

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 202 of 2016

BETWEEN : **ADVANTAGE CARS LIMITED** a limited company having its registered offices at 142, Ratu Mara Road, Suva.

FIRST PLAINTIFF

AND : **NATIVA HOLDINGS LIMITED** T/A Nativa Motors a limited liability company having its registered offices at 142, Ratu Mara Road, Suva.

SECOND PLAINTIFF

AND : **ROOPAL PATEL** of 9 Guava Place, Suva, Director.

THIRD PLAINTIFF

AND : **RIZWAN ALI HAROON** of 9 Guava Place, Suva, Director.

FOURTH PLAINTIFF

AND : **GULAM MOHAMMED HOLDINGS AUTO LIMITED** a limited liability company having its offices at allotment, Suva, Fiji.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Ms. Mohini Pillai for the Plaintiff  
Mr. Ravi Singh for the Defendant

Date of Ruling: 06<sup>th</sup> August, 2018 @ 10 am

**RULING**

*[Application by the Plaintiff seeking injunctive relief pursuant to Order 29 Rule 1(1) of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honorable Court]*

### APPLICATION

1. This is the Plaintiff's Notice of Motion seeking for the following orders:
  - (a) *That until further order of the court, the Defendant by himself and/or his agents, servants or employees be restrained from making any defamatory remarks about the Plaintiffs including but not limited to the article published from the Defendants Facebook account under the title "Urgent Press Release";*
  - (b) *That the cost of this application be paid by the Defendant;*
  - (c) *Any other or further order that court deems just.*
2. This application is made pursuant to Order 29 rule 1 of the High Court Rules, 1988 and the Inherent Jurisdiction of the High Court.
3. The Summons is supported by the Affidavit of Rizwaan Ali Haroon in his capacity as the Director of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
4. The orders sought on the Plaintiff's Summons were strongly objected to by the Defendant and filed an Affidavit in Opposition accordingly.
5. I must add that the Court intervened and used its Mediatory powers in terms of **Order 59 of the High Court Rules, 1988** to mediate the Injunctive issue and see if both parties are able to resolve the issue bearing in mind what transpired between the parties and the nature of the claim at foot.

### AFFIDAVITS FILED

6. (i) Affidavit in Support of Rizwaan Ali Haroon deposed on 09<sup>th</sup> August, 2016;  
(ii) Affidavit in Response of Mohammed Shaheen deposed on 15<sup>th</sup> September, 2016.

### THE LAW & APPLICATION

7. The power of the High Court to grant injunctions is confirmed by the High Court Rules Order 29 Rule (1) which states:
  - (i) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

### ANALYSIS and DETERMINATION

8. The orders sought as per the both parties to the proceedings **Summons** are a **final Order** in terms of a **mandatory** and a **restraining** order.
9. The principles for granting a **mandatory injunction** was set out in Redland Bricks Ltd -v- Morris (1969) 2 ALL ER 576-
  - (a) *A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution, but in the proper case unhesitatingly.*
  - (b) *Damages will not be a sufficient or adequate remedy if such damage does happen.*
  - (c) *The cost to the defendant to do the work or the act must be taken into account.*
  - (d) *The court must be careful to see that the defendant knows exactly what he has to do.*

*However, the House of Lords went on to say that every case must depend essentially on its own particular circumstances and the same applies to this very instant case. [Emphasis mine]*
10. In a **mandatory injunction** case, the **principles** to adhere will change on the circumstance of the case.
11. The **Plaintiff** is seeking the following orders-
  - *That until further order of the court, the Defendant by himself and/or his agents, servants or employees be restrained from making any defamatory remarks about the Plaintiffs including but not limited to the article published from the Defendants Facebook account under the title "Urgent Press Release";*
  - *That the cost of this application be paid by the Defendant;*
  - *Any other or further order that court deems just.*
12. The **Defendant** has filed an Affidavit in Response to the Plaintiff's Affidavit.
13. In order to determining the above **application**, the **test** the court should follow was laid down in American Cyanide Co -vs- Ethican Ltd (1975) AC 396. As per the said case in granting injunctive relief, the court should consider the following: -
  - i. *Whether there is a prima facie case with the probabilities of plaintiff (Defendant) succeeding and whether there is a serious issue to be tried.*
  - iii. *Whether the balance of convenience favours the court exercising its discretion in favour of the plaintiff.*
  - iv. *Undertaking as to damages.*
14. The consequence of granting the injunction especially in the nature of a **mandatory** and a **restraining** nature has been considered by this court.



15. The **Plaintiff** is a second hand car dealer and has its office and car yard in the same vicinity as the defendant. The **Defendant** engages in car repair and servicing. As part of its second hand car dealership the **Plaintiff** also services vehicles and has a team that looks at the mechanical aspect of vehicles.
16. In the **Defendants** Facebook page they posted an article either by themselves or through their agents words which we say **libelous** in nature. The title of the article read "**Urgent Press Release**". In the article, the **Plaintiffs** were labeled as: **people who dealt in unscrupulous business, who had their license revoked by LTA, company that tempered with odometer, illegally removing cars from FIRCA bonded warehouse, servicing vehicle with inferior quality products and being unprofessional.**
17. A letter was sent to the **Defendant** by the **Plaintiff's** solicitors requesting that the **libelous post** be removed and an **apology posted**. The **Defendant** has failed to do the same and the Facebook post continues to jeopardize the **Plaintiffs'** reputation and business.
18. This application for an **injunction** is to determine whether the words in the statement are **libelous** and if they are should an order be granted to have the **Defendant** remove the post.
20. The **Defendant** filed an **Affidavit in Response** to the **Plaintiff's** Affidavit in Support. The **Defendant** deposed and admitted that he on or about 20<sup>th</sup> July, 2016, the **Defendant** published the statement on their Facebook account. But he denied that any part of the statement that was published by him was defamatory.

To paragraphs **10** and **11** of the **Plaintiff's** Affidavit, the **Defendant** deposed that the words used by him were true to the best of his knowledge information and belief. Further, to paragraphs **12** to **18**, the **Defendant** deposed that the allegations made against the 2<sup>nd</sup> **Plaintiff** do appear to have been proven before the Land Transport Authority when the decision was made to cancel its licence.

To paragraph **21**, the **Defendant** deposed that his statement could not have caused the 1<sup>st</sup> **Plaintiff** to lose any bona fide customers.

To paragraph **22**, the **Defendant** denied the allegations that the 1<sup>st</sup> **Plaintiff** is suffering from business loses and the losses are continuing and that the defamation is causing irreparable harm to its reputation.

To paragraph **24**, the **Defendant** stated that he does not accept the contents of the letter and to paragraph **25** he says that the undertaking is not sufficient.

(i) Whether there is a serious issue to be tried?

21. The **Plaintiff** is alleging that in the **Defendants** Facebook page they posted an article either by themselves or through their agents words which we **libelous** in nature. The title of the article read "**Urgent Press Release**". In the article, the **Plaintiffs** were labeled as: **people who dealt in unscrupulous business, who had their license revoked by LTA, company that tempered with**



odometer, illegally removing cars from FIRCA bonded warehouse, servicing vehicle with inferior quality products and being unprofessional.

The Defendant has admitted in his Affidavit in Response that he on or about 20<sup>th</sup> July, 2016, published the statement on their Facebook account. But the Defendant denies that any part of the statement that was published by him was Defamatory in nature.

Obviously, the Parties are in dispute as to whether there is (are) **serious issues** to be tried. Since they are pointing a finger at each other demonstrates the fact that there is/or are to be tried by the Court of Law. The Questions that needs to be tried are obvious;

"Whether the article posted by themselves or through their agents' words which appear therein are libelous in nature? Further:

"Whether the Facebook post continues to jeopardize the **Plaintiffs'** reputation and business?

Bearing in mind *Lord Diplock's* observation that "*a resolution of conflicts on facts and claims in Affidavit or difficult Questions of law is not for the Court at this stage to decide*" but should be left for the trial Judge to decide. (Emphasis Mine).

Therefore, these are the substantial Questions that needs to be investigated by the Court of Law.

(ii) Undertaking as to damages

22. The Plaintiff in his Affidavit in Support is giving an undertakings as to Damages.
23. The question of adequacy of damages, has been clarified in the case of Bath and North East Somerset District Council -v- Mowlem Plc [2004] EWCA Civ 115, where the court found that it was not a question of whether the Plaintiff will recover some damages, but whether the damages he may recover are adequate to compensate him for the loss he may suffer before the trial. In the latter case the damages that were in consideration was liquidated damages agreed by the parties in their contract, but did not take into account additional damage that may be difficult to quantify.
24. Therefore, at the end of the day the court must weigh the relative questions before addressing whether to grant or refuse the injunction. As was referred to in the Bath case - "The question arises in each application for an interlocutory injunction as to the point on a broad spectrum at which the particular circumstances of the case in question may fit in, and what additional factors there may be to place into the balance of convenience".
25. It would be no great injustice if the return on the hearing of the injunction could be urgently addressed by the court. The injunction does of course continue until determined by the court, it does not lapse if on an adjourned consideration of the matter the court does not formally declare that the injunction is to continue until the next hearing date; this is the effect of N Elias and sons Ltd -v- George Elias 11971], GLR 342.



26. One other point needs to be considered, and that is whether and to what extent should the court address the question of the undertaking as to damages. In Vinelli Industries Ltd -v- Ricks & Sari Industries Ltd, Action No. 1366 of 1983, the honourable Ms. Justice Bernard (as she then was) considered this point, she said (without deciding the issue), that;

"If the defendants were to succeed at the trial in establishing their right to use the name 'Cream of Rice' will they be adequately compensated under the plaintiffs' undertaking as to damages for the loss they would have sustained by being prevented from doing so between the time of the application and the time of trial. ....It is in circumstances such as these that a court has to consider where the balance of convenience lies."

27. Any other material circumstances that might militate for or against the grant (Ramada International Inc -v- Issa Nicholas (Grenada) Ltd, Civil Appeal No. 13 of 1987 (Grenada)):

"An undertaking as to damages for which the court must be satisfied the plaintiff must be "good for the undertaking".

28. It was submitted that as for 'damages', on the evidence before the Court, damages would not be an adequate remedy for the plaintiff since the result of the defamatory statements on the Defendant's account with Facebook has resulted in loss of business which is continuing and also the Plaintiff has been suffering irreparable harm to its reputation which has been built over the course of 14 years this was outlined in *paragraphs 21, 22 and 23 in the Affidavit in Support of the Plaintiff Mr. Rizwan Ali Haroon*.
29. Further, that the Plaintiff would not be adequately compensated in damages recoverable for the loss they would have suffered before the trial based on the reasoning that the article published was posted on the internet more specifically the social website Facebook where information can be shared, re- posted and downloaded.
30. However, the Defendant's contention is that the Plaintiff's undertaking is insufficient in the circumstances. The alleged Damages submitted by the Plaintiffs can be compensated after the hearing of the substantive matter if it is found that the publication has truly had an impact on the Plaintiff's business operation.
31. The issue of whether the publication has had an impact will need to be assessed on the character of the Plaintiffs which again cannot be assessed by affidavit evidence as submitted above.
32. Reference is made to the *American Cyanamid principles* which clearly indicate that if damages are an adequate remedy than an interim injunction would not be granted. This is expressed in the speech of Lord Diplock wherein at page 408, his Lordship states as follows-

"..if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should be normally be granted, however, strong the Plaintiff's claim appeared to be at that stage..."



33. However, I also make reference to the case of *Devi -v- Prasad [2016] FJHC 442*. *Hon Justice Kumar* stated therein that "even damages would be an adequate remedy; the view of the Court is that it should consider the balance of convenience and not strike out application on this basis only."
  34. The **Plaintiff** has given its undertaking as to damages. The **Defendant** on the other hand has not given any undertaking as to damages.
  35. I reiterate that the **Defendant** has **admitted** in his Affidavit in Response that he on or about 20<sup>th</sup> July, 2016, **published the statement on their Facebook account**. But the **Defendant denies** that any part of the statement that was published by him was **Defamatory** in nature.
  36. Therefore, again. I find that the Question of **Adequacy as to damages** (if any) should be left for the court to determine at the substantive hearing since the evidence of the parties as well as the witnesses' evidence together with the documentary evidence can all then be taken into consideration and tested out accordingly to deliberate and arrive at a just and fair decision.
- (iii) Whether the balance of convenience favours the court exercising its discretion in favour of the plaintiff?
37. The third Test called the '**Balance of Convenience**' will determine which party of the two, whether the Plaintiff or the Defendant will suffer the greater harm from grant or refusal of an interlocutory injunction pending the decision on the merits of the substantive impending application filed by the Plaintiff in terms of the Writ of Summons.
  38. In the current case, once again I reiterate that the **Defendant** has **admitted** in his Affidavit in Response that he on or about 20<sup>th</sup> July, 2016, **published the statement on their Facebook account**. But the **Defendant denies** that any part of the statement that was published by him was **Defamatory** in nature.
  39. The onus of proving the case and/or the allegations made by the **Plaintiff** alleging that in the **Defendants** Facebook page the Defendants posted an article either by themselves or through their agents' words which the Plaintiff says is **libelous** in nature.
  40. I note that this application as well as the Substantive Action has been impending since 09<sup>th</sup> August, 2016, and none of the parties to the proceedings have made any effort to seek court's indulgence in expediting the decision and make directions for the parties to move expeditiously and have this dispute and pending issues resolved for once and for all.
  41. This Court is yet to hear both parties and the evidence with documentary evidence in order to determine what transpired between the parties and whether the published article on the Facebook is **libelous** and or Defamatory in nature. Until, these issues are dealt with and determined then only this court will be able to determine a just and fair decision. Whatever orders may be necessary then, would only be acceded to and made as final orders of this court in the best interest of the parties accordingly.

IN CONCLUSION

42. I find that it is only proper that this Court in the interim decline to make any appropriate orders so that the **Status Quo** of the matter remains **intact** and parties move on expeditiously to finalise the **pleadings** in the Substantive matter to enable this court determine the entire case globally once and for all expeditiously.
43. In light of above, this Court has decided that each party should bear their own costs at this stage of the proceedings for this particular application.

FINAL ORDERS

- A. That there will be no orders made and/or granted as sought for by the Plaintiff on his Notice of Motion filed on 09<sup>th</sup> August, 2016 and motion is dismissed.
- B. Each party to the proceedings to bear their own costs;
- C. Orders accordingly.
- D. Matter to be listed for further direction on 06<sup>th</sup> August, 2018 at 10 am.

Dated at Suva this 06<sup>th</sup> day of AUGUST, 2018



Master  
MR VISHWA DATT SHARMA

cc: Reddy & Nandan Lawyers, Suva  
Parshotam Lawyers, Suva