

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 101 of 2021

Sambhu Lal Construction (Fiji) Limited

Plaintiff

v

Fiji National University

Defendant

Counsel: Mr A.K. Singh for the plaintiff
Mr V. Kapadia for the defendant

Date of hearing: 30th March, 2022

Date of Ruling: 20th January, 2023

Ruling

1. There are the following three interlocutory applications before me:
 - i) The defendant's notice of motion filed on 23rd April, 2021, to stay this action.
 - ii) The plaintiff's summons filed on 22nd September, 2021, for leave to cross examine Prof Toby Wilkinson, Vice Chancellor of the defendant on his affidavits of 6th, 9th and 22nd April, 2021.
 - iii) The plaintiff's amended notice of motion filed on 22nd March, 2021, that:
 - a. the defendant be ordered to deposit in ANZ Bank account No. 2201127 the sum of \$1,180,439.03 (one million one hundred and four thousand thirty nine dollars and three cents) encashed prematurely under a bank guarantee bond until the hearing and determination of the substantive matter ;
 - b. the plaintiff will undertake not to withdraw or interfere with ANZ Bank account No. 2201127 until the hearing and final determination of the substantive matter.

2. This case concerns a Contract which required the plaintiff to construct a three storey building for the defendant.

3. *The sequence of steps taken and material correspondence between the parties*
 - a. On 26th March,2021, the plaintiff filed writ together with indorsement of claim and ex parte notice of motion,(made inter partes) for an injunction restraining the second defendant, (ANZ Bank) from releasing or encashing the plaintiff's bond.
 - b. On 29th March,2021, the defendant's solicitors opposed the application for an injunction. I directed the parties to file their affidavits in opposition and reply,
 - c. On 1st April,2021, the plaintiff filed another application for an injunction restraining ANZ Bank from encashing the bond.
 - d. On 6th April,2021, the defendant filed affidavit in opposition.
 - e. On 7th April,2021, I declined to grant interim relief and directed the defendant to file its response.
 - f. On 8th April,2021, the defendant filed acknowledgment of service.
 - g. On 9th April,2021, the defendant filed affidavit in opposition to the affidavit filed by the plaintiff on 7th April,2021.
 - h. On 9th April,2021,the plaintiff's solicitors issued a Notice of Dispute under clause 42.1 to refer the dispute to arbitration.
 - i. On 12^h April,2021, the defendant's solicitors replied that the defendant remains willing to proceed to arbitration.
 - j. On 16^h April,2021, the defendant's solicitors requested that these proceedings be withdrawn or they would move for a stay.
 - k. On 19th April,2021, Mr Singh, counsel for the plaintiff stated that he is not proceeding with the hearing on the application for an injunction, as the bond had been encashed and discontinued the action against the second defendant.
 - l. On 23rd April,2021, the defendant filed notice of motion to stay this action together with a supporting affidavit of Prof Toby Wilkinson, Vice Chancellor of the defendant of 22nd April,2021.
 - m. On 12th November,2021, the plaintiff filed statement of claim without leave of Court.

The application to stay this action in terms of section 5 of the Arbitration Act

4. The affidavit in opposition filed on behalf of the plaintiff states that the defendant accepted the plaintiff's notice to invoke clause 42.1 for arbitration, but encashed the bond. There is nothing left to proceed to arbitration, since the unconditional bond has been encashed. When a party invokes his right to arbitration, the other party cannot act on disputed facts.

The determination

5. At the commencement of the hearing, Mr Kapadia, counsel for the defendant submitted that the writ together with indorsement of claim was filed on 26th March, 2021. The plaintiff has filed statement of claim on 12th November, 2021, without leave of Court. The statement of claim cannot be considered.
6. Mr Singh's response was that the plaintiff filed statement of claim without leave, as the defendant did not file notice of intention to defend in terms of Or 13, r1.
7. The defendant has filed acknowledgment of service, which contains the notice of intention to defend.
8. In ***ANZ Banking Group Ltd v Caine***, [2006] FJHC 42; HBC0500R.2004S(3 February, 2006) Jitoko J said:

*Once a writ is served, a Defendant is required to file an 'Acknowledgement of Service' (Order 12, Rule 1(3))...If a Defendant fails to acknowledge service or give a notice of intention to defend and the claim is for a liquidated demand, the Plaintiff may there upon proceed to enter a final judgment against the Defendant 'for a sum not exceeding' the amount indorsed on the writ (Order 13, Rule 1). However, once a Defendant acknowledges service and gives a notice of intention to defend, the procedural rule for entering default judgment alters. Where a writ includes the Statement of Claim and if the Defendant fails to file a statement of defence, a Plaintiff may proceed to enter a default judgment upon expiry of 14 days of such acknowledgment. **On the other hand, where a writ is indorsed with a 'concise statement of the nature of the claim' the Plaintiff in that case must serve a Statement of Claim to the Defendant within 14 days of the service of the acknowledgment. This is a mandatory requirement under Order 18, Rule 1..** (emphasis mine)*

9. With respect to the application for a stay, Mr Kapadia submitted that the defendant has not taken a step in the proceedings, as no steps were taken to file defence. Opposing an injunction is not a step in the proceedings.
10. Mr Singh submitted that the defendant, in opposing the injunction, did not state that the matter should proceed to arbitration.
11. Section 5 of the Arbitration Act provides:

*If any party to a submission, .. commences any legal proceedings in any court against any other party to the submission, .., in respect of any matter agreed to be referred, **any party to such legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and that court, if satisfied that there is no sufficient reason by the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.**(emphasis and underlining mine)*

12. The section lays down a two fold criteria. viz, (i) the application for a stay must be made before delivering any pleadings or taking any other steps in the proceedings and, (ii) the applicant, at the time the proceedings commenced and is still willing to proceed to arbitration.
13. In *Eagles Star Insurance Company Limited v Yuval Insurance Company*, [1978] 1 Lloyds Report 357 at pg 361 Lord Denning M.R. referred to cases where a defendant had sought time to file a defence and where an application for discovery of documents was made and concluded :

*On those authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a “**step in the proceedings**” must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration. ..(emphasis added)*

14. Kumar J(as he then was) in *Digicel (Fiji) Ltd v Fiji Rugby Union*, [2014] FJSC 95; HBC 30.2014[21 February, 2014] quoted the following passage from the aforesaid judgment of Lord Denning at pp 360 and 361:

It seems to me that if a defendant who is being sued in the courts asks that a matter should go to arbitration in accordance with their agreement, prima facie that agreement ought to be honoured: the action should be stayed and the matter should be allowed to go to arbitration. Subject to this statutory qualification; if the defendant has taken a "step in the proceedings" then he is too late. He can no longer apply for the court proceedings to be stayed...

On principle it is a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for an arbitration. Like any election, it must be an unequivocal act done with knowledge of the material circumstances..(emphasis added)

15. In my view, the defendant has not taken a **step** in the proceedings. Opposing an injunction is not an unequivocal act indicating willingness to go on with proceedings in Court instead of arbitration.
16. On the second requirement of section 5, in my view, the defendant, at the time these proceedings were commenced and still, remains ready and willing to proceed to arbitration, as manifest from its response to the plaintiff when it initiated arbitration. I would reiterate the following sequence of events in this regard:
- a. 26th March,2021: the plaintiff filed writ.
 - b. 9th April,2021 : the plaintiff's solicitors issued a Notice of Dispute under clause 42.1 to refer the dispute to arbitration.
 - c. 12^h April,2021, : the defendant's solicitors replied" *..we note the mandatory nature of clause 42 of the Contract where the parties have irrevocably submitted to arbitrate any dispute.. **Our client remains ready, willing and to do all things necessary for the proper conduct of the arbitration in accordance with the Contract. The matters in dispute are preeminently suited for determination by arbitration by an arbitrator with construction law experience.*** (emphasis added)
 - d. 16th April,2021: the defendant's solicitors requested that these proceedings be withdrawn or they would move for a stay.
 - e. 23rd April,2021: the defendant filed the present application.

17. Mr Singh relies on the judgment of Kumar J(as he then was) in *Digicel (Fiji) Ltd v Fiji Rugby Union*, (*supra*) which held that filing affidavit and appearing at the hearing of the application for interim injunction amounts to steps in the proceedings. At paragraph 3.35, His Lordship stated:

I hold that the actions taken by the Applicant in the preceding paragraph amounts to step in the proceedings and having taken such steps Applicant is now precluded from seeking Stay of proceedings pursuant to Section 5 of the Arbitration Act.

18. His Lordship's finding must be read with the paragraphs that follow:

At paragraphs 3.36 to 3.38, His Lordship stated:

Even if the actions taken by the Applicant are not deemed to be steps in the proceedings it has failed to satisfy the Court that the Applicant was at the commencement of this proceedings was ready and willing to do all things necessary to the proper conduct of the arbitration. In response to query by the Court the Applicant's Counsel admitted that the Applicant and the Counsel were at all material times aware about the existence of the arbitration clause.

The Applicant and the Respondent were in contact by correspondence immediately prior to the institution of these proceedings but at no time did either of them served notice for parties to submit the dispute to arbitration.

There is no statement or evidence produced by on behalf of the Applicant that at the commencement of this proceedings was ready and willing to do all things necessary to the proper conduct of the arbitration. Obviously if the Applicant was ready then it would have moved the Court for a Stay of Proceedings instead of filing Singh's Affidavit and attending Court by its Counsel on 6th February 2014 to oppose the Application for Interim Injunction. (emphasis added)

19. It is evident from the succeeding paragraphs of his judgment that His Lordship did not make a conclusive finding on the first criteria laid down in section 5. The rationale for his decision was that the applicant had not met the second requirement viz, that at the commencement of proceedings it was ready and willing to proceed to arbitration.

20. In my view, the application of the defendant for a stay of these proceedings and referral to arbitration succeeds.
21. The affidavit in opposition filed on behalf of the plaintiff states that there is nothing left to proceed to arbitration, since the unconditional bond has been encashed. On the contrary, I find that several issues have been raised for arbitration by the plaintiff as contained in its affidavit in opposition.

The plaintiff's summons

22. The plaintiff seeks leave to cross examine Prof Toby Wilkinson, Vice Chancellor of the defendant on his affidavits of 6th, 9th and 22nd April,2021.
23. It suffices to say that the application is belated. The affidavits of 6th and 9th April,2021, were in response to the plaintiff's application for an injunction, which did not proceed to hearing for the reasons noted in paragraph 3 k above.
24. The affidavit of 22nd April,2021, was made in support of this application for stay.
25. The plaintiff's summons is declined.
26. The plaintiff also seeks that the defendant be ordered to deposit the sum of \$1,180,439.03 "*encashed prematurely*" under a bank guarantee bond until the hearing and determination of the substantive matter.
27. These proceedings have been stayed.
28. That application does not arise for consideration
29. The application is declined.

30. Orders

- a. I stay these proceedings and make order that the dispute between the parties be referred for arbitration.
- b. I decline the summons filed by the plaintiff leave to cross examine Prof Toby Wilkinson, Vice Chancellor of the defendant on his affidavits of 6th, 9th and 22nd April,2021
- c. I decline the plaintiff's amended notice of motion filed on 22nd March,2021.
- d. The plaintiff shall pay the defendant costs summarily assessed in a sum of \$ 1500.00 within 15 days of this Ruling.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
JUDGE

20th January,2023