IN THE MAGISTRATES' COURT
AT BA
CIVIL JURISDICTION

Civil Case No. 34 of 2014

BETWEEN: **BINOD PRASAD** trading as **METAL EX ENTERPRISES**

PLAINTIFF

AND: **AMITESH KUMAR**

DEFENDANT

Counsel: Vijay Naidu & Associates for the Plaintiff
Samuel Ram Lawyers for the Defendant

Date of Hearing: 18 June 2020
Date of Judgment: 12 September 2025

JUDGMENT

Introduction

1. On 18 July 2014, a Writ of Summons was filed on behalf of the Plaintiff seeking the following orders:

   i. Judgment in the sum of $11,758.67.

   ii. Damages for Breach of Contract in the sum of $10,000.00.

   iii. Interest on the judgment sum under Law Reform (Miscellaneous Provisions) (Death and Interest) Act, Cap 27.

   iv. Costs on indemnity basis.

   v. Such further or other orders this Honourable Court considers just and equitable in the circumstances.

   vi. Any award to be limited to the jurisdiction of this Honourable Court being $50.000.00.

2. An Amended Statement of Defence was filed on behalf of the Defendant on 10 March 2020 seeking that the Plaintiff's claim be dismissed and costs on an indemnity basis.

3. From the Court records, it is evident that the Plaintiff counsel relied on the Reply to Defence that was initially filed on 8 January 2015.

4. An Affidavit of Evidence in Chief was filed by the Plaintiff on 5 March 2020 and the Defendant filed his Affidavit Evidence in Chief on 10 March 2020.

5. The Hearing for this matter proceeded before Senior Resident Magistrate Mr. Green ('this Court's first predecessor') on 18 June 2020 where the Plaintiff gave evidence. Thereafter, the Defendant and his witness gave evidence. Parties were then given time to file written closing submissions simultaneously.

6. Due to the resignation of the Trial counsel, the law firm representing the Plaintiff sought a copy of the transcripts of the Hearing. Once the same was made available, submissions were filed by the Plaintiff counsel on 15 July 2021 and by the Defendant's counsel on 19 July 2021.

7. After various adjournments due to the COVID pandemic and the resignation of the Court's first predecessor, the matter was called before Resident Magistrate Mr. Qica (as he then was) ('this Court's second predecessor') and parties agreed to this Court's second predecessor to refer to the transcripts and determine the matter.

8. Due to this Court's second predecessor's elevation to the High Court, a Ruling was not delivered in the matter. Parties awaited the commencement of a new Magistrate. Upon the commencement of Resident Magistrate Mr. Waqaivolavola, this Court's third predecessor, the matter was then listed for Judgment on various dates until this Court started presiding and the Court was informed to deliver Judgment in this matter.

9. It is imperative to highlight that section 47 of the Magistrates Court Act 1944 allows a new Magistrate to complete proceedings and/or deliver pleadings in conjunction with the submissions and transcript of notes of the previous Magistrate. The only exception to section 47 of the Act is section 139 of the Criminal Procedure Act 2009 which allows an accused the right to demand the new Magistrate when he/she commences to re-summons and re-hear the witnesses in the matter. Such a right does not exist within the ambits of the Magistrates Courts Act or Magistrates Court Rules for Civil matters. As such, this Court will proceed to deliver the Judgment pending in this matter.

10. Moreover, it became evident to this Court that the Plaintiff had reached his untimely demise as such an application to substitute the Plaintiff with his Executrix and Trustee was made on 4 November 2024. There was no objection by the Defendant's counsel, as such, on 5 November 2024, this Court granted orders to allow the Plaintiff's Executrix and Trustee namely Devi Uttra Wati Prasad to act in substitution of the Plaintiff.

11. Considering the evidence, the pleadings filed as well as the submissions filed by counsel, I now pronounce my Judgment in this matter.

Plaintiff's case

12. The Plaintiff relied on his Affidavit Evidence in Chief filed on 5 March 2020 and his testimony in Court on 18 June 2020. The Plaintiff is the owner and operator of a registered business namely Metal Ex Enterprises which is involved in the buying and selling of scrap metal within Fiji and abroad.

13. On 15 February 2011, the Plaintiff entered into a written contract with the Defendant for the supply of scrap metal to the Plaintiff's business, Metal Ex Enterprises.

14. Within the agreement, the Plaintiff states that he and the Defendant agreed that in the event of a breach of the terms and conditions of the said contract, a penalty of $10,000.00 will result and further legal action may be taken.

15. The Plaintiff further states that he had given a truck with registration number DH 934 to the Defendant solely for the purpose of collecting scrap metal.

16. The Plaintiff then deposed that on 14 May 2011, he and the Defendant entered into a verbal agreement where it was agreed that the Plaintiff would provide the Defendant with cash advances to allow him (the Defendant) to complete the written contract. These cash advances were to be used by the Defendant to purchase scrap metal from various locations and pack 22 tons of scrap metal in a 20 feet container which would then be supplied to the Plaintiff.

17. Between 14 May 2011 and 2 June 2011, on numerous occasions, the Plaintiff had given advances to the Defendant which amounted to $7,300.00 with the Defendant signing an 'Advance Payment Agreement Note' dated 14 May 2011, 17 May 2011, 21 May 2011, 23 May 2011, 24 May 2011, 25 May 2011, 27 May 2011 and 2 June 2011.

18. The Plaintiff then stated that during the cause of the Defendant collecting scrap metal, the Defendant damaged the Plaintiff's truck engine by operating the truck without sufficient engine oil which caused the engine to get damaged. As a consequence of this, the Plaintiff states that the Defendant asked him to pay for the maintenance of the truck and that the Defendant would pay the Plaintiff back. The sum of $4,000.00 was advanced by the Plaintiff to the Defendant for this purpose.

19. Between 22 March 2011 to 21 April 2011, the Defendant paid a total of $1,274.00 towards the $4,000.00 advancement, leaving a balance of $2,726.00. Demands had been made by the Plaintiff to the Defendant to return this outstanding amount and the Defendant agreed to pay $200.00 per week. On 10 January 2011, the Defendant paid the Plaintiff $200.00 in Ba Town.

20. Further, the Plaintiff deposed that the Defendant failed to supply scrap metal to the sum of $7,300.00 to offset the cash advances made by the Plaintiff. Thus, the Defendant has failed and/or neglected to pay the Plaintiff $10,026.00 being the cash advanced for the collection of scrap metal and for the truck repair.

21. Additionally, the Plaintiff deposed that on 31 May 2011, the Defendant obtained 2 bottles of BOC Gas Cylinder under the Plaintiff's account at BOC (Fiji) Limited in the sum of $282.07 without the authority of the Plaintiff.

22. Furthermore, the Plaintiff deposed that on 14 June 2011, the Defendant transported 1x20 foot container from Lautoka to Rakiraki and then on 15 June 2011 from Rakiraki to Lautoka for which the Plaintiff incurred charges for transportation in the sum of $1,401.85 from General Machinery Hire Limited.

23. Moreover, on 6 June 2011, the Plaintiff deposed that he had gone to Rakiraki to photograph the scrap metal collected by the Defendant to allow him to send the same to his overseas clients. Upon reaching the site in Rakiraki, the Plaintiff states that he found a half-wrecked car and inside the car was loads of rocks and stones.

Defendant's case

24. The Defendant relied on his Affidavit Evidence in Chief filed on 10 March 2020 as well as his oral testimony in Court on 18 June 2020. The Defendant states that the Plaintiff had approached him sometime in 2010 to work as a contractor for him. The Plaintiff could give him a truck and the Defendant was to collect scrap metals and that the Plaintiff would pay

the Defendant for the weight of the metal collected. As part of the Agreement, the Defendant was to pay for the fuel of the truck. The Defendant accepted the offer and started to collect and supply scrap metal to the Plaintiff.

25. A separate agreement with the Plaintiff had been made with the Plaintiff with respect to advance payments for the collection of scrap metal given that the Defendant had no capital of his own to buy scrap metal to supply the Plaintiff. As such, the Plaintiff provided the Defendant with the funds as and when he needed them to buy scrap metal.

26. The Defendant states that the Plaintiff would deduct the sum advanced out of each payment made to him for the scrap metal supplied.

27. The Defendant states that in 2011, the Plaintiff had informed him that he was renewing all contracts, and that the Defendant would have to sign a written agreement for the supply of scrap metal. On or about 7 March 2011, the Plaintiff brought the contract which the Defendant read and signed.

28. The Defendant agreed that the contract was for the supply of scrap metal to the Plaintiff, that the Plaintiff would pay the Defendant $330.00 per ton of scrap metal collected, that the Plaintiff was to provide the Defendant with a truck with registration number DY068 which was to be used solely for the purpose of locating and carting metals, that the fuel and maintenance of the truck was to be the Defendant's responsibility and if it was found to not have been done on time, the Plaintiff had the right to stop work and do the servicing at the Defendant's cost. Further, another term was that when the Defendant had collected the scrap metal required, he would handover the container to the Plaintiff and they would check the container, take it and weigh it.

29. The Defendant denies that Plaintiff's claim that he had not provided the Defendant with any scrap metal to offset the advance payments of $7,300.00, that the Defendant had not transported the container from Lautoka to Rakiraki on 14 June 2011 and then back from Rakiraki to Lautoka on 15 June 2011 as the container was not in the Defendant's possession and that the allegation that he had obtained 2 bottles of BOC Gas cylinders under the Plaintff's account at BOC (Fiji) Limited is false.

30. The Defendant's witness, Ihaz Mohammed gave evidence to the effect that in 2010, the Defendant had employed him. He testified that they were given another vehicle by the Plaintiff and that the vehicle was not damaged and in February it was still running and it was never taken for repairs.

Legal Provisions and Analysis

31. The Plaintiff contends that he and the Defendant entered into a written agreement on 15 February 2011 whereas the Defendant contends that he signed the contract on 7 March 2011. It is evident that parties agree that a written agreement was entered into where the following terms were stipulated:

    1. *You (Defendant) will be provided with a truck registration DY068 by MetalEx solely for the use of locating and carting metals for the above company.*
    2. *The fuel and the maintenance eg. Servicing, breakdown of engine will be your responsibility. This is to be done on time and if found not done, MetalEx has a right to stop work and do the servicing first at the cost of the contractor.*

3. *You (Defendant) will be provided with a container by MetalEx and you (Defendant) have to purchase and fill the container with scrap metal. The container will be picked by MetalEx and it will be weighed at Tropik Wood Weigh Bridge. Only the total wight of scrap metal will be paid to you (Defendant). (The total gross weight less truck and container weight). The weight of container should be approximately 22 tons.*
4. *You (Defendant) will be paid $330.00 (Fijian) per ton of scrap metal.*
5. *You (Defendant) have to report on daily basis to MetalEx.*
6. *Any fines or surcharges on the vehicle should be paid by you (including parking meter pr speeding fines).*
7. *The company MetalEx will renew the wheel tax and third party policy.*
8. *You (Defendant) are to locate HMS1&2 metal stock and inform us (Plaintiff) for pricing of the same.*
9. *You (Defendant) will be allowed to use all equipment and machinery provided by MetalEx with extreme care and responsibility. You will be responsible for any loss of machinery and equipment.*
10. *The equipment and machinery will remain the property of MetalEx.*
11. *You (Defendant) are required to provide a minimum of 15mT's of HMS1&2 on weekly basis.*
12. *You (Defendant) are not to buy stolen materials.*

Breach of this terms and condition will result in initial penalty of F$10,000.00 and further legal action may also be taken.

32. Beyond the written agreement, the Plaintiff and the Defendant entered into a further agreement albeit verbal that the Plaintiff would provide the Defendant with cash advances to allow the Defendant to complete the terms and conditions of the written agreement.

33. It is the Plaintiff's contention that $7,300.00 is the outstanding amount of the cash advanced to the Defendant. The Plaintiff relies on an Advanced Cash Payment Note in 'Annexure BP 2' as well as the 'Advanced Payment Agreement Notes' in 'Annexures BP 3 – 10' in his Affidavit.

34. The Defendant, on the other hand, contends that any cash advances made to him by the Plaintiff have been paid and that this is evident from the Plaintiff's own documents in 'Annexures BP 3 – 10' which the Defendant's counsel is saying are Acknowledgment slips for the respective cash advance payments.

35. Looking at the Advanced Cash Payment Note in 'Annexure BP 2', it has the following entries listed:

    i. *14/5/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $1,500.00*
    ii. *17/5/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $1,200.00*
    iii. *21/5/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $1,000.00*
    iv. *23/5/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $500.00*
    v. *24/5/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $500.00*
    vi. *25/5/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $1,300.00*
    vii. *27/5/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $1,000.00*
    viii. *2/6/11 Gave Amitesh Cash Advance to fill cont. up to 22 ton $300.00*

36. Alongside each entry is a signature. Turning to the documents in 'Annexures BP 3 – 10', each of the 'Advanced Payment Agreement Notes' has the same dates as stated in the Advanced

Cash Payment Note in 'Annexure BP 2' and on each date in the 'Advanced Payment Agreement Notes' is the corresponding amount as stated in the Advanced Cash Payment Note'.

37. The Plaintiff in his Affidavit did not explain whose signature appeared alongside each entry in the Advanced Cash Payment Note in 'Annexure BP 2'. He, however, explained in his Affidavit that the Defendant signed each of the 'Advanced Payment Agreement Notes' in 'Annexures BP 3-10'.

38. As the Plaintiff failed to explain whose signature appeared alongside each note in the Advanced Cash Payment Note or provide any further evidence or explanations regarding the same, the Court is unable to infer that the signature was the Defendant's.

39. Regarding each of the 'Advanced Payment Agreement Notes', it is observed that it is with respect to the Defendant supplying the business MetalEx with scrap metal. The Court observes that there is a handwritten notation on each 'Advanced Payment Agreement Note' stating 'Gave cash advance to buy scrap and fill cont. up to 22 ton'. However, it was not explained by the Plaintiff why he had made such notations on a document which is evidently used to confirm the supply of scrap metal.

40. Moreover, the Plaintiff failed to provide any further documentation as proof that he had given the Defendant various sums of money as noted in the Advanced Cash Payment Note as a cash advance. There were no receipts or bank statements or financial records to show the outflow of the money from the Plaintiff to the Defendant.

41. Additionally, the Plaintiff did not address in evidence if he had been deducting any cash advances to the Defendant from each payment made to the Defendant when he supplied scrap metal.

42. Thus, the mere assertions of the Plaintiff with no further documentation or explanations are not sufficient to allow this Court to order the Defendant to pay the sum of $7,3000.00.

43. Now considering the penalty clause in the written agreement, the Plaintiff contends in his evidence that the Defendant breached the agreement by not supplying them on time. Even in cross examination, the Plaintiff agreed that the penalty clause would be applicable if the Defendant had broken the headlight of the vehicle given to him.

44. The Plaintiff's counsel submits that the penalty clause is enforceable in law given the Defendant's admission in cross examination that he had fraudulently breached the contract and that he was liable under the penalty clause.

45. It is the Defendant's counsel's contention that the penalty clause is unenforceable due to the breach being for trifling damages.

46. Thus, the Court needs to determine whether the penalty clause in the written agreement is enforceable and whether the Defendant is liable for damages in the sum of $10,000.00 as stipulated in the written agreement.

47. Her Ladyship Justice Wati in ***Wellsford Ltd (trading as Fuji Xerox Business Centre Fiji) v Sharma;*** *Case Number: ERCC 10 of 2013 (22 November 2021)* discussed liquated damages and penalty clauses and how to determine the same. She stated:

69. *The terms of the bond clause will determine its enforceability. When is the provision a penalty according to the law?* ***The law governing the enforceability of penalty clauses is stated in the 1915 House of Lords decision in Dunlop Pneumatic Tyre Company v. New Garage and Motor company [1914] UKHL 1; (1915) AC 79.***

70. ***Even though this decision is more than a century old, it remains good law. This law is also followed in Singapore and was adopted in a recent Singapore case of Xia Zhengyan v. Geng Changqing [2015] 2 SLR 731. The decision stated that when the contract provides for liquidated damages to be paid in the event of a breach, it will be enforceable if the amount of damages is a genuine pre-estimate of the loss flowing from the breach (early termination) of the contract.***

71. ***The Court further stated: If the obligation or damages sought is extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed from the breach, the provision is a penalty clause and thus unenforceable.***

73. ***I will determine the issue in reference to the Dunlop test. I need to ask two questions. The first is whether the sum of $25,000 is a genuine pre-estimate of the loss flowing from the breach (early termination) of the contract and the second is whether the sum of $25,000 extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed from the breach.***

(my emphasis)

48. Thus, a penalty clause is not enforceable in law especially when it is proven that it is not a genuine pre-estimate of the loss flowing from the breach and that the amount is extravagant and unconscious in comparison with the loss that could conceivably be proved to have followed from the breach.

49. In the case of ***Raj v Prasad;*** *Civil Action No. HBC 280 of 2005 (29 August 2008)* Master Udit differentiated between liquidated damages and penalty and when discussing how to differentiate the two, he stated:

> *[42] The judgment in Commission of Public Works –v- Hills was delivered by Lord Dunedin. Later* ***Lord Dunedin considered this issue again in Dunlop Pneumatic Tyre Company -v- New Garage and Motor Company Ltd. [1914] UKHL 1; [1915] AC 79 at 86f. His Lordship offered a very helpful guide to differentiate between a payment for breach stipulated as 'in terrorem' thus a penalty and a "genuine covenanted pre-estimate of the damages". The question was one of construction of a particular contract. It is to be construed at the time of its making and not the time of breach of contract.*** *His Lordship said:-*
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> > *a.* ***It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach...***
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> > *b.* ***It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid...*** *This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but court never recover further damages for non-timous payment, or whether it was a survival of the time*

when equity reformed unconscionable bargains merely because they were unconscionable...is probably more interesting than material.

*c. **There is a presumption (but no more) that is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage'.***

d. It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost impossible. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties..."

*[43] **Normally parties do describe at the time of the making of a contract as to what constitutes liquidated damages or for that matter a penalty. The express statement in the agreement is not conclusive. At the end the Court must still decide whether the sum fixed was a genuine forecast of the possible losses thus liquidated damages; Turner -v- Superannuation and Mutual Savings Ltd [1987] 1NZLR 218 at 223. Further the onus of showing a certain sum of money being paid as liquidated damages and not penalty rests on the receiving party; Law v Redditch Local Board [1891] UKLawRpKQB 219; [1892] 1 QB 127 at 132. Ram Binod -v- see head note and page 227.***

50. Considering the case herein, the Plaintiff's contention that just because the Defendant had agreed in cross examination that he had fraudulently breached the contract and that he was liable under the penalty clause is incorrect. The Court is required to look at the construction of the contract at the time of it being made and not at the time of the breach of the contract (vide ***Raj*** [supra]).

51. Turning to the two-step process as highlighted in ***Wellsford Ltd*** [supra], the first step being whether the sum of $10,000.00 is a genuine pre-estimate of the loss flowing from the breach. There was no evidence from the Plaintiff on how the sum of $10,000.00 was reached when the written agreement was contemplated. There was also no evidence why the sum of $10,000.00 was chosen. The Court is unable to ascertain whether the sum of $10,000.00 was a genuine pre-estimate of any loss flowing from the breach of the written agreement.

52. The second step is whether the sum of $10,000.00 is extravagant and unconscionable in comparison with the loss that could conceivably be proved to have followed. As stated by Her Ladyship Justice Wati in ***Wellsford Ltd*** [supra], the Court needs to have regard to what the sum represents.

53. There was no evidence offered by the Plaintiff as to what the $10,000.00 represented. There was no evidence presented by the Plaintiff to show that the loss that followed the breach would have been within the range of $10,000.00 as stated within the written agreement between the Plaintiff and the Defendant. Thus, the Court finds that the sum of $10,000.00 is extravagant and unconscionable.

54. Consequently, the Court finds that the clause in the agreement relating to the payment of $10,000.00 is unenforceable and therefore cannot find the Defendant liable for the sum of $10,000.00 as stipulated in the written agreement.

55. The next issue in contention is whether the Defendant is liable to pay the Plaintiff the remainder amount of $2,726.00 being outstanding repayment for repairs to vehicle registration No. DH934.

56. The Plaintiff in his evidence in Court stated that he paid $4,000.00 as repairs to the vehicle, however, he acknowledged that there was no evidence of the receipts as he was not provided with receipts.

57. However, the Plaintiff relies on a payment note which was annexed to his Affidavit as 'Annexure BP 11'. This shows that the Defendant made the following repayments:

    i. *28 February 2011 - $350.00*
    ii. *26 March 2011 - $357.00*
    iii. *14 April 2011 - $335.00*
    iv. *21 April 2011 - $232.00*

58. The payment note has the signature of the Plaintiff as the person receiving the money and the Defendant as the person who has paid money with deductions being made from the $4,000.00 after each repayment. After the last repayment of $232.00 on 21 April 2011, the amount of $2,726.00 is outstanding and this is the amount that the Plaintiff is seeking.

59. The Plaintiff during cross examination admitted that whilst he paid $4,000.00 to repair the vehicle, he did not have any evidence to show that he had paid this amount. He stated that no receipts were given to him and that he had forgotten to ask for the same.

60. The Defendant during cross examination denied damaging the vehicle and maintained that he had been forced to pay and that the Plaintiff was cutting money from the profit.

61. Counsel for the Defendant submitted that the Defendant had been under duress when he agreed to pay for the repairs and that the agreement to pay the $4,000.00 was entered into under economic duress.

62. In the case of ***Gilmour v Kubs*** *[2007] FJLawRp 48; [2007] FLR 47 (30 January 2007)* His Lordship Justice Jitoko discussed what economic duress was. He stated:

> *At common law* ***duress is based on the principle that a transaction to which consent had been obtained by unacceptable means should not be allowed to stand****. Whereas the early concept of* ***duress*** *was restricted to actual or threatened physical violence to the other party, it* ***now extends to the question of whether the effect of the threat is to coerce the other into agreeing and in effect negates the element of consent****. As stated by the Privy Council in Pao On v Lau Yiu Long [1980] AC 614 at 635; [1979] 3 All ER 65 at 78; [1979] 3 WLR 435 (Pao On):*
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> > *Duress whatever form it take, is a coercion of the will so as to vitiate consent.*
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> *Economic duress which the law now recognises as a category of duress, deals with commercial pressure that is brought to bear on one of the parties, to such an extent that he was effectively deprived of his freedom to exercise his own will. On this the law lords in Pao On case added at AC 635; All ER 78: ...*
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> > *... Their Lordships agree with the observation of Kerr J in Occidental Worldwide Investment Corporation v Skibs A/S Avanti [1976] 1 Lloyds Rep 293 at 336 that in a contractual situation commercial pressure is not enough.* ***There must be present***

> ***some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent".*** *This conception is in line with what was said in this Board's decision in Barton v Armstrong [1976] AC 104 at 121; [1975] 2 All ER 465 at 476; [1973] 2 NSWLR 598 at 634; (1973) 3 ALR 355 at 368 BY Lord Wilberforce and Lord Simon of Glaisdale — observations with which the majority judgment appears to be in agreement.* ***In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in Maskell v Horner [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not.***

63. Thus, for there to be economic duress, there needs to be present some factor of coercion that impairs the person's consent such as whether the person who was coerced protested, whether the person had an alternate course for an adequate legal remedy at the time the person was coerced, whether the person was independently advised and whether the person took any steps to avoid the contract after entering it.

64. In ***Gilmour*** [supra], the Court found that the Defendant's conduct of accepting the money paid for their shares, the spending of the monies and the failure to protest after the contract was concluded, had in fact and in law, affirmed the contract.

65. In the case herein, the Defendant merely stated that he had been forced to pay the Plaintiff as the Plaintiff had been cutting money from the profit. However, it was during cross examination of the Plaintiff who agreed that the Defendant had refused to pay the costs and that he informed the Defendant that he would cancel his contract.

66. Whilst there was an admission by the Plaintiff that he had informed the Defendant that he could cancel his contract, there was no arguable evidence to support the Defendant's claim for economic duress. There was no evidence that the Defendant took steps to protect himself from this agreement that he claimed he was forced into and there was no evidence that he had taken steps to avoid the contract he had claimed he had been forced into.

67. Whilst the Court finds that there was no economic duress, the Court needs to ascertain whether the Plaintiff is entitled to the remaining amount of $2,726.00. By virtue of the Plaintiff's own admission, he did not have any receipts to confirm that he had in actual fact paid $4,000.00 to repair the vehicle that he had taken from the Defendant to repair.

68. In absence of any documentation to prove that the Plaintiff paid the amount of $4,000.00, the Court is unable to find that the Defendant ought to pay the remaining amount of $2,726.00. It cannot be argued that as the Defendant had been paying the Plaintiff then he ought to be liable for this amount. Mere assertions are not enough. A plaintiff in any matter is always required to prove his/her claim against a defendant and does so with relevant documentation.

69. The final issue is whether the Defendant is liable to pay $282.07 for the 2 bottles of BOC Gas Cylinder that was acquired under the Plaintiff's account with BOC (Fiji) Limited and $1,401.85 for hiring transportation from General Machinery Hire Limited.

70. The Plaintiff in his Affidavit relies on the Statement of Account from BOC (Fiji) Limited in 'Annexure BP 12' and Invoices from General Machinery Hire in 'Annexure BP 12' and 'Annexure BP 13'.

71. Aside from the Statement of Account tendered by the Plaintiff, there is no other evidence to suggest definitively that it was the Defendant who had bought the 2 bottles of BOC Gas Cylinder from BOC (Fiji) Limited which came to the total of $282.07.

72. Further, aside from the invoices tendered, there is no other evidence to suggest that it was the Defendant who had hired transportation from General Machinery Hire Limited to the total cost of $1,401.85.

73. In absence of such evidence, the Court is unable to find that the Defendant ought to be liable for the payment of $282.07 for the 2 bottles of BOC Gas Cylinder from BOC (Fiji) Limited and $1,401.85 for the hired transportation from General Machinery Hire Limited.

Determination

74. The Plaintiff's Statement of Claim is struck out and dismissed.

75. Parties to bear their own costs.

76. Any party aggrieved with this decision has a right to appeal to the High Court.

N. Mishra
Resident Magistrate