

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 120 of 2018

BETWEEN: SAVERIO BALEIKANACEA of 3 Baka Drive, Delainavesi, Lami, Retiree.

PLAINTIFF

AND: TOKATOKA BETOBALAVU TRUST established under the trust deed dated 18th November, 2016,
whose principal address is Korobebe Village, Voturu, Ba.

1ST DEFENDANT

AND: ERONI NARUA of Korobebe Village, Baturu Ba, Trustee.

2ND DEFENDANT

AND: JOPE NUKUQAMU of Korobebe Village, Baturu Ba, Trustee.

3RD DEFENDANT

AND: AISAKE NAVURA of Korobebe Village, Baturu Ba, Trustee.

4TH DEFENDANT

BEFORE: Hon. Justice V D Sharma

COUNSEL: Mr. Maisamoa - for the Plaintiff
No-appearance - of all the Defendants

Date of Ruling: 21st August, 2019 @ 9.30 am

JUDGMENT

[Originating Summons on Breach of Contract and Specific Performance together with an Ex-Parte
Summons seeking an order for Final and Interlocutory Judgment against the Defendants]

INTRODUCTION

1. The Plaintiff commenced the substantive proceedings against the Defendants alleging Breach of Agreement and claimed for the following relief from the Defendants jointly and severally:
 - (a) *Specific performance*
 - (b) *Special damages in the sum of \$82,500.00*
 - (c) *General damages*
 - (d) *Punitive damages*
 - (e) *Exemplary damages*
 - (f) *Interest on the award of damages*
 - (g) *Interest on the award of costs*
 - (h) *Costs of indemnity basis*
 - (i) *Such other relief as the court deems just and equitable in the circumstances.*
2. The Defendants were served with the writ of Summons and the Statement of Claim together with the Acknowledgment of service by the Plaintiff's Lawyer.
3. The 1st, 3rd and 4th Defendants failed to file and serve their respective Acknowledgment of Service and the Statement of Defence as was required in terms of the *High Court Rules, 1988*. However, the 2nd Defendant filed his Acknowledgment of Service only.
4. The Defendants failed to file and serve any pleadings and or statement of Defence to counter the Plaintiff's claim.
5. On 25th June, 2018, the Plaintiff filed a Summons Ex-Parte together with an Affidavit in Support and sought for Judgment in Default against the Defendants, Damages to be assessed together with costs.
6. The Plaintiff's Summons Ex-Parte of 25th June, 2018 was heard and accordingly dismissed by this court on 18th October, 2018, on the grounds of lack of evidence since the Memorandum of Agreement upon which the Plaintiff's claim hinged upon was not tendered into evidence by the Plaintiff and that the Summons ex-Parte sought for an order for Judgment in Default when the Plaintiff's claim against the Defendants was in fact a combination of a liquidated demand and unliquidated Damages.

Therefore, the Plaintiff's Summons should have been filed and made in terms of mixed claim pursuant to Order 19 Rule 6 which would have taken care of both the liquidated claim and unliquidated damages that was sought for in terms of Order 19 Rules 2 and 3 respectively.
7. This court whilst dismissing the Plaintiff's Summons Ex- Parte on 18th June 2018 did not proceed to strike out and or dismiss the Plaintiff's substantive Writ of Summons and the Statement of Claim on which the Default judgment was sought then.
8. As a result of this inadvertent error, the substantive Writ of Summons and the Statement of Claim remained pending. This prompted the Plaintiff to file the current Summons Ex-Parte together with an Affidavit in Support on 25th March 2019 and seek the following orders-
 - (i) That the Plaintiff be granted final judgment against the Defendants on the basis that they failed to file their intention to defend the claim for liquidated demand and also failed to file their defence to the claim for liquidated demand pursuant to Order 13 Rule 1 and Order 19 Rule 2 of the High Court Rules, 1988 respectively;
 - (ii) That the Plaintiff be granted Interlocutory judgment against the Defendants on the basis that they failed to file their intention to defend the unliquidated damages and also failed to file their defence to the claim for unliquidated demand pursuant to Order 13 Rule 2 and Order 19 Rule 3;
 - (iii) That the plaintiff's unliquidated damages to be assessed by the court; and

- (iv) That the Plaintiff be granted costs and to be paid by the Defendants.

The current application is made pursuant to Order 13 Rules 1 & 2, Order 19 Rules 2,3, 6 and Order 37 of the High Court Rules, 1988.

BACKGROUND

9. The 1st Defendant, Tokatoka Betobalavu Trust (Trust) was awarded a Contract by Basic Industries Limited Fiji to load and cart blasted quarry stones. A mandatory deposit was required by Financial Institution for the Funding.
10. The Trust through their adviser Kinijoji Sokosoko and the 2nd Defendant on behalf of the Trust including the 3rd and 4th Defendants approached the Plaintiff and discussed the possibility of funding the Tokatoka Betobalavu Trust in order for the Trust to implement its contract with the Basic Industries Limited Fiji.
11. After a successful discussion between Kinijoji Sokosoko and the 2nd Defendant on behalf of the Trust with the Plaintiff, the Plaintiff offered to provide financial deposit required by the Defendants.
12. A Memorandum of Agreement (MOA) was drawn and entered into between the 2nd Defendant on behalf of the Defendants and the Plaintiff on 10th November, 2016. The MOA with all the particulars and conditions as enumerated at paragraph 9 of the Statement of Claim was witnessed by the Trust Advisor Kinijoji Sokosoko.
13. On or about the 11th November, 2016, the Plaintiff transferred a sum of \$100,000 from his HFC Bank account to the Defendant's account Tokatoka Betobalavu Trust at BSP.
14. According to the Plaintiff's Counsel-
 - *The Defendants paid a total sum of \$27,500 only to the Plaintiff and failed to continue with the monthly payments of \$5,000 to clear the balance of \$82,500 despite several reminders made:*
 - *That the Defendants failure to make the payments in terms of the Memorandum of Agreement makes the Defendants liable for the Breach of Agreement dated 10th November, 2016.*
 - *That the Plaintiff on the Basis of the Breach of Agreement by the Defendants is claiming against the Defendants jointly and severally for Specific Performance, Damages under various heads, interest and costs accordingly.*
15. The Defendants failed to file and serve any pleadings to counter the Substantive claim and therefore the Defendants failure prompted the Plaintiff to seek an order for Judgment in Default for the balance sum of \$82,500 against the Defendants.

ANALYSIS and DETERMINATION

16. The Plaintiff's current application for *Final and Interlocutory Judgment* against the Defendants is made pursuant to *Order 13 Rules 1 and 2, Order 19 Rules 2, 3, and 6 and Order 37 of the High Court Rules, 1988 respectively.*
17. The issue to determine is "*Whether the Plaintiff is entitled to Final and Interlocutory Judgment together with Damages to be assessed and costs on their substantive Claim against the Defendants as sought for herein?*"
18. *Order 19 rule 6 of the High Court Rules, 1988* deals with "mixed claims" and provides as follows-
Default of defence: mixed claims (O.19, r.6)

6. Where the plaintiff makes against a defendant two or more of the claims mentioned in rules 2 to 5, and no other claim, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, enter against that defendant such judgment in respect of any such claim as he would be entitled to enter under those

rules if that were the only claim made, and proceed with the action against the other defendants, if any. (underline mine)

Order 19 Rule 2 deals with Default of defence for a claim for liquidated demand and *Order 19 Rule 3* deals with Default of defence for a claim for unliquidated damages.

19. The 1st, 3rd and 4th Defendants failed to file and serve their respective **Acknowledgment of Service** and the **Statement of Defence** as was required in terms of the *High Court Rules, 1988*. The court notes that the 2nd Defendant had only filed his Acknowledgment of Service.
20. At the hearing, the Plaintiff's Counsel called the Plaintiff as the only witness to give evidence and tender any documentary evidence to substantiate the Plaintiff's claim as per the Statement of Claim filed herein and also furnished court with his written submissions.
21. The Plaintiff in his evidence states as follows- "Recalled making an agreement with the defendants on 10th November, 2016. He was shown annexure marked "SB1" and recognised at the last page the signature of Ratu Eroni Narua as witness and chief advisor to Trust and his signature. He said that Ratu Eroni Ratu Eroni is head of Tokatoka, Turaga ni mataqali and Turaga ni Yavusa-head of Betobalavu Trust. They had a Trust Deed and shown annexure "SB1". Later tendered as exhibit- "SB1".

Witness was shown annexure "SB2" Memorandum of Agreement (MOA) -Reads-Provisions of \$110,000 Bridging Fund to finance the purchase of vehicles and machinery towards the Tokatoka Betobalavu stone cartage venture at sabeto. "Tendered MOA as exhibit "SB2". He said provided the defendants with \$110,000.

\$10,000 was paid before the signing of the Agreement. Paid to the Trust by Bank transfer to Tokatoka's account. After agreement was signed he paid a balance of \$110,000 from his HFC account to Tokatoka Trust account. Witness sees annexure "SB3"-its his bank account statement. Refers to line 11th Nov 2016- Transferred to BSP Tokatoka \$100,000.

Witness sees exhibit "SB2"-Mode of payment- to an account nominated by him to pay \$5,000 monthly for 5 years.

How much money did you receive? -Since November up to March 2017, he was paid \$27,500. They did not pay any further money. Given excuses by the Defendants, Tender "SB3" as exhibit "SB3". Thereafter sought for legal advice. This is all.
22. The Plaintiff's Substantive claim was founded on the **Breach of Agreement** by the Defendants which was executed and witnessed by the **Trust Advisor Kinijoji Sokosoko** on the 10th November, 2016.
23. At the close of the Plaintiff's case, the Plaintiffs' counsel further submitted that as per the **Memorandum of Agreement (MOA)**, the Plaintiff provided a sum of \$10,000 cash to the Defendants as a pre-operation expenses and thereafter on or about 11th November, 2016; the Plaintiff transferred a sum of \$100,000 from his HFC Bank Account to the Defendant's Bank Account style as Tokatoka Betobalavu Trust at BSP.

It was agreed in the MOA that the Defendants will reimburse the \$110,000 through monthly instalment payments of \$5,000 to the Plaintiff within a five years period. That the Defendants paid a sum of \$27,500 only and failed to pay the balance of \$82,500. Hence, the Defendants have breached the MOA.

The Plaintiff now seeks an order for a **Final and Interlocutory Judgment** to be entered against the Defendants for the balance sum of \$82,500 and **General Damages** to be assessed with **Interest** and costs to the Plaintiff.
24. The Plaintiff's case hinged on the **Memorandum of Agreement** in order for him to substantiate his claim and succeed in obtaining a **Interlocutory Judgment** against the Defendants.
25. It can be clearly ascertained from the **Memorandum of Agreement (MOA)** entered into between the 2nd Defendant on behalf of the Defendants and the Plaintiff and witnessed by the **Trust Advisor Kinijoji Sokosoko** on 10th November, 2016 (Tendered into evidence as exhibit: SB2") that one of the terms and conditions of the MOA was that the Defendants were to pay a monthly instalment of \$5,000. First payment was due in November 2016 and the last payment would have become due in October 2021. According to the Plaintiff's evidence, the Defendant only paid a total sum of \$27,500 and failed to continue payment of the


monthly instalment of \$5,000. The Defendants failure to adhere to this particular terms and condition of the MOA tent amounted to the breach of the MOA. Thus prompted the Plaintiff to file the current Summons Ex-Parte and seek for the Interlocutory Judgment against the Defendants.

26. Taking into consideration the Plaintiff's evidence, the Trust Deed (Exhibit SB1), The Memorandum of Agreement (Exhibit SB2), and the Plaintiff's HFC Bank Statement (Exhibit SB3), I find that the Defendants have failed in its bid to continue with the \$5,000 monthly installment payment to the Plaintiff in terms of the Terms and Conditions of the MOA and therefore have breached the Memorandum of Agreement executed between the Plaintiff and Defendant on 10th November 2016.
27. In light of the above finding, I accordingly enter Interlocutory Judgment against the Defendants for the balance sum of \$82,500.
28. The Plaintiff is at liberty to file and serve Summons for Assessment for Damages as sought for in his substantive claim herein.
29. There will be no order for any costs made against the Defendants at the discretion of this court.
30. In conclusion, for the aforesaid rational, I now proceed to make the following Final Orders-

FINAL ORDERS

- (a) The Plaintiff's Summons seeking an order for Interlocutory Judgment against the Defendants in the sum of \$82,500 succeeds.
- (b) The Plaintiff is at liberty to proceed with the Summons for Assessment of Damages accordingly.
- (c) There will be no order for costs at the discretion of this court.
- (d) Orders accordingly.




VISHWA DATT SHARMA
JUDGE
SUVA
21st Day of August, 2019

cc: Maisamoa & Associates, Rakiraki