

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 42 of 2019

BETWEEN : HAZRA KHATOON

1ST PLAINTIFF

AND : AHMED BEGG

2ND PLAINTIFF

AND : ABDUL AZIZ BEGG

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. S. Sharma & Mr A Namua for the 1st and 2nd plaintiffs

: Mr. A. Kohli & Ms. S. Naidu for the defendant

Date of Hearing : 15 August 2022

Date of Decision : 23 January 2023

DECISION

CONTEMPT Contempt of Court – Order arising from settlement terms – Failure to comply with consent order – Caveat lodged by third party - Order 52 of the High Court Rules 1988

1. By ex parte notice of motion, the defendant gave notice of committal supported by a statement and an affidavit verifying facts, alleging that the plaintiffs have failed to comply with the court's orders made on 12 March 2020, and sought leave to apply for committal. The orders of court were based on written terms of settlement between the parties. Leave to issue committal proceedings was granted on 16 May 2022. After notice of motion for committal was served, the plaintiffs filed an affidavit on 14 July 2022 opposing committal proceedings.
2. The consent order made on 12 March 2020, and sealed on 1 April 2020, gave effect to the terms agreed by the parties, which are reproduced below:
 - 1) "The Company shall transfer to Aziz Begg (or his nominee) the property of the Company situated in Labasa Town Complex housing the Shop and Save Supermarket Crown Lease No. 13817 known as Lot 2 SO 3807 Formerly Lot 6 M 2144 Labasa Town in the district of Labasa and the Province of Macuata with an area of 1955 Square Meters with no consideration. Parties agree to the value of the property as being FJD 3 million dollars.
 - 2) The Company shall transfer to Estate of Nasib Begg aka Jaffar Begg (or his nominee) the property of the Company situated in Nadera, Nasinu known as Prime Plaza being Housing Authority Lease No. 360292 being Lot 1 Deposited Plan No. 4581 in the Province of Naitasiri and the district of Naitasiri with an area of 2 Rood and 32.8 Perches and Housing Authority Lease no. 866868 being Lot 1 DP 11143 in the Province of Naitasiri and the Tikina of Naitasiri with an area of 1241 Square Meters for no consideration. Estate of Jaffar Begg shall be responsible the repayment of the mortgage against the said property. Parties agree to the value of the property as being FJD 6 million dollars.
 - 3) Parties agree that Abdul Aziz Begg is to receive a further sum of monies which shall be calculated as follows:

- i. ½ of the sum remaining after the deduction of FJD 3 million and loan amount owed to Bred Bank from the Nadera property value of FJD 6 million.
 - ii. This sum shall be paid by the Estate of Jaffar Begg aka Nasib Begg to Abdul Aziz Begg at the time of the transfer of the Prime Plaza Property.
- 4) The Company shall declare a Dividend of FJD 4 million which shall be paid in equal parts to the shareholders being Aziz Begg and Estate of Nasib Begg aka Jaffar Begg. That the shares of dividend payable to Aziz Begg shall be paid into the trust account of AP Legal whereas the dividend payable to Estate of Nasib Begg aka Jaffar Begg shall be paid out to individual beneficiaries with a written authority from ahmed Begg and the cheque shall be drawn simultaneously.
- 5) The directors of the Company shall be Aziz Begg, Ahmed Begg, Feroz Begg and Maqsum Begg and the affairs of the Company shall be managed by the Directors sitting as a Board. No decision of the Company shall be considered approved unless there is a majority vote on the matter unless the decision reached is consistence with Articles of Association and the Companies Act 2015.
- 6) The signatories of all bank accounts of the Company shall be Ahmed Begg and Feroz Begg both of whom shall be required to sign cheque for the same to be honored by the banks.
- 7) Upon the maturity of all keyman policies, the insurance payout sums shall be equally divided between Aziz Begg and the Estate of Nasib Begg aka Jaffar Begg unless the Company requires the funds for its operational needs.
- 8) All parties shall be paid any unpaid monies due and owing relating to salaries and directors fees and any unpaid workers shall be paid any dues.
- 9) Upon filing of these terms in Court, Ahmed's phone and email access with the Company shall be restored.
- 10) Parties agree that this Deed resolves all claims of any nature between the parties in relation to the Company and no party shall bring any future claims against each other in respect of the matters already filed in the court or any other claim the party intends to bring in respect of the cause of the operation of Waiqele Sawmill Limited.
- 11) The parties will bear their own costs".

3. The defendant detailed the plaintiffs' failure to comply with the court's orders in this way:
- (a) "That they failed to transfer to Estate of Nasib Begg aka Jaffar Begg (or his nominee) the property of the Company situated in Nadera, Nasinu known as Prime Plaza (being Housing Authority Lease No. 360292 being Lot 1 Deposited Plan No. 4581 in the Province of Naitasiri and the district of Naitasiri with an area of 2 Rood and 32.8 Perches and Housing Authority Lease No. 866868 being Lot 1 DP 1 1 143 in the Province of Naitasiri and the Tikina of Naitasiri with an area of 1241 Square Meters for no consideration.
 - (b) That they failed to pay the Defendant the money as per clause 3 of the Order of 12th March, 2020. Upon transfer of the said property the Defendant was to receive half of the sum remaining after the deduction of FJD 3 million (which sum was the value of the property known as Labasa Town Complex mentioned in clause 1 of the Order) and the loan amount owed to Bred Bank from Nadera Property. The loan amount owing to Bred Bank was \$1.3 million at the time the order was made. The Defendant was supposed to be paid \$3 million less \$1.3 million which amounted to \$850,000.00. The Defendant has been paid \$425,000.00 and the balance owing is \$425,000.00. Despite repeated requests the Plaintiffs have failed to pay the same.
 - (c) They failed to pay the sum of \$425,000.00 from transfer of Nadera property after deduction of FJD 3 million and loan amount owed to Bred Bank. The amount outstanding to Bred Bank was \$1.30 million. The Defendant should have been paid \$850,000.00 but was paid \$425,000.00.
 - (d) They failed to pay half of the insurance proceeds of all keyman policies".

Preliminary Issue

4. At the hearing, Mr. Sharma raised a preliminary issue on behalf of the plaintiffs. The issue was whether leave granted to issue committal proceedings had lapsed and as a result the application for contempt should be struck off. He contended that the defendant was not within time as required by Order 52 of the High Court Rules 1988. This position was also asserted in the plaintiffs' written submissions tendered on the day of the hearing.
5. Section 3 (1) of Order 52 states there must be at least 8 clear days between the service of the notice of motion and the day set for the hearing, and leave would

lapse unless within 14 days of leave being granted the motion is entered for hearing.

6. The plaintiffs submitted that the defendant's notice of motion for committal was filed on 19 June 2022 after leave was granted on 16 May 2022, and that the defendant did not enter the matter for hearing within 14 days of leave being granted. Mr. Kohli submitted that the defendant filed the application for committal within time, on 19 May 2022. The affidavit of service filed on behalf of the defendant confirms service of the notice of motion for committal and accompanying documents on 23 May 2022. When Mr. Kohli pointed out the timelines within which the applications were made and the matter was set down for hearing, Mr. Sharma abandoned his preliminary issue.

Property in Nadera

7. The defendant submitted that the consent judgment required the transfer of two properties by the company; the property in Labasa to the defendant, and the property in Nadera to the estate of Nasib Begg aka Jaffar Begg (the estate). The defendant's complaint concerns the failure to transfer the Nadera property to the estate as ordered by court. The property belongs to a company by the name of Waiqele Sawmills Limited.
8. The Nadera property was valued at \$6,000,000.00 as at the date of the order, but the transfer did not require consideration. In his supporting affidavit, the defendant said that he paid the plaintiffs a sum of \$202,779.02, as capital gains tax to effect the Nadera property's transfer to the estate as agreed by the parties. This sum, he said, should have been paid by the company, and was not reimbursed to him.
9. The second plaintiff filed an affidavit in opposition on behalf of both plaintiffs. Mr. Ahmed Begg admitted that the company did not transfer the Nadera property, and that it remains in the name of the company. The defence of the plaintiffs in not making the property transfer is the existence of a caveat – bearing number 893286 – and lodged on the property by a third party, one Farina Bi on 23 July 2020 and registered the next day by the registrar of titles. She is said to be a beneficiary of the estate of Jafar Begg. Being a beneficiary of the estate of

which the first plaintiff is the administratrix, what persuaded Farina Bi to oppose transfer of the property from the company to the estate is not known to this court. The plaintiffs say that they instructed their solicitor to apply for the removal of the caveat, and that, thereafter, Farina Bi filed action in the High Court of Suva (HBC 138 of 2022). The notice of removal of caveat signed by the registrar of titles is dated 22 March 2022.

10. The second plaintiff's affidavit avers in this way: "The plaintiff is unable to comply with the court order as there is another existing court order in civil action number 138 of 2022 wherein the High Court in Suva has extended the caveat and the caveat forbids any registration of the transfer of the property". Mr. Sharma submitted that hearing into the caveat application was to be taken up a few days later. The plaintiffs submitted that they made all necessary efforts to transfer the property.
11. The court order in that case – HBC 138 of 2022 – made on 25 April 2022 by Amaratunga J says that the applicant in that matter had not filed a copy of the caveat to show the caveatable interest. A copy of the order is annexed to the plaintiffs' affidavit in opposition. The judge extended the caveat by a *week* from 25 April 2022 to 2 May 2022. The case was to be mentioned on 2 May 2022. Although the order contains these details, they are not mentioned in the affidavit filed on behalf of the plaintiffs. The impression given to court by the plaintiffs' affidavit is that the caveat was indefinitely extended by the High Court and that the extension prevented the registration of the transfer of the property. This is not the factual position. Regretfully, the plaintiffs' counsel did not present court with a proper representation of facts concerning the caveat lodged by the third party.
12. The pleadings of the case filed by the third party to extend the caveat is not before court. The plaintiffs have not provided the court with proceedings after 25 April 2022 in HBC 138 of 2022. Therefore, this court is unaware of the present status of the action relied upon by the plaintiffs. On the basis of the material placed before court, it can be said that the extended caveat expired on 2 May 2022. The affidavit filed on behalf of the plaintiffs also fails to explain the reasons for not making the property transfer prior to lodgment of the caveat on 23 July 2020, as the court order was on 20 March 2020. The plaintiffs have failed to show

that they took all necessary steps to transfer the property in terms of the court order or that there was a real impediment to making the transfer.

Payment of monies

13. The defendant complained that the estate should have settled a loan owing to Bred Bank and, thereafter, settled him a sum of \$850,000.000. He claims to have been paid \$425,000.00, while a similar sum is outstanding. In regard to the defendant's claim of unpaid monies, the plaintiffs stated that the defendant was paid \$450,000.00 even though the property settlement was not affected. The second plaintiff explained that monies were payable to the defendant after completion of the property transfer, which did not eventuate. He admitted that the estate was responsible for repayment of the mortgage after transfer of the property. While repayment of the bank loan by the estate seems to be linked to the transfer of the property, there is no clear explanation by the plaintiffs as to why court orders relating to the property transfer and payment of monies by the estate were not carried out.

14. The defendant alleged that he was not paid half the insurance proceeds from keyman policies which had matured in July 2020. The second plaintiff explained that the insurance proceeds were not released to any of the parties due to the economic effect of Covid 19, and the money was kept in the company's bank account. If the policies matured in July 2020, it is reasonable to surmise that the monies were received by the company. Court orders were made in March 2020. The second plaintiff has not shown that the funds were needed for the company's operational requirements, the only reason, in terms of the court order, upon which the release of funds could have been delayed. The mere assertion that funds were retained by the company due to the economic effects of Covid 19, without evidence to back the claim, is insufficient to explain the failure to make the agreed payment.

Are the plaintiffs' in contempt?

15. The court adopted the terms of settlement prepared and signed by the parties, when the case was taken up on 20 March 2020. A perusal of the terms which the court adopted shows that the terms could have been made with greater clarity. It

is possible to say this in hindsight. Precision and detail in consent orders can save much trouble. In the end, the court must give effect to its orders.

16. In terms of the order dated 12 March 2020, the company, Waiqele Sawmills Limited, was required to transfer the Nadera property of 2 roods and 32.8 perches to the estate. The transfer did not take place. The monies which the defendant says he did not receive were also not paid to him. Unfortunately, the consent order does not prescribe a period within which to comply with orders. But orders by court must be complied within a reasonable time. The plaintiffs had more than two years in which to comply with orders by court.
17. The power of the High Court to punish for disobeying the orders of court can be exercised by an order of committal. Order 52 of the High Court Rules makes provision for contempt proceedings. Being punitive in character, as the plaintiffs pointed out, the facts alleged to constitute contempt, have to be proved beyond reasonable doubt in contempt proceedings.
18. Paragraph 5 of the order names the directors of the company as Aziz Begg, Ahmed Begg, Feroz Begg and Maqsum Begg. The order tasked the directors with managing the affairs of the company by sitting as a board. In his affidavit in opposition, the second plaintiff only admits that the defendant is a shareholder and denies that he is a director of the company. Committal is sought of the two plaintiffs, Hazra Khatoon and Ahmed Begg. The first plaintiff, Hazra Khatoon is not named as a director in the consent order. The second plaintiff, Ahmad Begg, is a director of the company. The signatories of all bank accounts of the company are named as Ahmed Begg and Feroz Begg. This suggests that the second plaintiff is in control of the company's affairs, and particularly its finances.
19. The consent order directs all parties to comply with the orders. The first plaintiff has not stated what steps she took to comply with the orders. She is the administratrix of the estate. The second plaintiff has not averred any impediment within the company to executing the orders made by court. Before the defendant's notice of motion was filed on 19 May 2022, the plaintiffs did not bring to the attention of court any factor that impeded the performance of the orders made by court on 12 March 2020. The defendant's notice of motion,

statement and affidavit have set out the facts constituting the alleged contempt. The plaintiffs have had a fair opportunity to present their case. The reasons given on behalf of the plaintiffs for their failure to comply with the orders made by court are unconvincing. The plaintiffs submitted that they did not deliberately or willfully act in breach of the court order. However, the evidence establishes the contrary. The plaintiffs' disobedience can be described as willful as they have not shown regard for the consequences of disobeying the court's order. After considering the material in the respective affidavits, the court is satisfied that the plaintiffs are in contempt of court.

ORDER

- A. The plaintiffs are guilty of contempt of court.
- B. The defendant's application for an order of committal against the plaintiffs is allowed.
- C. Order on sentencing after hearing the plaintiffs.
- D. Plaintiffs to comply with paragraphs 2, 3 & 7 of the order made by consent on 12 March 2020 and sealed on 1 April 2020 within 21 days of this decision.
- E. Each plaintiff to pay \$1,500.00 to the defendant within 21 days of this decision in settlement of costs summarily assessed in a sum of \$3,000.00.

Delivered at Suva on this 23rd day of January, 2023



M. Javed Mansoor
M. Javed Mansoor
Judge