

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action. 157 of 2009

BETWEEN : **FLOUR MILLS OF FIJI LIMITED**, a company incorporated in Fiji
having its registered office at Leonidas Street, Walu Bay, Suva.

PLAINTIFF

AND : **DAYALS (FIJI) ARTESIAN WATERS LIMITED**, a limited liability
company having its registered office at 1 Kings Road, Yalalevu, Ba.

DEFENDANT

COUNSEL : **Mr H Nagin** for the **Plaintiff**
Mr A Sudhakar for the **Defendant**

DATE OF JUDGMENT: 28th March, 2014

INTERLOCUTORY JUDGMENT

(Discharge of Mareva Injunction Orders)

1. Ex-parte Notice of Motion for a Mareva Injunction was filed by the Plaintiff on 1st October 2013 and sought the following orders supported by the Affidavit of Ramcharan Shivanand Bajekal and sought the following orders:

(1) That the Defendant by itself and/or through its servants and/or agents or howsoever be restrained from transferring, selling, charging, mortgaging, disposing or in any manner whatsoever dealing with any of its real

properties, equipment, machinery or any other property of whatsoever nature over which it has ownership or control within the jurisdiction of this court;

(2) That the Defendant do forthwith disclose within seven days after the service of the order on them and serve on the Plaintiff's Solicitors an affidavit disclosing the full value of all and each of its assets within the jurisdiction of this court identifying with full particularity the nature and whereabouts of all such assets and whether the same are held in its own name or jointly or by nominees or companies on its behalf and in particular specifying:-

(a) The identify of all bank, financial institution or other accounts held in its name either jointly or by nominees on its behalf and the balance of each of such accounts and the name and addresses of the branch at which it is held;

(b) Any other assets, money or goods owned by the company and the whereabouts of the same and the names and addresses of all persons having possession, custody or control of such assets, moneys or goods at the date of service of this order.

(3) Further or other relief(s);

(4) Cost of this application.

2. The matter was taken up for hearing Ex-parte on 11/10/2013 and Interlocutory Judgment was granted by this court on 14th October 2013 and made the following Orders:

- (i) *Order sought under paragraph 1 of the Ex-parte Notice of Motion dated 1st October 2013 is granted and in force until 1st November, 2013;*
- (ii) *Order sought under paragraph 2 of the Notice of Motion is granted and varied as follows:*

2. That the Defendant forthwith disclose **within 21 days** after the service of the order on them and serve on the Plaintiff's Solicitors an affidavit disclosing the full value of all and each of its assets within the jurisdiction of this Court identifying with full particularity the nature and whereabouts of all such assets and whether the same are held in its own name or jointly or by nominees or companies on its behalf and particular specifying:

(a) *The identity of all bank, financial institution or other accounts held in its name either jointly or by nominees on its behalf and the balance of each of such accounts and the name and addresses of the branch at which it is held;*

(b) *Any other assets, money or goods owned by the company and the whereabouts of the same and the names and addresses of all persons having possession, custody or control of such assets, moneys or goods at the date of service of this order.*

- (iii) *The above orders shall be operative subject to the deposit of \$10,000.00 as security for costs with the Chief Registrar of this court by the Plaintiff.*

3. Order was sealed by the Acting Chief Registrar on 16th October 2013 and Affidavit of Service was filed by Mohammed Kazim Yasin on 23rd October 2013.
4. When the matter came up before this court on 1st November 2013, Mr Prasad N appeared for the Defendants on instructions of Krishna and Company Solicitors and both parties jointly tendered consent orders which were recorded.
5. On 31st October 2013, the Defendant filed summons for dissolving Injunction Orders and summons to set aside Orders made by the Master on 28th July 2011. Summons was supported by the Affidavit dated 30/10/2013 sworn by Jay Prakash Dayal, Director of the Defendant Company.
6. When the matter was taken up before this court on 13th October 2013, it was informed there were negotiations between the parties to settle the issues and sought time until 13th December 2013. Accordingly, matter was fixed for 13th December 2013.
7. On 13th December 2013 in absence of a settlement, the Defendant's counsel made an application to fix the matter for hearing and the hearing was fixed for 3rd February 2014.
8. When the matter was taken up for hearing on 3rd February 2014, both parties filed their submissions and made their oral submissions.
9. At the outset, both counsel agreed to argue the summons filed for dissolving the injunctions on 31st of October 2013. The Defendant's counsel stated he does not intend to file an Affidavit in oppose to the Plaintiff's Affidavit in Support. However, the Defendant had filed an Affidavit in Support of the summons to set-a-side the orders on 31st October 2013.

The Defendant's submissions

10. The Defendant's counsel submitted that unless the injunction is dissolved, there will be irreparable loss and damage since the proposed sale cannot be proceeded. Further, it was submitted the Plaintiff had not disclosed all material facts to the court and cited **4 Wheel**

Drive Sales Limited v. Land Transport Authority (unreported) HBC 107 of 2003L (decided on 15th June 2004) Burns J. in paragraph 26 and 27 states:

“26. I now consider the law and the submissions received from the parties and begin with the fundamental principle governing ex-parte applications namely that the party applying must be completely frank with the court and state all relevant facts; favourable and unfavourable known to it when seeking assistance.....” (emphasis mine)

*“27. In **Rex v. Kensington Tax Commissioners Ex-parte Princess Edmond De Polignac** (1917) 1KB 486 at p. 514 Lord Justice Scrutton said:*

.....and it has been for many years the rule for the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex-parte statement he should make a full and fair disclosure of all material facts – facts not law. He must not mistake the law if he can help it – the court supposed to know the law.”

11. The Defendant’s counsel disputed the amounts claimed in the Affidavit in support of the Plaintiff filed on 1st October 2013. It is important to consider the chronological events in this matter:

(1) Writ of Summons and Statement of Claim was filed on 11th June 2009 and claimed:

(i) *A Declaration that the Defendant has breached the Contract dated 15th June 2007;*

(ii) *Judgment in the sum of \$77,853 VIR being balance advance refund;*

(iii) *Judgment in the sum of \$105,666.07 VEP being full refund of VTY 500 ml and 1.5 litre mould;*

- (iv) *Judgment in the sum of \$222,166.67 VEP for the manna moulds;*
- (v) *An order that the Defendant forthwith return the labeling machine valued at \$257,777.78 in good condition;*
- (vi) *An order that the Defendant forthwith return the labels valued at \$18,433.99 plus VAT;*
- (vii) *An order that the Defendant forthwith return or replace 1038 carton or pay to the Plaintiff \$9,217 plus VAT;*
- (viii) *Damages for all other consequential loss of profit;*
- (ix) *Damages for loss of use of the labeling machine due to its deteriorating state;*
- (x) *General and special damages for breach of contract;*
- (xi) *Exemplary and Punitive damages;*
- (xii) *Interest;*
- (xiii) *Post Judgment Interest;*
- (xiv) *Costs on indemnity basis;*
- (xv) *Any other relief this Honourable Court deems just.*

- (2) The amended Statement of Claim was filed on 15th January 2010, the Plaintiff had removed certain machineries from the Defendant and as a result the prayer was amended by removing and amending certain reliefs claimed in the Statement of Claim.

The following reliefs were removed from the prayer:

- (i) *judgment in a sum of \$105,666.67 of VTY 500ml and 1.5 litre moulds;*

- (ii) *an order that the Defendant forthwith return the labeling machine valued at \$257,777.78 in good condition;*
- (iii) *an order that the Defendant forthwith return VTY labels valued at \$18,433.99.*

As stated in paragraph 26 of the amended Statement of Claim the following machinery were removed from the Defendants premises:

- (a) *labeling machine with VTY labels;*
- (b) *VTY and mauva mould assembly.*

The Statement of Defence and Counter Claim was filed by the Defendant on 12th July 2010 and admitted the paragraph 25 of the Statement of Claim.

12. I find that the Affidavit sworn by Ramcharan Shivanand Bajekal of the Plaintiff had divulged only the Settlement Agreement entered with the Defendant which was annexed to the Affidavit marked “B”. I specifically refers to paragraph 7 of the Affidavit which states:

“7. WHILST proceedings are still on foot in this Honourable Court, the Defendant is now selling away all his assets and equipment. I verily believe that the Defendant intends to dispose of its assets and the sale proceeds in such a manner that the Plaintiff will be deprived of the Fruits of Judgment.”

13. This court finds that suppressing fact that the Plaintiff partially fulfilled his obligations under the Settlement Agreement, the Plaintiff had made believe this court that the total claim is outstanding, which resulted in granting the Ex-parte Injunction. I find that the Plaintiff deliberately failed to divulge that the Plaintiff removed certain reliefs stated in the Statement of Claim filed with the Writ of Summons on 11th June 2009 on recovery of the machinery.

14. It was the duty of the Defendant to make full and frank disclosure of all material facts to the court; including disclosures of possible defenses known to the Plaintiff. In this matter, I find that by failing to make frank disclosures as stated, the Plaintiff had misled the court to obtain Ex-parte Mareva Injunction.
15. As stated in preceding paragraph 11 in the Statement of Claim filed on 11th June 2009, the total monetary claim (*apart from the other reliefs*) amounted to \$691,095.55.
16. In the Affidavit dated 1st October 2013, sworn by Ramcharan Shivanand Bajekal of the Plaintiff Company failed to divulge the credit given to the machinery possessed from the Defendant and no proper Statement of Accounts was tendered. The Deed of Settlement dated 29/10/2009 marked “B” annexed to Bajekal’s Affidavit I quote Clause (C) which states:

“C. The parties entered into negotiations have agreed to settle part of the proceedings with regard to the return of the assets.”

If the Plaintiff relies on the Deed of Settlement, the Plaintiff must have given credit to the value of the assets returned and it is evident that the Plaintiff did not divulge the information in his possession in his Affidavit and I conclude the Plaintiff is guilty for non disclosure of the material facts. In this regard, I cite the following cases in support of my conclusion.

17. It was stated in case of ***Grant Matich & Co. Pty Ltd v. Toyo Menka Kaisha Ltd*** [1978] 3 ACLR 375. If the Plaintiff had not shown appropriate degree of candor, and has omitted evidence that has bearing on the application, an injunction granted exparte will be dissolved.
18. I also cite Ralph Gibson LJ in the case of ***Brink’s MAT Ltd v. Elcombe*** (1988) 1 WLR 1350 at 1356 sets out the principles of relevant non disclosure and the consequences of such failure in support of my findings:

“In considering whether there has been relevant non disclosure and what consequences the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

- 1) The duty of the applicant is to make “a full and fair disclosure of all the material facts:” see ***Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac*** (1917) 1 K.B. 486, 514 per Scrutton L.J.
- 2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisors: see ***Rex v. Kensington Income Tax Commissioners***, per Lord Cozens-Hardy M.R., at p. 504, citing ***Dalgish v. Jarvie*** (1980) 2 Mac. & G. 231 and Browne-Wilkinson J. in ***Thermax Ltd v. Schott Industrial Glass Ltd*** (1981) F.S.R. 289, 295.
- 3) The applicant must make proper inquiries before making the application: see ***Bank Mellat v. Nikpour*** (1985) F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional as facts which he would have known if he had made such inquiries.
- 4) The extend of the inquiries which will held to be held to be proper, and therefore necessary, must depend on all the

circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant; see for example, the examination by Scott J. of the possible effect of an Anton Piller order in ***Columbia Picture Industries Inc. v. Robinson*** (1987) Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries see per Slade L.J. in ***Bank Mellat v. Nikpour*** (1985) F.S.R. 87, 92-93.

- 5) If material non-disclosure is established the court will be “astute to ensure that a plaintiff who obtains (an *ex parte* injunction) without full disclosureis deprived of any advantage he may have derived by that breach of duty.” ‘se per Donaldson L.J. in ***Bank Mellat v. Nikpour*** at p. 91, citing Warrington L.J. in the ***Kensington Income Tax Commissioner***’ case (1917) 1 K.B. 486, 509.
- 6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

7) “When the whole of the facts, including that of the original non-disclosure, are before (the court, it) may well grant a second injunction if the original non-disclosure was innocent and if an injunction could be granted even had the facts been disclosed:” per Glidewell L.J. in *Lloyds Bowmaker Ltd v. Britannia Arrow Holding Plc.*, ante. Pp. 1343H – 1344A”.

19. I also observe that the Judgment was entered by the Master D. Amaratunga on 28th of July 2011 and the Plaintiff had not made any application to for over 3 years to execute the judgment. They were well aware of the assets of the Plaintiff. They have made an application for Mareva Injunction only on 1st October 2013. No reasoning given in the Affidavit with regard to delay in taking steps for non execution. Further during the said period, the Plaintiff had not made any application to ascertain the damages caused until the Ex-parte application for injunction was made and stated that the anticipated damages to the Plaintiff could be assessed in excess of \$750,000.00. This averment is made without any basis and the Plaintiff had ample time to make an application to assess the damages. The Plaintiff had not given any reason or substantiated his inaction of not making an application for assessment of damages. As such the Plaintiffs conduct is dubious and questionable and I conclude the Plaintiff had failed to divulge material disclosures.
20. Having made my conclusions, I make the following **Orders**:

- (a) *The Injunction Orders made on 14th October 2013 and varied Orders made on 1st November 2013 are dissolved;*
- (b) *The Plaintiff is ordered to pay summarily assessed cost of \$2,500.00 to the Defendant within 14 days from this Judgment.*

Delivered at Suva this 28th Day of March, 2014.



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C. KOTIGALAGE
JUDGE