IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

No. CV 199/09

Between: 'ALIFELETI VAITUULALA -
Plaintiff

And: SITIVENI IONGI -
Defendant

BEFORE THE HON MR JUSTICE SHUSTER
MR V FA'OTUSIA FOR THE PLAINTIFF
MR C EDWARDS FOR THE DEFENDANT
HEARING DATES 24th JUNE 30th JUNE 2010
SUBMISSIONS 23rd JULY 30th JULY and 6th AUGUST 2010
JUDGMENT DELIVERED 17th AUGUST 2010

JUDGMENT

1. INTRODUCTION

These proceedings consisted of -

a) The plaintiff's action claiming:
   i) An interim injunction
   ii) Damages in the sum of $12,000.00 and
   iii) Costs

b) The defendant's counterclaim seeking:
   i) Damages in the sum of $162,000.00
   ii) 12% interest on $162,000.00 from 12/6/2009 - until that sum is fully paid
   iii) An order declaring that the plaintiff was and is in default
   iv) An order terminating the agreement dated 12/6/2009
   v) Costs of this action

The plaintiff abandoned his claim referred to in paragraph 1.1 (a) during the course of the trial

2 THE PLAINTIFF'S ACTION

As a result of the plaintiff abandoning his claim for damages this court orders the plaintiff's action - struck out; with costs awarded FOR the defendant on the basis of solicitor client.

Defence counsel Mr. Edwards submitted the plaintiff had no proper or valid claim against the defendant in the first place and counsel questioned: -

i) Whether the plaintiff had any or proper grounds for applying for an interim injunction.
ii) Counsel requested the cancellation of the interim injunction dated 11/5/2010.
iii) Costs on a solicitor client basis.

2 THE INTERIM INJUNCTION - 27 AUGUST 2009

This Court granted an interim injunction on the plaintiff's undertaking as to damages on 27th August 2009 that injunction remained in force until 18 January 2010.

The injunction was cancelled on 18 January 2010, but reinstated on 11/5/2010. The injunction still remains in force. [***Evidenced by court orders dated 27/8/2009, 16/11/2009, 18/1/2010 and 11/5/2010 [pages 24 to 130 of the defendant's booklet]***

It is clear to this court that the evidence given in support of the ex-parte application was clearly incorrect as to the nature of any alleged wrongful interference by the defendant in this case in the running of the said quarry subject of this action.

This court finds as a fact [after trial] that the evidence did not provide sufficient grounds for the grant of an injunction in August 2009 primarily because the evidence of the plaintiff was false - as has been clearly revealed during this trial.

During the trial it emerged the reason for the said work stoppage was due to there being no diesel oil available to operate machines on ***one day.*** It was made clear from the evidence which I accept that work resumed the following morning when a quantity of diesel oil was made available for use.

The following points from the evidence are accepted by this court as findings of fact based on evidence which I accept–

a) After signing the agreement on 12/6/2009 the plaintiff did not make payment[s] as promised as provided for in the written agreement.
b) That between 12/6/2009 and 15/7/2009 various promises of payment were made by the plaintiff to the defendant but no payment was ever received.
c) On 15/7/2009 a meeting took place between the defendant and plaintiff to obtain a firm date for the payment of the $200,000.00 at a chambers hearing on 20/7/2009 in the case of ANZ Bank v. Sitiveni 'Iongi LA no. 07/2009 - seeking an order for possession of the defendant's house at Tokomololo.
d) At the meeting on 15/7/2009 the plaintiff advised the defendant he would have to travel to the USA to bring the money personally he indicated – that the defendant need not worry.
e) On 25/7/2009 the parties met at Mr. Clive Edwards Law Office where in the presence of Mr. Clive Edwards, the plaintiff repeated the explanation given to the defendant on 15/7/2009 and reassured the defendant payment would be made no later than 20/9/2009.
f) According to the defendant because the amount involved was large the plaintiff claimed a visit to the USA was necessary to personally collect and travel with that sum of money.
g) On or about the 12/8/2009 it transpired - the plaintiff had not left for the USA so the defendant went to the quarry to see the plaintiff - but he was not there.
h) It was at that time the defendant asked the workers to stop work whilst the question of payment was resolved
i) The evidence revealed a meeting was held that same evening 12/8/2009 at the defendant's home between the defendant, the plaintiff and Tevita Talanoa.

j) The plaintiff and Tevita Talanoa both assured the defendant - ***the money was a small matter to the plaintiff*** (Tongan words – "Koe ki'i me'a lefu ena ia kia Vaituulala") and that payment would be made before the 20/9/2009.

k) As a result of that promise work at the quarry continued on 13/8/2009.

Upon hearing all the evidence - I find as a fact that the plaintiff in his ex parte application failed to disclose and inform the Court – the following material facts:

a) That no payment had been made under the agreement dated 12/6/2009. I accept that evidence from the plaintiff – because he admitted under cross examination that no payment whatsoever had been made under - the written agreement.

b) I fully accept that work had stopped because no diesel oil was available to operate the machines – ***I refer to the evidence of Siaosi Cocker in his affidavit dated 12/4/2010 (page 64 of defendant's booklet) and Sione Lavaka in his affidavit dated 15/4/2010 (pages 67 – 72 of defendant's booklet).***

c) In evidence both witnesses named in [b] re-confirmed the contents of their affidavit and I fully accept their sworn evidence and the contents of their affidavits.

d) Agreements were breached on 1/4/2009 and 12/4/2009 - the defendant asked that work at the quarry stop during the afternoon of the 12/8/2009. Differences between the defendant and plaintiff were resolved that evening, and a promise was made and accepted that payment would be made before the 20/9/2009.

e) Accordingly on the evidence I do not accept the plaintiffs assertion that the defendant interfered with the running of the quarry and that there was a 4 day work stoppage ***I find as a fact this was just not true. None of the evidence supported that allegation in the statement of claim and the affidavit of the plaintiff dated 17/8/2009 (defendant's booklet pages 73 – 77).***

f) I find as a fact that part of the work stoppage was entirely due to the plaintiff's default - due to no diesel oil being available for the various quarry machines and trucks to operate and that default - was clearly the plaintiffs own responsibility.

There was no evidence produced to this court of alleged interference at the quarry either at the time of the ex parte application for an injunction; or during the course of this trial by the defendant as is alleged by the plaintiff.

I find as a fact the plaintiff misled this Court by obtaining an ex-parte restraining order dated 27 August 2009. In my view the plaintiff did not come to equity with clean hands in his dealings with this court in August 2009.

Although the defendant served a termination notice on 7/10/09 and he applied for a cancellation order in respect of the injunction on 19/10/2009 - the plaintiff nevertheless sought to oppose those applications, and as a result there were inevitable delays and the cancellation order was not made until 18/1/2010. Again my view is that the plaintiff did not come to equity with clean hands - in his dealings with this court

4 THE PLAINTIFF'S UNDERTAKING AS TO DAMAGES

In my view there was no proper basis for an interim injunction - given the evidence at the time of the ex parte application or, during the trial proper. Tevita Talanoa gave hearsay evidence on this issue. The plaintiff did not give any evidence at the trial on this point and the plaintiff completely failed to establish - alleged occasional interferences by the defendant.

At a point in time in the trial the plaintiff suddenly confirmed that he was not pursuing his claim for damages against the defendant. The plaintiff said in evidence it was not 4 days the work was suspended for, but – in his words it was for about - 1 day. Further the plaintiff testified he was told this by his workers but no workers were called to give evidence on this particular point.

Accordingly - I find on the facts before me the plaintiff withheld material relevant facts and he has failed to make proper disclosure to the Court at the time of him making his ex parte application to this court.

5 COSTS

The defendant argued that costs should reflect and indicate this Court's disapproval of the manner in which the plaintiff mislead this Court and abused the injunctive process of the court – and I fully agree.

In this instant case I order that costs MUST be awarded in this case on a solicitor / client basis. I also order the injunction dated 11/05/2009 - is hereby cancelled.

6 CHRONOLOGY OF EVENTS

3.5 According to the defence the chronological events in this action and the counterclaim can be summarized as follows:

i) During the beginning of 2009 the defendant was in arrears with the ANZ Bank and his home loan and he wanted money to repay the bank.

ii) In February / March 2009 the defendant met with the plaintiff to sound out his interest in a possible takeover arrangement by the plaintiff of his quarry.

iii) In March 2009 the plaintiff visited and inspected the quarry and its machinery on two separate occasions.

iv) On the third occasion the plaintiff arranged for his lawyer to visit the quarry to inspect its operation and report back to him.

v) On 28/3/2009 plaintiff and defendant met at "Friends Café" for breakfast where the parties are said to have concluded the **"March Agreement".**

vi) On 1/4/2009 there was a meeting at the quarry for the takeover by the plaintiff and the quarry was taken over by the plaintiff.

vii) In April 2009 a formal demand for payment was made by the defendant - but the demand for payment was not met and the plaintiff promised $100,000.00 would be paid in May 2009.

viii) In May 2009, no payment was made - the plaintiff promised to pay $200,000.00 in June 2009.

ix) On 12 June 2009 a written agreement was signed the agreement provided for the payment of $200,000.00 on signing of the agreement.

x) On 15 July 2009 there was a meeting of the plaintiff and the defendant where the plaintiff promised payment would be made not later than 20/9/2009.

xi) The explanation given by the plaintiff for the delay was because of the amount of money involved the plaintiff would need to travel to the USA and return with it - personally.

xii) In Ford CJ's Chambers because of the promise of a substantial payment a consent order in the case of ANZ Bank v. Sitiveni 'Iongi for possession of his home was made - but suspended for 2 months to (20/9/2009) to enable the defendant to make a lump sum payment

xiii) On 25 July 2009 a meeting of the plaintiff and defendant took place at Clive Edwards Law Office whereby the plaintiff repeated his assurance given to the defendant on 15 July 2009 concerning a payment in September 2009.

xiv) On 12 August 2009 the defendant visited the quarry because the plaintiff he found out the plaintiff was still in Tonga and he had not left for USA as promised in the meetings on 15th and 25th July 2009. Work at the quarry stopped that afternoon.

xv) On 12 August 2009 after a meeting at the defendant's home with the plaintiff and Tevita Talanoa they reassured the defendant that the amount of $200,000.00 is quote ***"a little matter for plaintiff"*** and it would be paid before 20/9/2009.

xvi) On 3 September 2009 the defendant rang the plaintiff in the USA about payment. The plaintiff and his wife assured the defendant the money would be available before 20/9/2009.

xvii) The defence says it is interesting to note: the plaintiff did not mention to the defendant in his phone call that he had commenced proceedings on 19/8/2009 and had applied for an injunction on 27/8/2009).

xviii) On 5/9/2009 writ, statement of claim, restraining orders, affidavit of plaintiff dated 27/8/2009 and ex parte application notice was served on the defendant.

xix) After 5/9/2009 the plaintiff refused to make any payment to the defendant.

xx) 7/10/2009 [1] a notice of termination of the agreement and [2] an eviction notice were served on plaintiff.

7 THE EVIDENCE

The evidence clearly established the following facts during the trial:

a) The defendant was in financial difficulties in servicing his loan commitments with the ANZ Bank and judgment was obtained against him by the ANZ Bank.

b) In the beginning of 2009 the ANZ bank wanted possession of the defendant's home - **unless** a substantial payment was received.

c) The defendant met the plaintiff and discussed the take over and management of the defendant's quarry at Fualu.

d) In March 2009 the plaintiff visited the quarry twice to inspect and observe its operation.

e) Following these 2 visits, the plaintiff arranged for his lawyer to visit and inspect the quarry.

f) After those visits and inspection; the plaintiff and the defendant met on 28 March 2009 at "Friends Café" for breakfast to finalize their agreement on the quarry. The agreement is set out in paragraphs 4 and 14 of the statement of defence and in paragraphs 1, 2, 3, 4 and 8 of the counterclaim.

g) The defence says it is significant to note that the plaintiff during cross examination admitted the March agreement except the payment of $100,000.00 to be made on the takeover date on 1/4/2009.

h) They say it is also strange - that the plaintiff said in evidence that he had asked that the amount of $500,000.00 be reduced to $400,000.00 and the 5 years term be extended to 8 years which were the terms of the "March agreement" yet he denied any financial arrangement for the takeover on 1/4/2009. The plaintiff referred to what happened on 1/4/2009 as an - informal conversation (para. 1 of statement of defence to counterclaim).

responsibility for the cost of the operation. He also received payments for all sales of coral rock and dust from that quarry.

j) Demands for payments made during April 2009 were not met because the plaintiff gave an excuse that money will be available in May 2009 from the sale of machinery in USA. ***{Refer to plaintiff's affidavit dated 9 April 2010 paragraphs 2 and 3 thereof.}***

k) The plaintiff refers to his agreement with the defendant as a gentlemen's agreement and said that he took over in May 2009.

l) The defence says the implication of this gentlemen's agreement - is that the plaintiff will take over the entire defendant's machinery and quarry at no costs and he receives all the proceeds of the quarry. The defence argues – it is an unreal, untrue, absurd and insulting statement to the intelligence of the defendant or to any normal person. I fully agree more especially if the defendant is proved to have been in dire financial difficulties which evidence I do accept.

m) In May 2009 the plaintiff did not pay any money and he promised to pay $200,000.00 in June 2009.

n) During the first week of June 2009 the plaintiff well knew the defendant was in financial difficulty and he negotiated a variation to "the March agreement" on the pretext that this was a temporary arrangement and it was necessary for his loan from the bank (Westpac Bank of Tonga). The words used in paragraph 10 of plaintiff's affidavit dated 23/10/2009 is as follows:

> ***"I have no loan in any bank in Tonga but the only requirement from the bank to view the written agreement so that I am secure in my financial situation."***

o) The plaintiff prevailed in obtaining the defendants signature on the grounds that the agreement was temporary and will be corrected later. Further he said the payment of $200,000.00 will be paid after the agreement was signed but even after the agreement was signed, no payment was ever made by the plaintiff to the defendant.

THE NATURE OF THE COUNTERCLAIM

a. The defendant claims that the plaintiff breached the management agreements dated 28 March 2009 (March agreement) and 12 June 2009 agreement (June agreement) respectively and as a result the defendant seeks damages in the sum of $162,950.00 (the balance of $200,000.00 less of $37050 paid in cash and kind).

b. Under the March agreement the plaintiff had full possession and operation of the quarry from 1/4/2009 to 12/6/2009. The plaintiff was required to pay $100,000.00 after he took over operations on 1/4/2009 - but throughout April and May 2009 until the date of trial June 2010 the plaintiff failed to make any payment to the defendant.

c. Although payment of the $100,000.00 was not made – the defendant admits there were various small cash advances with amounts – shown and dated as follows:

29/3/09 cash	$ 5,000.00
06/4/09 cash	$ 2,500.00
21/4/09 cash	$ 1,000.00
23/4/09 cash	$ 1,000.00
7/05/09 cash	$ 2,500.00
29/5/09 cash	$ 1,000.00
Total	$13,000.00

Evidence refer to the statement issued by the plaintiff and attached as appendix "B" to the defendant's affidavit dated 19/10/2009 sworn and file herein also the affidavit of the plaintiff dated 23/10/2009 and the attachments thereto. (Defendant's Booklet pages 34 – 43 and pages 94 – 116).

d. In May 2009 the plaintiff promised to pay the defendant $200,000.00 in June 2009. During this period of time the defendant had already given the quarry and machineries to the plaintiff. He was desperate to receive money because of an arrangement with the bank to save his home.

e. It was submitted and I fully accept this - that the plaintiff was aware of the defendant's financial situation at the time and the plaintiff used that knowledge to his advantage.

f. In the plaintiff's evidence he used the words "help" and "assist" with regards to the payments he said he was not obliged to make, but would do so in order to help the defendant. In my view this was an absurd statement because the plaintiff was obligated under the agreements to make payment - but he refused to accept his obligations.

g. The plaintiff's witness Tevita Talanoa also used the words "help" and "helping the defendant" when he was asked about the various meetings and the promises of payment.

h. According to the defence in June 2009 the position of the defendant was dire - if not desperate. He believed the plaintiff and he was ready to sign the "June agreement" as a temporary arrangement for the purpose of meeting the requirement of the Westpac Bank of Tonga for a loan.

i. The plaintiff denied this representation. The plaintiff was asked about paragraph 10 of his affidavit dated 23/10/2009 (pages 78 – 80 defendant's booklet) where he stated –

> ***I have no loan at any bank in Tonga but the only requirement from the bank to view the written agreement so that I am secure in my financial situation.***

j. The plaintiff denied that he gave this explanation - to his lawyer and he said it was wrong. He was asked two questions where did his lawyer get that information from and why did he swear it was true on 23/10/2009. He had no answer to either question. I find as a fact the plaintiff was clearly evasive.

9 PAYMENTS UNDER THE AGREEMENTS

I find as a fact the payment of $100,000.00 due on 1/4/2009 pursuant to the March agreement was never paid – up to this date. Further the payment of $200,000.00 due on signing the agreement on 12/6/2009 was also never paid up to this date.

10 REASONS FOR NON PAYMENT

The reason for not paying the $100,000.00 in April 2009 was because the plaintiff said there was no agreement - on the amount to be paid. The plaintiff further said it was a gentlemen agreement (refer his affidavit dated 9/4/2010 sworn and filed herein). Also refer to paragraph 7.1 (d) hereof as to reference to informal conversation.
The plaintiff was cross-examined on this point and he gave no satisfactory answer in my view he was extremely evasive.

The court accepts the submission by the plaintiff that some of the machinery left at the quarry by the defendant was old and that it would need constant maintenance and upgrading - but having taken over the quarry then that would always be up to the operator of the quarry, in this case the plaintiff. The court had the advantage in February of having visited the locus in quo.

11 DEFENCE TO THE COUNTERCLAIM

The defence as pleaded by the plaintiff - is as follows: The agreement dated 28 March 2009 was an informal conversation as to the value of the quarry, including the condition of the machineries at the quarry (paragraph 1 of the statement of defence).

a) The plaintiff took over the quarry on 1/4/2009 but he was not obliged to pay anything (denied he was obliged to pay $100,000.00) – refer para. 4 of the statement of defence. I do not agree.

b) The informal conversation of 28 March 2009 was reduced to a written agreement dated 12/6/2009 and duly signed by the parties. It represented the whole agreement between the parties. I do not agree.

c) That all previous arrangements between the parties were reduced to an assignment which was effective from 12/6/2009. I do not agree.

d) The plaintiff was free to pay $50,000.00 or $200,000.00 depending on the progression of the work on the quarry. I do not accept that assertion.

e) All other allegations in the counterclaim were denied.

Counsel argued - dealing with the first ground of defence - that the 28 March agreement was only an informal conversation as to value of the quarry, and the condition of the machinery.

The evidence showed quite clearly the plaintiff took the matter of the takeover seriously. In his own evidence and that of the defendant the plaintiff visited the quarry site twice in March 2009 and he observed the operation of quarry and the machinery. After two visits, the plaintiff arranged for his lawyer to visit the site, observe its operation and report back.

After his lawyer reported back the breakfast meeting at "Friends Café" was held where the agreement between plaintiff and the defendant was concluded. ***That agreement is pleaded in the statement of defence and counterclaim (refer paragraph 8.1 (c) hereof) and the plaintiff's denial of any financial arrangements. Refer paragraph 8.1 (d) hereof.*** The evidence of the defendant also clearly established the agreement and, I accept his evidence.

During the whole of the evidence there was no reference to any discussion of the condition of the machinery. The plaintiff visited and observed the operation of the quarry and machineries and he obviously approved it before agreeing to the 28 March 2009 agreement I fully accept that proposition and that evidence the site was taken – in what is commonly known as – "***As is condition."***

There is a difference between the plaintiff and defendant on the nature of the 28 March 2009 agreement - whether it was an informal conversation or an agreement as claimed by the defendant. The defence says there are 4 relevant factors which favors the defendants claim namely:

a) The careful consideration inspection and evaluation of the quarry as a business proposition before the meeting and the agreement of 28/3/2009 by the plaintiff. I accept that statement.

b) The admissions by the plaintiff of the terms of agreement - except the obligation to pay -which he says was not agreed on. However the plaintiff admitted the demands for payment which he construed as requests for in his words -help or assistance. I do not accept that statement.

c) The plaintiff promised to pay $100,000.00 in April and again in May 2009. As no payment was made in May 2009 the plaintiff promised to pay $200,000.00 in June 2009 and he took possession of the quarry on 1/4/2009.

d) On the question of the credibility of the plaintiff, the defence submits that his behavior, conduct, his explanations and answers in the witness box abundantly demonstrated that he was unreliable and had resorted to giving false evidence. Further he was warned by the court - and the case was adjourned to enable his counsel to advise him and impress on him, the risk of being charged with perjury if he gave false evidence.

The second ground of defence is that although the plaintiff took over the quarry and machinery on 1/4/09 he was not obliged to pay anything to the defendant. In evidence the plaintiff denied that agreement was reached on any payment being made; but the plaintiff freely admitted that payment was asked for, and he was prepared to ***help*** the defendant and he promised a payment in May 2009 from the sale of machineries which he had in the USA.

The defence argued that was an unreal contention - that the defendant wanted to dispose of his quarry without any fixed payment, because he wanted to do something else and he wanted to go back to the United States of America - as explained by the plaintiff. This was denied as a fabrication on the part of the plaintiff. In my view this assertion or suggestion

was clearly concocted by the plaintiff. It just did not make sense when the defendant's quite valuable and substantial house was about to be repossessed by the ANZ Bank

The defence argues it was also absurd for the plaintiff to say that the defendant wanted $100,000.00 a year for the quarry for 5 years and that he did not agree to it. If the plaintiff did not agree - then why did he take over the operation and kept the proceeds from the sale of coral rocks and dust from 1/4/2009 until 31/1/2010. [9 months]

The defence argues the final determination of the issue of payment on the whole of the evidence should be made in favour of the defendant. It should be noted that when it came to the question of payment of the $200,000.00 under the agreement of 12/6/2009 the plaintiff adopted and he repeated the same evasive attitude and explanation as on the payment he was required to make on 1/4/2009 and thereafter. I fully agree he was evasive.

The third ground of defence pleaded - is that the informal conversation of 28 March 2009 was reduced to a written agreement dated 12 June 2009 - which the plaintiff argues is the whole agreement between the parties and that the agreement of 12/6/2009 included all previous arrangements made between these parties.

Dealing with that defence it was submitted that the 12 June 2009 agreement was deficient in many respects and it made no reference to any previous arrangements neither did it cover the period from 1/4/2009 to 11/6/2009. The agreement made no references to any of the advances made to the defendant, or the supply of any coral rock to fulfill orders of customers who had already paid money to the defendant. The agreement was silent on all these points.

The fourth ground of defence was that the plaintiff was free to pay $50,000.00 or $200,000.00 depending on the progression of the work on the quarry.

The relevant paragraph relating to payment under the 12 June 2009 agreement is paragraph 2 which states viz:

ii) Because payment was not made the plaintiff promised to make the payment of $100,000.00 in May 2009 as money would be available from the sale of his or his son's machineries in USA.

iii) In May 2009 the payment of the $100,000.00 was not made and the plaintiff promised to pay $200,000.00 in June.

iv) In June 2009 the plaintiff obtained the defendant's signature to the 12 June 2009 agreement on the pretext that it was a temporary agreement to meet the requirement of the Westpac Bank of Tonga and it will be corrected later. Further he will pay $200,000.00 on signing of the agreement.

iv) The promise of payment of $200,000.00 made in June 2009 is reflected in the agreement but is made with the intention to confuse and not to bind the plaintiff to his promise.

v) After the signing of the 12 June 2009 agreement the plaintiff continued to promise payment but failed to do so. Please refer to paragraphs 3.5 (a) to (i), 3.6 and 7 hereof for details on this point.

vi) The promises to pay were not $50,000.00 but $200,000.00. The last date the plaintiff and his wife made this promise was on 3/9/2009.

The plaintiff did not in his defence [or evidence] deny the agreement dated 12 June 2009 and the obligation there under - to pay the defendant. I accept that proposition.

13 ANALYSIS

The defence says it was clear the plaintiff has defaulted under the verbal agreement of 28 March 2009, and also the written agreement dated12 June 2009 to make payments to the defendant. I find that as a fact.

The defence says the question to be determined is the quantum of damages - which in this case the defendant says should be $200,000.00 less $37,050.00 which the defendant is prepared to allow by way of deduction. On the evidence I accept I find as a fact the plaintiff owes the defendant $200,000.00 but the defendant is prepared to reduce that amount by $37,050.00

The evidence clearly showed the plaintiff has defaulted under both of the agreements and the damages suffered by the defendant consists of the nonpayment of a fixed amount i.e. $200,000.00 + of course loss of his machineries and home.

It is clear on the evidence presented to this court; that the plaintiff took over the operation and the running of the quarry from the defendant on the 1st April 2009 and that - from that date onwards, the plaintiff became fully responsible for the quarry, its operation and its running costs under the terms of the agreement[s].

It is clear that there was an offer and acceptance by the parties and also that proper consideration was offered for the plaintiffs rights to use that quarry- in both agreements both oral and written. It is also clear and I accept the proposition that no right minded person - would just give away for free a quarry - when he was in dire financial difficulties with his bank [the ANZ Bank] over threatened repossessions of his home. It makes good sense that the defendant would want to save his family home - at all costs.

It was clear on the evidence that the ANZ bank had commenced an action in the Supreme Court to repossess the defendant's home; and that the Bank eventually did so this was done because the plaintiff had failed to properly discharge his obligations under any of his agreements and; as a result of nonpayment of funds [for the use of the quarry] the defendant lost his quite substantial home, which the court of its own volition decided to visit, at the end of the trial.

I comment further that I found the plaintiff in this case was an evasive witness during this trial. I just did not believe him. He had also to be warned about giving evidence on oath and warned regarding the consequences of him giving perjured evidence. In my view the

plaintiff was not a credible witness - I found he manipulated his testimony and I prefer the evidence of the defendant in this case over that of the plaintiff and his witnesses.

Accordingly having heard all the evidence and having considered the helpful written submission filed by both counsel – In this case I find for the defendant on his counterclaim

JUDGMENT UNDER THE COUNTERCLAIM

The defendant asks for judgment as against the plaintiff. Because I find for the defendant

i) I make an order that the plaintiff is and was always - in default under the terms of his agreements with the defendant - in this case.

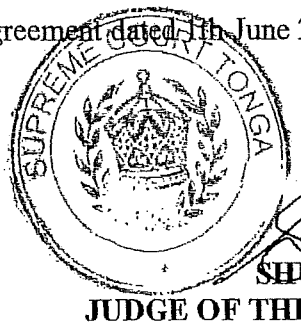
ii) I award damages in the sum of $162,000.00 against the plaintiff.

ii) The plaintiff is to pay interest at 12% on the sum of $162,000.00 from the 12/6/09 until payment is received in full.

iii) I make an order for costs based upon a solicitor / client basis

iv) I order that the injunction dated 11/05/2010 is cancelled

v) The agreement dated 11th June 2009 - is also cancelled



SHUSTER J
JUDGE OF THE SUPREME COURT