

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 110 of 2020

BETWEEN: **KARTIKA CONSTRUCTION PLUMBING SERVICES PTE LIMITED** a limited liability company
duly incorporated under the Companies Act and having its registered office situated at Lot 4,
Carpenters Street, Raiwai, Suva, Fiji.

PLAINTIFF

AND: **FIJI NATIONAL UNIVERSITY** a University and a body corporate established under the "The
Fiji National University Act 2009".

DEFENDANT

BEFORE: **Hon. Mr Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Prakash R.** - for the Plaintiff
 Mr. Singh B. - for the Defendant

DATE OF DECISION: **Wednesday 06th October, 2021 @ 10am**

JUDGMENT

*[Defendant's Summons on Locus and Extension of Performance Guarantee Bond pursuant to Order 33, Rule 3 and 32 of
the High Court Rules 1988 and the inherent jurisdiction of this Honourable Court]*

INTRODUCTION

- [1] Before this Court are two [2] Interlocutory Summons for hearing and determination filed by the Defendant on 25th August 2020 and 07th October 2020 seeking the following Orders respectively-
- (i) Whether the Plaintiff has any locus to prosecute and/or commence the current proceedings pursuant to Section 531 of the Companies Act 2015;
 - (ii) That the Performance Guarantee Bond dated 18th May 2018 and extended on 20th November 2019 until 16th October 2020 be further extended and validated until the final hearing and determination of these proceedings; and
 - (iii) The time for filing and service of this Summons be abridged.
- [2] Both Affidavits in support of the Applications were deposed by Ravindra Prasad in his capacity as a Litigation Officer and filed pursuant to Order 33 Rule 3 and Order 32 of the High Court Rules 1988 and the inherent jurisdiction of this Honourable Court.
- [3] Prior to the Defendant's Interlocutory Summons as hereinabove, the Plaintiff commenced proceedings against the Defendant by filing a Substantive Originating Summons on 15th April 2020 together with an Inter-Parte Notice of Motion seeking Declaratory and Injunctive Orders in particular-
- (i) That the Defendant by its agents, servants and/or officers and/or bankers be restrained from taking any steps and/or any further steps to call on the Bank of Baroda Guaranteed Performance Bond dated the 18th May 2018 and extended on 20th November 2019 given by the Plaintiff in favour of the Defendant;
 - (ii) That the Defendant be ordered to do all acts and deeds necessary to submit itself to arbitration in accordance with clause 42.2 of the Construction Agreement dated 16th April 2018 between the Plaintiff and the Defendant; and
 - (iii) Costs.
- [4] The Plaintiff commenced proceedings against the Defendant pursuant to Orders 5, 7 and 29 of the High Court Rules 1988 and the inherent jurisdiction of this Honourable Court.
- [5] On the returnable date of the Plaintiff's Inter-partie Notice of Motion, on 27th April 2020, the parties to the proceedings came to an agreement and by consent this Court granted an Interim Order that the Defendant by its agents, servants and/or officers

and/or bankers from taking any steps and/or any further steps to call on the Bank of Baroda Guaranteed Performance Bond dated the 18th May 2018 and extended on 20th November 2019 until the hearing and determination of both applications. The matter was then subsequently adjourned for hearing and determination.

- [6] Both parties to the proceedings made oral submissions and furnished Court with their respective written submissions accordingly.

BRIEF FACTS

- [7] On 16th April 2018 the Plaintiff and the Defendant entered into a Construction Agreement to undertake civil works and construction of building of the Plaintiff's Labasa Construction Project.
- [8] The consideration price of the contract was \$25, 534,567.52 VEP
- [9] The Plaintiff on 18th May 2018 provided to the Defendant a *Guaranteed Performance Bond* for \$2,047,000 through Bank of Baroda initially up to 20th November 2019 and later extended until 16th October 2020.
- [10] On 13th March 2020, the Defendant terminated the contract.
- [11] The Plaintiff has claimed Injunctive Orders against the Defendant on 15th April 2020, and the Substantive action on the Originating Summons is yet to be assigned with a hearing date.
- [12] The Defendant alleges a breach of agreement on the basis of the Plaintiff failing to pay the Sub-Contractors.
- [13] The Defendant denies the claims on the basis that now the Agreement is null and void, inoperative and incapable of being performed.
- [14] The Plaintiff is seeking to enforce a legal right it has under the said Agreement.

DETERMINATION

[15] There are two [2] issues to be deliberated upon and determined by this Court-

- **Firstly** - "Whether the Plaintiff has locus to commence and proceed with the proceedings against the Defendant?"; and
- **Secondly** - "Whether the Performance Guarantee Bond dated 18th May 2018 and extended on 20th November 2019 until 16th October 2020 be further extended and validated until the final hearing and determination of these proceedings?"

First Application

[16] The Plaintiff filed and commenced the substantive Originating Summons coupled with the Inter-Parte Notice of Motion in these proceedings against the Defendant on 15th April 2020.

[17] Notably, prior to the commencement of this civil proceedings Civil Action No. HBC 110 of 2020, the Petitioner M Y Khan filed and commenced a Winding Up proceedings No. HBE 11 of 2020 on 25th February 2020 against the Plaintiff Kartika Construction Plumbing Services Pte Limited.

[18] On 4th May 2020, the Plaintiff Company, Kartika Construction Plumbing Services Pte Limited was wound up and the Official Receiver was appointed as the Provisional Liquidator of the said Company.

[19] The Plaintiff, Kartika Construction Plumbing Services Pte Limited being dissatisfied with the Court's Winding Up Order, filed an Appeal against the decision of the Court together with an Application for Stay Order on 1st September 2020.

[20] Stay of Winding Up Order was granted by the Court on 10th June 2020 in favour of the Plaintiff, Kartika Construction Plumbing Services Pte Limited until further Order of the Court on terms and conditions as the Court may deem appropriate. The Appeal and Stay Application was set down for hearing on 30th October 2020.

- [21] On 30th October 2020, the pending Appeal and the Grant of Interim Stay Order was withdrawn by the Plaintiff, Kartika Construction Plumbing Services Pte Limited. The Order sought for the Withdrawal was accordingly granted by the Court on 30th October 2020 with no Order as to costs.
- [22] The Plaintiff's Substantive Originating Summons and the Inter-Parte Notice of Motion was filed on 15th April 2020, about two [2] months after the Winding Up Application was filed and commenced against the Plaintiff on 25th February 2020. The Winding Up Order was granted by Court on 4th May 2020 and not anytime earlier.
- [23] The Plaintiff accordingly filed and commenced his Substantive Originating Summons with the Inter-Parte Notice of Motion on 15th April 2020, when the Winding Up Application was still impending before Court for determination and grant of the Winding Up Order against the Plaintiff.
- [24] This confirms prima facie that the Plaintiff had the locus then on 15th April 2020 to file and commence proceedings against the Defendant since the Winding Up Application was still impending Court's hearing and determination.
- [25] However, I draw my attention to the provisions of **Sections 531 and 537** of the **Companies Act No. 3 of 2015** which provides as follows-

Actions stayed on winding up order

531. When a winding up order has been made or an interim liquidator has been appointed under section 537, no action or proceeding must be proceeded with or commenced against the Company, except by leave of the Court and subject to such terms as the Court may impose.

Appointment and powers of interim liquidator

537. – (1) The Court may appoint the Official Receiver to be the liquidator provisionally at any time after the presentation of a winding up application and before the making of a winding up order.

(2) Where a liquidator is appointed by the Court, the Court may limit and restrict his or her powers by the order appointing the liquidator.

- [26] The Winding Up Order made against the Plaintiff, Kartika Construction Plumbing Services Pte Limited was made on 04th May 2020 when the Plaintiff's Substantive Originating Summons with the Inter-Parte Notice of Motion was still impending hearing and determination. Further, the Official Receiver was appointed as the Provisional Liquidator for the Plaintiff Company.
- [27] In terms of *Section 531* of the *Companies Act No.3 of 2015*, the law provides-
- ".....no action must be proceeded with against the Company except by the leave of the Court....."*
- [28] Therefore, it is crystal clear that the Plaintiff, Kartika Construction Plumbing Services Pte Limited after commencement of the current Substantive Civil Proceedings Civil Action No. HBC 110 of 2020, whilst the Substantive Action was still impending, the Plaintiff, Kartika Construction Plumbing Services Pte Limited could not proceed further with the current Civil Proceedings against the Defendant since the Plaintiff Company was already wound up by the Court on 4th May 2020.
- [29] I do note that the Appeal and the Stay of Grant of Winding Up Order of 4th of May 2020 was eventually withdrawn by the Plaintiff/Appellant Kartika Construction Plumbing Services Pte Limited on 30th October 2020. This means that the eventual withdrawal puts the Plaintiff Company, Kartika Construction Plumbing Services Pte Limited back to the wound-up Status Quo without any locus to either commence or proceed with legal proceedings against the Defendant in this case. Thus, the Plaintiff's Civil Action No. 110 of 2020 refers herein.
- [30] If the Plaintiff still had the intention to proceed with its impending Substantive Originating Summons and the claim against the Defendant, then the provisions of Section 531 of the Companies Act No. 3 of 2015 provides that the Plaintiff ought to have sought the Leave of the Court accordingly.
- [31] In this case, so far, the Plaintiff has not filed any application to seek Leave of the Court in terms of the above provision in order to proceed with the impending Substantive Civil Case No. HBC 110 of 2020 against the Defendant.

[32] I make reference to the Case of *Alspec Holdings Limited v Ministry of Works, Transport and Public Utilities [2017] FJHC 187; HBC 341 of 2011*, his Lordship Justice Mutunayagam stated as follows:

In order to proceed with an action, a company in liquidation must follow a two tier process-

- *Firstly, it must obtain the Liquidator's consent. However, it is noted in the current case before Court that this has not been done by the Plaintiff Kartika Construction Plumbing Services Pte Limited.*
- *Secondly, where there is a Winding Up Order or an Interim Liquidator appointed: "no action or proceeding must be proceeded with or commenced against the Company, except by Leave of the Court" -----.*

[33] Bearing all above in mind and the circumstances and the manner in which the present applications within these proceedings was conducted by the parties to these proceedings, leaves me with no alternative but to hold that the Plaintiff, Kartika Construction Plumbing Services Pte Limited does not have the *locus standi* to proceed further with its current impending Civil Action No. HBC 110 of 2020 in absence of any leave sought in terms of the provisions of *Section 531 of the Companies Act No. 3 of 2015*.

Second Application

[34] I will now dwell upon to deliberate on the Defendant's second application filed on 07th October 2020 on the issue of the **extension of Performance Guarantee Bond until the final hearing and determination** of these proceedings.

[35] The very first thing I note herein although not raised by any of the counsels representing the parties to the proceedings is the fact that the Affidavit in Support relied upon to this particular application has been deposed by the Defendant's Litigation Officer, Ravindra Prasad.

[36] Reference is now made to **Order 41 Rule 5 of the High Court Rules 1988** which provides-

Contents of affidavit (O.41, r.5)

5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule

and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

- [37] The current application is Interlocutory and Contentious in nature. Therefore, it should contain statements of information or belief with the sources and grounds thereof. I note paragraphs 3, 4, 6, 7, 8 and 12 of the Affidavit deposited by Ravindra Prasad on 7th of October 2020.
- [38] In **Angco v. Mudaliar & Others [2000] HBC 26 of 1997L (1 September 2000)** the Court in respect to Affidavit filed by Senior Litigation Clerk stated as follows:-
"The court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of their clients. Proceedings such as the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. It trespasses the demarcation between client and solicitor roles." [underline mine]
- [39] The following was adopted in **Tavo & Anor. v. Enasio [2019] FJHC 40; HBC 369.2017 (28 February 2019)**
"I note the affidavit in support is affirmed by the solicitor's clerk and not by the Defendant and contains facts in issues and issue of law which a Law Clerk cannot assert to, in the words of the Judge."
- [40] In light of the above case authority, since the Affidavits filed herein by the Defendant's Litigation Clerk, Ravindra Prasad, it cannot be admitted into evidence in support of the Defendant's latter application seeking for further extension and validation of the Performance Guarantee Bond.
- [41] The Court on the 8 June 2020 had made an interim order that the Defendant by its agents or servants or officers or bankers is restrained from taking any steps and/or any further steps to call on the Guaranteed Performance Bond dated 16 May 2028 and extended on the 20 November 2019 until the hearing and determination of both applications.

- [42] The matter on both applications is not heard and determined, but the Performance Guaranteed Bond was expiring on 16 October 2020.
- [43] The Defendant made an application by way of Summons dated 07th October 2020 for an extension of the Bank Guarantee Bond and hence the application was listed on for the 15th October 2020.
- [44] On 15 October 2020; the Plaintiff's Solicitor advised the Court that they have agreed to an extension of the Bank Guarantee Bond until the 16th January 2021 and therefore on this advice, the Court directed parties to the proceedings to jointly write to the respective Bank to check on their position and further adjourned the matter to 16 October 2020 for mention to check on the Bank's response.
- [45] On 16th October 2020, the matter was listed to check on the Bank's response. There was no formal reply from the Bank except a telephone discussion with the Bank's Manager with the Defendant, that the Bank will not extend the Bank Guarantee Bond until the Plaintiff clears all the arrears. Further, taking into account of the imminent expiry of the Bank Guarantee Bond and in absence of any formal reply to the joint letter written by both Counsels to the proceedings, dated 15 October 2020, the Court had in interim extended the Performance Guarantee Bond to the 29th October 2020 and adjourned the matter to the 29th October 2020 for mention to check on the status of the Bank Guarantee Bond.
- [46] On 29th October 2020, the matter was listed for mention to check for any reply from the Bank. The Bank in its letter dated 15th October 2020 has advised that **'they will be unable to extend the Bank Guarantee Performance Bond as the Plaintiff is unable to pay the Bank Guarantee extension charges'**.
- [47] The Plaintiff at no stage advised to the Defendant that it was in arrears of the Bank Guarantee Bond until the Bank of Baroda wrote **"that it cannot extend the Bank Guarantee Bond due to the Defendant unable to pay the extension charges'**.
- [48] The Defendant's contention is that the Performance Guaranteed Bond is well intact with the Bank of Baroda and the Defendant has the right to make a call.

- [49] It is noted that the Plaintiff had provided the Defendant a *Guarantee Performance Bond Agreement* on 18th of May 2018 through Bank of Baroda.
- [50] By its letter dated 20th November 2019, Bank of Baroda wrote to the Defendant advising on the extension of the Bank *Guarantee Bond* till 16th October 2020 with all other terms and conditions mentioned in the original remained unchanged.
- [51] The Defendant's current application before this Court hinges on the *Performance Guarantee Bond* provided by Bank of Baroda.
- [52] However, Bank of Baroda has not been made a party to these proceedings.
- [53] In absence of Bank of Baroda not been made a party to the current proceedings, the Defendant's application on the extension of the *Performance Guarantee Bond* holds no water and accordingly fails.
- [54] Bearing in mind my finding that the Plaintiff, *Kartika Construction Plumbing Services Pte Limited* was on a wound-up status, the Plaintiff did not have the locus to proceed with its substantive *Civil Action No. HBC 110 of 2020* in terms of the provisions of ***Section 553 of the Companies Act No.3 of 2015***, unless the Plaintiff had sought the leave of the Court accordingly.
- [55] For the aforesaid rationale, the Plaintiff's *Substantive Originating Summons* together with the *Inter-parte Notice of Motion* seeking declaratory and Injunctive Orders also deem to fail and is accordingly dismissed.
- [56] Following are the Orders of this Court.

ORDERS

- (i) The Defendant's Summons on whether the Plaintiff has locus to commence and proceed with the proceedings against the Defendant hereby succeeds and is accordingly allowed.
- (ii) Whether the Performance Guarantee Bond dated 18th May 2018 and extended on 20th November 2019 until 16th October 2020 be further extended and validated until the final hearing and determination of these proceedings fails and is accordingly dismissed.
- (iii) The Plaintiff's substantive Originating Summons together with the Inter-partie Notice of Motion seeking declaratory and Injunctive Orders fails and is accordingly dismissed.
- (iv) Each party to bear their own costs at the discretion of this Court.

Dated at Suva this 06th day of October, 2021



Vishwa Datt Sharma
Judge