

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL CASE NO.: HBC NO.: 71 OF 2013

BETWEEN : FRINCOS HIRE (FIJI) LIMITED a limited liability company
having its registered office at Lot 26 Wainibuku Subdivision,
Nakasi, Nasinu, Fiji Islands.

PLAINTIFF

AND : HERBERT CONSTRUCTION (FIJI) LIMITED a limited liability
company duly incorporated in Fiji Islands, currently in
receivership under the Official Receiver of Fiji.

DEFENDANT

Appearances:

Mr S. Nand for the Plaintiff

Ms. Laisani Tabuakuro for the Defendant

J U D G M E N T

Introduction

1. By Originating Summons dated 01st May, 2013 the Plaintiff is seeking following declarations and Orders from this Court.
 - (a) A MANDATORY ORDER ordering the Defendant to give/release to the Plaintiff from the Defendant's site at Momi the following items:
 - (i) Flat Jacks;
 - (ii) Double Couples;
 - (iii) Join Pins;
 - (iv) Swivel Pins;
 - (v) Tubes;
 - (vi) Props;

- (vii) A-frame Structures;
 - (viii) Planks
- (b) A PERMANENT INJUNCTION retraining the Defendant either by itself, its agents, its servants, its receivers from disposing of the items mentioned above either by means of an auction or any means whatsoever.
- (c) ANY other order that this Court deems just and appropriate including costs.
2. The application is supported by the Affidavit of Laitia Matalomani (General Operations Manager of the Plaintiff's Company) sworn on 29th April, 2013.
3. Mr Sanaila Nukutaumaki, the Deputy Officer Receiver, Western, filed Affidavit sworn on 17th June, 2012.

The Hearing

4. When the matter was taken up for hearing on 29th September, 2014 the Court was informed by Ms. Tabuakuro who appeared as a friend of Court that temporary stay of the receiving order had been granted and the Official Receiver could no longer represent the Defendant. The matter was adjourned accordingly and Messrs KLaw Chamber and Partners filed a Notice of Change of Solicitors and put themselves on record as the Defendants Counsel. Costs of the wasted hearing was reserved in favour of the Plaintiff.
5. When this matter was finally taken up for hearing on 31st March, 2015 Plaintiff's Counsel made Oral Submissions and later filed Written Submissions with leave of the Court. The Defendant's Counsel made Oral Submissions on behalf of the Defendant.

The Facts

6. The Plaintiff's General Operations Manager in his Affidavit filed in support of the Originating Summons deposed inter-alia the following facts:
- (i) Sometimes in March 2013 the Plaintiff Nadi Manager Sada Reddy called him and informed him that he had become aware that some of the Plaintiffs properties were found in the custody of one Anil who had been previously employed by the Plaintiff as a driver. Upon learning that he instructed the said Sada Reddy to lodge a complaint about this

with Nadi Police. He is advised and verily believe that Sada Reddy did so on 27th March, 2013.

- (ii) On or about 27th March, 2013 the Nadi Police confiscated the material found in Anil's residence. On the same day while he was at the Nadi Police Station, Anil and one Anthony Herbert came to the Police Station. He believes that the Police interviewed Anil and took down Anthony Herbert's Statement.
- (iii) The following day 28th March, 2013, he along with a Police Officer and two of the Plaintiff's employees went to the Herbert Construction site at Momi.
- (iv) When they reached the said site, two security guards stopped them and informed them as the Defendant is in receivership no one is to enter without the Official Receiver's permission. When the Police Officer showed the Search Warrant the security guards allowed them to enter the site and view materials kept in a container at the site. The Plaintiff's employees then identified the items which belonged to the Plaintiff.
- (v) After the site visit he followed up with the Nadi Police several times about when the Plaintiff could take the possession of its materials and he was informed each time that the Police were waiting for a response from the Official Receiver's Office.
- (vi) At a meeting held on 16th April, 2013 he explained to the Official Receiver's employees as to why he was there and also that they could identify the material as theirs as the material was distinctive from the material belonging to other companies. He also had copies of documentation from the Suppliers of the materials.
- (vii) After that the employees of the Official Receiver and Anthony Herbert had a private meeting to which neither he nor the other persons present there were privy.
- (viii) After the said meeting he was informed by the Deputy Official Receiver, Mr Sanaila, that the Plaintiff would need an Order from the Court for them to release the Plaintiff's items to the Plaintiff. He was further informed that the Official Receiver's Office could not release the items to the Plaintiff as the case with Herbert Construction was still pending in the High Court at Lautoka.

- (ix) He then inquired from the High Court Registry of Lautoka and was informed that the Stay against Winding Up of the Plaintiff had been refused in case HBF 009 of 2010 and the Winding Up Order against the Defendant had been made and the matter in the High Court was at end.
- (x) He subsequently caused a letter to be written to the Official Receiver's Office by the Plaintiff's Solicitors. (annexure LM1).
- (xi) The Official Receiver 's Office responded to the said letter dated 26th April, 2013 (annexure LM2).
- (xii) That he is annexing marked LM 3 Bundles of copies of Documents relating to supply of goods by Advance-Isp-(India) Limited. Bundle of Document marked LM4 including pro-forma invoices, letter of credit, various correspondences between the Plaintiff and the Plaintiff's suppliers, Bundle of document marked LM5 relating to shipments, customs clearance of materials supplied to the Plaintiff by the Plaintiff's overseas suppliers.

7. The Deputy Official Receiver, Sanaila Nukutaumaki in his Affidavit states inter-alia the following facts:

- (i) That a Winding Up Order was issued against the Defendant by the High Court of Lautoka on the 27th September, 2012 and the Official Receiver was appointed to be its Provisional Liquidator.
- (ii) That on 5th April, 2013 two staff from the Office of the Official Receiver went to execute the Winding Up Order at the said address as appear in the Order.
- (iii) That there was no Official Receiver security present on the 28th of March, 2013 at the site as alleged by the Plaintiff as the Official Receiver had not taken over the Defendant's Company at the relevant time.
- (iv) That there was no meeting arranged with the Plaintiff's Staff, but the normal meeting between the Deputy Official Receiver West and Directors of the Defendant was scheduled on the same date and the Plaintiff was told to be on the site for their advice.
- (v) After their meeting with the Director of the Defendant they saw the Plaintiff's Staff waiting and advised them to seek Order from Court if there was a need to remove any item from the yard.

- (vi) That the Plaintiff will need to show proof of ownership before any item can be removed from the yard.

Analysis and Determination

8. The Plaintiff in this action claims against the Defendant a mandatory order ordering the Defendant to give/release to the Plaintiff from the Defendant's site at Momi the items mentioned in the Originating Summons. The Plaintiff's Counsel submitted that the ownership of property that the Plaintiff seeks to be returned by the Defendant is not contested therefore the Defendant has no colour or right to keep the said property in its possessions.

The Plaintiff in its written submission state that the Defendant had to have known the Plaintiff's property did not belong to the Defendant yet they have resisted returning the same. It is also contended by the Plaintiff that there is no proper Affidavit in Opposition and the Plaintiff's claim to ownership has not been disputed and therefore the Plaintiff is entitled to the Orders it is seeking.

9. It is evident from the Affidavit filed by the Plaintiff that the items it is claiming from the Defendant are not items supplied to the Defendant by the Plaintiff. What the Affidavit evidence reveal is that:
- (i) Some items belonging to the Plaintiff was found in the custody of its former employee Anil.
 - (ii) The Plaintiff's Nadi Manager lodged a complaint about this with the Nadi Police Station.
 - (iii) The Police seized the items found at Anil's residence and interviewed him and recorded statements from one Herbert who is a Director of the Defendant's Company on 27th March, 2013.
 - (iv) On 28th March, 2013 the Defendant's construction site was searched with a search warrant obtained by Police and further items belonging to the Plaintiff was discovered.
10. It is also relevant to note the contents of paragraph 1 of the letter written by the Plaintiff's Solicitors to the Official Receiver marked as annexure "LM1".

It states:

"We act on instructions of Frincos Hire and we are instructed that our Clients properties ("Properties") namely:

1. Flat Jacks
2. Double Couples
3. Join Pins
4. Swivel Pins
5. Tubes
6. Props
7. A-frame Structures
8. Planks

have been located at Herbert Construction site at Momi. Our Clients properties had been missing from their yard from the year 2007 and the Police are still investigating this incident. During the Police investigation it has come to light that our Clients properties were found at Herbert Construction site and that Herbert Construction has pending Winding Up Action number 009/10 with your office."

11. It is clearly established by the aforesaid evidence that the items the Plaintiff is claiming from the Defendants Yard are stolen or taken away without authority from the Plaintiff by a former employee of the Plaintiff or some other person. As such I am of the view that the items the Plaintiff is claiming from the Defendant cannot be claimed through Originating process in a Civil Action. It is revealed in evidence that some items found at the former employee Anil's residence were seized by the Police and Police also recorded the Statement of Herbert who is Director of the Defendant Company. The Plaintiff does not disclose in its evidence about the progress of the Police Investigation but files the Originating Summons claiming the items found at the Defendant's Yard.
12. I will now turn to Section 98 of the Criminal Procedure Decree which states as follows: -

"Power to issue Search Warrants

98.(1) *Where it is proved on oath to a Magistrate or a Justice of the Peace that in fact or According to reasonable suspicion anything relevant to the commission of an offence is in any building, ship, vehicle, box, receptacle or place, the Magistrate or Justice of the Peace may by a search warrant authorise a Police Officer or other person named in it to search the building, ship, carriage, box, receptacle or place named or described in the warrant.*

(2) *If, during the authorised search –*

(a) *Anything searched for is found; or*

(b) *Any other thing reasonable suspected as having been stolen or unlawfully obtained is found –*

The Police Officer or other person authorised by the search warrant may seize it and take it to the court issuing the warrant, or some other court, to be dealt with according to law."


13. The above legal provision in the Criminal Procedure Decree authorises a Police Officer to seize and take into the Court issuing a warrant or any other Court any item reasonably suspected as having been stolen or unlawfully obtained is found during the authorised search.
14. It is established by the Plaintiff's Affidavit evidence as I mentioned before that the items it is claiming are suspected as having been unlawfully obtained by the Defendant. It is also revealed in evidence that the Police have recorded the statement of Mr Herbert a Director of the Defendant Company. It is further revealed that the items found at the Plaintiff's former employee's residence were seized by the Police. As such it is clear that there is an ongoing Police investigation on the complaint made by the Plaintiff's employee regarding the lost items claimed by the Plaintiff in this action.
15. Therefore what the Plaintiff should do is to seek Police assistance to seize the items it is claiming from the Defendant's Yard. The Police could take appropriate action to seize the items whether they are in the custody of the Defendant Company or the Official Receiver.
16. In the circumstances, I conclude that the Plaintiff has not followed the correct procedure to claim the items found at the Defendant's yard and the Plaintiff's application is therefore misconceived in law.

Final Orders

17. Accordingly I make the following Orders.
 - (i) The Plaintiff's Summons is dismissed.
 - (ii) The Plaintiff to pay the Defendant costs summarily assessed in a sum of \$750.00.



At Lautoka
8th September 2015


Lal S. Abeygunaratne
Judge