and 22 January, 2019**

**Date of Judgment** : **4<sup>th</sup> February, 2019**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff who is the sole 'Solution Provider' for implementation of e-ticketing in the public transport, had instituted this action by way of writ of summons to recover the cost of the equipments installed in the 1<sup>st</sup> Defendant's buses. In the statement of claim the Plaintiff is claiming a sum of \$134,087.00 from the 1<sup>st</sup> Defendant for the e-ticketing

equipment that were installed and other expenses incurred in the buses operated by 1<sup>st</sup> Defendant. The Plaintiff is also seeking the money collected through the said machines be deposited in the court till final determination of this matter. At the same time the Plaintiff filed an *ex parte* summons for interim injunction seeking *inter alia* restraining the 1<sup>st</sup> Defendant from selling and or negotiating the said equipment installed in the buses to the 2<sup>nd</sup> Defendant. The Plaintiff is also seeking interim order to deposit money collected for bus fares using the said machines to be paid to the court pending the action. At the hearing it was also brought to the notice that Plaintiff had unilaterally stopped the transfer of the revenue from bus fares collected from the said equipments installed. This resulted the 1<sup>st</sup> Defendant filing a summons for an interim order for the release of all the money retained with the Plaintiff.

## FACTS

2. There are currently two applications before the Court;
  - a) The application by the Plaintiff for injunctive and other relief by a Motion dated 8 January 2019.
  - b) The application by the First Defendant to have monies paid out to it by Summons dated 16 January 2019.
3. There are four affidavits filed in connection to the applications. These affidavits are;
  - a) The Affidavit in Support of Ronald Prasad sworn on 7 January 2019 and filed on 8 January 2019.
  - b) The Affidavit in Response and Affidavit in Support of Satend Maharaj sworn on 15 January 2019 and filed on 17 January 2019 (the Affidavit in opposition)
  - c) The Affidavit in Reply of Ronald Prasad sworn and filed on 18 January 2019
  - d) The Supplementary Affidavit of Satend Maharaj sworn and filed on 22 January 2019. The deponent of the affidavit in opposition clarified the objection taken by the Plaintiff regarding his name.
4. The Plaintiff in the *ex parte* sought following orders.....
  1. *"An interim Injunction restraining the First Defendant by itself and/or its solicitors and/or its solicitors and/or officers and/or directors and/or members and/or executives and/or employees and/or agents and/or servants and/or sub-contractors and/or otherwise howsoever from:*

- a. *Negotiating and/or attempting to negotiate to sell and/or alienate and/or transfer and/or dispose the electronic fare ticketing equipment including forty-nine (49) units being bus card readers/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.*
  - b. *Selling and/or attempting to sell and/or alienate and/or transfer and/or dispose the electronic fare ticketing equipment including forty-nine (49) units being bus card readers/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.*
  - c. *Entering into and/or attempting to enter into and/or executing and/or attempting to execute any oral and/or written agreement or option or contract or other writing or instrument or paper to sell and/or alienate and/or transfer and/or dispose the electronic fare ticketing equipment including forty nine (49) units being bus readers/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.*
2. *An interim injunction restraining the Second defendant by itself and/or its solicitors and/or officers and/or directors and/or members and/or executives and/or employees and/or agents and/or servants and/or sub-contractors and/or otherwise howsoever from:*
    - a. *Acquiring and/or attempting to acquire from the First Defendant and/or to obtain a transfer or an assignment of and/or using and/or disposing and/or damaging and/or in any manner or form from interfering with the electronic fare ticketing equipment including forty nine (49) units being bus card readers /junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.*
    - b. *Howsoever dealing with electronic fare ticketing equipment including forty-nine (49) units being bus card reader/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software*



*installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.*

3. *An Order that the revenue generated to the benefit of the First Defendant from operation of the fare ticketing equipment be paid into Court pending the determination of the Plaintiff's action....."*
5. The Plaintiff's claim is that it has sold the First Defendant certain e-ticketing equipment which the First Defendant has not paid for. These equipments were installed in 49 of the buses operated by the 1<sup>st</sup> Defendant. The Plaintiff seeks payment of \$134,087.00 for the said equipment.
6. The First Defendant disputes the Plaintiff's claim on, *inter alia*, the following grounds:
  - a) No contract for sale and purchase of equipment had been entered into by the parties.
  - b) There is no statutory rate of payment for the equipment that the First Defendant is required to make and the parties are free to negotiate terms and conditions and the 1<sup>st</sup> Defendant is yet to come to agreement as to the cost of the equipments and other service agreements regarding that.
7. 1<sup>st</sup> Defendant is not a member of the bus operators association and negotiations were done through all the bus operators for the implementation of the e-ticketing for buses. The bus operators association and all individual operators had agreed with the Plaintiff, to certain terms and conditions as to the installation and equipment costs etc and they had all signed the relevant agreements with the respective entities, except the 1<sup>st</sup> Defendant.
8. The Plaintiff had offered the same terms and conditions to the 1<sup>st</sup> Defendant but he is yet to sign to an agreement for the installation and implementation of e-ticketing in public transport. The 1<sup>st</sup> Defendant has some reservations about some of the clauses.
9. The Plaintiff in the affidavit in support stated that it had installed equipment relating to e-ticketing in Defendant's buses and this is part of implementation of e-ticketing initiative for all the public transport buses. It had discussions with all the bus operators including the bus operators association prior to the implementation of the e-ticketing initiative. 1<sup>st</sup> Defendant also participated in some of the discussions and they opted not to participate in some discussions and this is evidenced in email correspondence between the parties.
10. The 1<sup>st</sup> Defendant, in the affidavit in opposition stated *inter alia* following:

- a) First Defendant is selling its buses to the Second Defendant and the transaction is yet to be completed.
  - b) The Plaintiff's equipment installed in 49 buses which is yet to be paid, do not form part of the sale.
  - c) It is the Plaintiff's responsibility to make revenue payments to bus operators.
  - d) There was no discussions and negotiations with the First Defendant to finalize a contract prior to the installation of the equipment.
  - e) The Plaintiff and the Defendant have not agreed to the price of the equipment and on the Plaintiff's commission rate. The Plaintiff has implemented a rate of 4.5% as its commission.
  - f) Since the Plaintiff and 1<sup>st</sup> Defendant did not enter in to a contract regarding the implementation of eticketing in their buses parties continued discussions without success and still there is no agreement.
11. At the hearing Plaintiff admitted that it had stopped transfer of funds collected on behalf of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant filed a motion seeking release of all the funds retained by the Plaintiff.
  12. Before the Plaintiff stopped transferring of revenue of 1<sup>st</sup> Defendant, collected through bus fare it had deducted their commission of 4.5% and the 1<sup>st</sup> Defendant did not raise an issue as regard to the said deduction, though they are yet to enter in to any agreement regarding that.
  13. There was no appearance for the 2<sup>nd</sup> Defendant despite the service of *inter partes* motion to them. 2<sup>nd</sup> Defendant is the entity that 1<sup>st</sup> Defendant intends to sell its buses.

## ANALYSIS

14. There is no dispute as that there is serious question to be tried at the hearing. The statute obliges the Plaintiff to provide bus card readers to all the public transport buses and they are also obliged to manage the information gathered statutorily. There are no statutory guidelines pointed out by the parties that relate to the pricing of such equipment and or charge for services provided. The Plaintiff and bus operators to set guidelines and submit for endorsement (see RP -D of affidavit in reply).
15. There is a commission of 4.5% deducted from unsubsidised bus fare and there is no dispute as to the said deduction and it was applied to all bus operators.
16. The Plaintiff installed the equipment in the buses of the 1<sup>st</sup> Defendant without a written agreement relating to the price of the items.



17. The Plaintiff's *inter partes* motion seeks restraining the 1<sup>st</sup> Defendant from selling or negotiating for sale of equipments installed in 49 buses and the restraining order specifically confined to the equipments and not the buses.
18. The 1<sup>st</sup> Defendant in the affidavit in opposition stated that such equipment is not part of its sale of its business which they are negotiating to sell with the 2<sup>nd</sup> Defendant.(see paragraph 7 of the affidavit in opposition)
19. The Plaintiff is also seeking identical orders restraining the 2<sup>nd</sup> Defendant, too. They had not participated in this hearing hence the orders sought can be granted against them.
20. 2<sup>nd</sup> Defendant had not acquired the assets of 1<sup>st</sup> Defendant, yet and according to the 1<sup>st</sup> Defendant and agreement for the sale was not finalized, and equipment installed by the Plaintiff did not form part of the said sale.
21. So the 1<sup>st</sup> Defendant is not affected by restraining the sale or transfer of the said equipment.
22. The Plaintiff had installed e-ticketing equipments in 49 buses operated by the 1<sup>st</sup> Defendant as required by law.
23. Section 16 of Omnibus Electronic Fare Ticketing Act 2014(the Act) states '16(1) A *Solution Provider must-*
  - a. *Supply or sell a Buscard reader that is interoperable and can acquire or read and Buscard supplied or sole by another Solution Provider; and*
  - b. *Have a back office that is interoperable and can interoperate with the back office of another Solution Provider,*
24. The Plaintiff is the sole 'Solution Provider' under the Act, as the other two bidders had withdrawn their respective bids.
25. The Plaintiff in terms of Section 16 of the Act is obligated either to supply or sell bus card readers in all the buses and also to have back office to provide services related to it.
26. So the Plaintiff could either supply or sell bus card readers and it could package the product with other services and support services. So, this part of the operation is left to the parties to negotiate as a commercial deal rather than statutory obligation. The Plaintiff being aware of the legislation prior to the bidding had submitted its bid to be the 'solution provider' under the Act and was also selected accordingly.

27. The Plaintiff had decided to sell the relevant equipment and had discussions with all bus operators. So the price it could get depends on how it had packaged its product along with other support services including maintenance, upgrade etc. These are commercial dealings between the relevant parties.
28. The Plaintiff had also indicated it had obtained IT services through another entity and all these involve additional costs to the Plaintiff that needs to be recovered though commercially negotiated arrangements with relevant parties.
29. The Plaintiff had discussions with Bus Operators Association as well as individual operators. 1<sup>st</sup> Defendant had also participated in the discussions but had also opted not to participate in all the discussion. (see RP -F to affidavit in reply).
30. Though the Plaintiff had entered in to contracts with all other bus operators but there is no such contract signed with the 1<sup>st</sup> Defendant.
31. Despite not having a contract Plaintiff installed the equipment in 49 buses operated by 1<sup>st</sup> Defendant.
32. The Plaintiff was offered 49 units that were initially installed at a concessionary price and a deadline was given to avail that price.
33. Apart from the price of the machines there are various administrative costs involved and this is at the moment charged as a commission by Plaintiff at the maximum rate of 4.5% from unsubsidised fare collected from e-ticketing, and the rest of the money is transferred.
34. The Plaintiff had installed 49 bus card readers and other equipments related to that in the buses operated by 1<sup>st</sup> Defendant, but the terms of the said installation were not finalized between the Plaintiff and 1<sup>st</sup> Defendant. In 'RP-F' by an email Plaintiff had indicated installation of equipment will only be done once signed agreement is received by them.
35. There is no written agreement between the parties regarding the service and maintenance of the same. The 1<sup>st</sup> Defendant was offered the same terms and conditions that were offered to all other bus operators including the members of Bus Operators Association, but the 1<sup>st</sup> Defendant had not agreed to the said terms.
36. So, the cost of installation of equipment to initiate eticketing to 1<sup>st</sup> Defendant's buses remains a debt but the amount of the debt remains uncertain due to parties not agreeing to

the price of the equipments which needs determination at the hearing of the writ of summons.

37. The Plaintiff had given a deadline to avail the concessionary price for the initial 49 machines and related services, but this had expired due to the 1<sup>st</sup> Defendant's failure to enter to a service agreement.
38. In terms of Sections 20 and 21 of the Act provides that funds collected from electronic means should be deposited in a trust account and payment of that is done according to law.
39. So, the payment of the funds kept in trust fund are restricted and there is no provision to pay such funds to court as a security or otherwise.
40. So all the funds collected subject to any commission charged for maintenance of the system which is deducted without any objection so far should be forthwith transferred to 1<sup>st</sup> Defendant.
41. The bus fares of all the said 49 buses are collected by the 1<sup>st</sup> Defendant. At present, there is no substantive contract or statute which covers all aspects of the Plaintiff and the First Defendant's dealings.
42. There are, certain provisions in the Act that are relevant:
  - a) Section 4 – requires bus operators to have bus-card readers on their buses. If it does not then it must allow passengers to travel for free.
  - b) Section 20 – A Solution Provider shall keep a trust account with a financial institution for the purpose of safeguarding funds exchanged for e-money.
  - c) Section 21 – A Solution Provider shall ensure that funds from the trust account shall only be used for refund payment to users.
  - d) Schedule – 4.2 – Solution Providers are responsible for the transactions and payments to bus operators.
43. There is no statutory provision which allows the Plaintiff to withhold the First Defendant's revenue as they have done in this instance and there is no statutory provision that allows the funds to be remitted to court for security or otherwise, otherwise than mutual consent.
44. In American Cyanamid Co v. Ethicon Ltd [1975] AC 396, a two-stage approach in the consideration of granting interlocutory or interim injunction applications was enunciated by the House of Lords. The two-pronged approach was:



- a) Is there a serious question to be tried?
- b) Are damages an adequate remedy?

If the answer to (b) is in the negative, then where does the balance of convenience lie?

45. Lord Diplock's approach in American Cyanamid was as follows:

"The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried...so unless the material available to the Court at the hearing of the application of an interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lied in favour of grounding or refusing the interlocutory relief sought."

46. The Privy Council decision in Eng Mee Yong v. Letchumanan [1980] AC 331 confirmed the approach of the American Cyanamid principles where in the judgment delivered by Lord Diplock, he says:

"The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted, the Plaintiff should satisfy the Court that there is a 'probability', a 'prima facie case', or a 'strong prima facie case' that if the action goes to he will succeed; but before any question of balance of convenience can arise, the party seeking the injunction must satisfy the Court that his claim is neither frivolous or vexatious; in other words, that the evidence before the Court discloses that there is a serious question to be tried..."

47. Order 29 Rule 8 applies. This relevantly reads:

"Where any real or personal property forms the subject-matter of any proceedings, and the Court is satisfied that it will be more than sufficient to answer all the claims thereon for which provision ought to be made in the proceedings, the Court may at any time allow the whole or part of **the income of the property** to be paid, during such period as it may direct, to any or all of the parties who have an interest therein or may direct that any part of the personal property be transferred or delivered to any or all of such parties." (emphasis added).

48. The Plaintiff does not want its equipment that were installed in the buses be excluded from the sale of the buses. The 1<sup>st</sup> Defendant in the affidavit in opposition stated that

those equipments are not part of the sale of the business. So there is no basis for the objection to the grant of interim injunction restraining sale or negotiation of the equipment.

## CONCLUSION

49. The Plaintiff has not made out any case of any dissipation or assets stripping in order to avoid the claim of \$134,087.00 which is not a substantial claim considering that it had more than 49 buses for public transport. The funds collected through ticketing is governed by statutory provisions and they are to be deposited in a trust account and disperse in accordance with statutory provisions. There is no provision in the Act or regulations under that allows such money to be used as a security or to be deposited in court. This money collected from e ticketing is part of the daily operational costs of bus companies and not to be mistaken as money or revenue earned from the equipment. The bus companies need money collected for daily operations and any dispute as to the price of the equipments cannot hold money in the trust account. 1<sup>st</sup> Defendant had stated that the equipments installed in the buses are not part of the sale to 2<sup>nd</sup> Defendant, and it did not participate at the hearing. So the interim injunction is granted only to the extent such equipments installed in the said buses against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants until final determination of this matter or another order is made in this regard by this court.

## FINAL ORDERS


1. An interim Injunction restraining the First Defendant by itself and/or its solicitors and/or its solicitors and/or officers and/or directors and/or members and/or executives and/or employees and/or agents and/or servants and/or sub-contractors and/or otherwise howsoever from:
  - a. Negotiating and/or attempting to negotiate to sell and/or alienate and/or transfer and/or **dispose the electronic fare ticketing equipment** including forty-nine (49) units being bus card readers/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.
  - b. Selling and/or attempting to sell and/or alienate and/or transfer and/or dispose the **electronic fare ticketing equipment** including forty -nine (49) units being bus card readers/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.



- c. Entering into and/or attempting to enter into and/or executing and /or attempting to execute any oral and/or written agreement or option or contract or other writing or instrument or paper to sell and/or alienate and/or transfer and/or dispose **the electronic fare ticketing equipment** including forty nine (49) units being bus readers/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.
2. An interim injunction restraining the Second defendant by itself and/or its solicitors and/or officers and/or directors and/or members and/or executives and/or employees and/or agents and/or servants and/or sub-contractors and/or otherwise howsoever from:
  - a. Acquiring and/or attempting to acquire from the First Defendant and/or to obtain a transfer or an assignment of and/or using and/or disposing and/or damaging and/or in any manner or form from interfering with the electronic fare ticketing equipment including forty nine (49) units being bus card readers /junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.
  - b. Howsoever dealing with electronic fare ticketing equipment including forty-nine (49) units being bus card reader/junction box, bus card validating machines/bus validator, DCON case, Point of Sale, GPS module, printer, related software installed on the buses identified and enumerated in the Schedule appended to the Notice of Motion herein.
3. The Plaintiff is ordered to pay forthwith, 1<sup>st</sup> Defendant's revenue collected and withheld (subjected to commission so far applied) and also to continue such payments without delay.
4. Parties to bear their costs.

Dated at Suva this 4<sup>th</sup> day of February, 2019.



  
Justice Deepthi Amaratunga  
High Court, Suva