



# Employment Court of New Zealand

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## Yakka Contracting Limited v Naicker [2021] NZEmpC 166 (1 October 2021)

Last Updated: 7 October 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 166](#)  
EMPC 343/2021

IN THE MATTER OF	an application for a freezing order and an ancillary order
BETWEEN	YAKKA CONTRACTING LIMITED Applicant
AND	KRISHNEEL NAICKER Respondent

Hearing: On the papers and by telephone conference on 29  
September 2021

Appearances: MC Donovan and E Hill, counsel for applicant

Judgment: 1 October 2021

### JUDGMENT OF JUDGE KATHRYN BECK

[1] This judgment provides reasons for the granting of an application for a without notice freezing order and ancillary order in a Minute dated 30 September 2021.<sup>1</sup>

#### Background

[2] The application was filed on 28 September 2021. The Court was advised that the matter was urgent.

[3] Mr Naicker was an employee of Yakka Contracting Ltd (Yakka) until his resignation on 18 February 2021. Yakka intends to file proceedings against Mr Naicker in the Employment Relations Authority and withdraw corresponding claims and a freezing order application against him that currently form part of a High Court

1 *Yakka Contracting Ltd v Naicker* EMPC 343/2021, 30 September 2021 (Minute).

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proceeding. Before doing so, Yakka is applying to this Court to make its own orders against him.

[4] This proceeding for freezing and ancillary order against Mr Naicker was commenced by way of an application and supporting memorandum which attached a draft statement of problem to be filed in the Authority. It was supported by an affidavit of Mr Bruce Levien, the sole director and shareholder of Yakka, and an undertaking as to damages. In addition, draft proposed orders were filed.

[5] Counsel for Yakka have certified that:

- (a) the grounds upon which the application relies are made out; and
- (b) all reasonable inquiries have been made and all reasonable steps taken to ensure that the application contains all

relevant information, including any opposition or defence that may be relied on by any other party, or any facts that would support the position of any other party.

[6] I convened an urgent telephone directions conference with counsel for Yakka as a result of which Mr Donovan and Ms Hill filed an amended memorandum and application later in the afternoon of 29 September 2021, explaining in more detail the basis for the ancillary order and the application being without notice.

[7] Yakka already has proceedings in the High Court against the respondent, his wife and an associated company, Amrita Naickers Ltd (ANL). The statement of claim filed in the High Court includes causes of action for money had and received, conversion by receiving, and unjust enrichment.

[8] Freezing orders were sought and granted by the High Court against ANL, disposing of monies held in bank accounts or other assets, and against Mr Naicker and his wife dealing with the property they own in Papakura.<sup>2</sup> No orders were made against Mr Naicker from dealing with his bank accounts but he was ordered to disclose

2. *Yakka Contracting Ltd v Amrita Naickers Ltd* HC Auckland CIV-2021-404-1297, 16 July 2021 (Minute of Fitzgerald J).

details of those accounts and provide copies of bank statements for each bank account dating from February 2020.

[9] As a result of the Supreme Court's decision in *FMV v TZB*,<sup>3</sup> and as already noted above, Yakka intends to withdraw the claims against Mr Naicker that currently form part of the High Court proceeding and file proceedings against him and others in the Authority.

[10] Yakka is a company which carries on business in demolition and civil works services. Its clients include property developers who require it to demolish buildings, excavate land and prepare and install foundations or retaining walls.

[11] Mr Naicker was employed by Yakka in April 2019 in the position of project manager. The written individual employment agreement between them contained terms in relation to the duty of fidelity, the maintenance of confidentiality, conflicts of interest, as well as restraints of trade.

[12] He was promoted to the position of general manager civil works in July 2019. In that role he liaised with clients, managed projects, procured additional contracts, represented Yakka on project sites, and entered into contractual arrangements on Yakka's behalf.

[13] Yakka intends to bring proceedings in the Authority,<sup>4</sup> alleging breaches by Mr Naicker of various terms of his contract of employment. Its proposed statement of problem seeks awards of damages against him in excess of \$2.2 million, an account of profits, restitution and various penalties.

3. *FMV v TZB* [2021] NZSC 102 which has clarified that the Employment Relations Authority's exclusive jurisdiction extends to any controversy that arises during the course of an employment relationship and in a work context, regardless of whether it can also be pleaded without reliance on an employment right or interest.

4 Although it has indicated it will also be applying for the matter to be removed to this Court.

### **The Employment Court may make freezing orders**

[14] Under [s 190\(3\)](#) of the [Employment Relations Act 2000](#), the Employment Court has the same powers as the High Court to make freezing orders, as provided for in the [High Court Rules 2016](#).

[15] [Part 32](#) of the [High Court Rules](#) is therefore applied by this Court, with appropriate modifications. This means that a freezing order may be made under r 32.2 and ancillary orders may be made under r 32.3.

[16] Rule 32.5 provides that the Court may make the freezing order or an ancillary order against a prospective judgment debtor if the Court is satisfied that there is a danger that a judgment will be wholly or partly unsatisfied because the assets of that prospective judgment debtor, or of another person, might be removed from New Zealand or disposed of, dealt with, or diminished in value.

[17] In order to obtain such orders, Yakka must satisfy four essential requirements:<sup>5</sup>

- (a) It has a good arguable case.
- (b) Mr Naicker has assets within the jurisdiction.
- (c) There is a real risk that the property will be moved out of the jurisdiction or dissipated.
- (d) The balance of convenience and interests of justice require the order to be granted. In making this assessment, the Court will need to consider any potential defences that a respondent may have.

[18] The orders sought by Yakka comprise:

(a) an order pursuant to s 190(3) of the Act and r 32.2 of the [High Court Rules](#) freezing the assets of the respondent specified in the draft order;

5. See for example *A Labour Inspector of Ministry of Business Innovation and Employment v Jeet Holdings Ltd* [2019] NZEmpC 188 at [5] and the cases there referred to.

(b) an order dispensing with service of this application on any person; and

(d) an ancillary order requiring the respondent to provide a schedule particularising his assets within 10 working days of the date of service of the orders of the Court.

[15] Counsel for Yakka submits that any potential hardship that the respondent may incur as a result of the orders being made are mitigated by r 32.6(3) which provides that the freezing order must not prohibit the respondent from dealing with the assets covered by the order for the purposes of paying ordinary living expenses, legal expenses related to the freezing order, or disposing of assets or making payments in the ordinary course of business, including business expenses incurred in good faith.

### Good arguable case

[19] Rule 32.5 provides that the Court may make a freezing order against the respondent if an applicant has a good arguable case, not only on an accrued cause of action, but one which is prospective. The allegations in relation to a proposed claim must be capable of tenable argument, supported by sufficient evidence.<sup>6</sup> The cases emphasise that the sufficiency of evidence required must reflect the early stage of the proceeding.<sup>7</sup> This means that an order may be made if there is a sufficient prospect that another judicial body (here the Authority) will give judgment in favour of the applicant.

[20] Mr Donovan has submitted that there is a good arguable case that Mr Naicker has committed multiple breaches of his express and implied contractual duties, including to act with good faith, fidelity and in his employer's best interests, and has breached his statutory duty of good faith.

[21] Yakka alleges that, without its knowledge or authorisation, Mr Naicker:

6 *Hannay v Mount* [2011] NZCA 530 at [21]–[22].

7. *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, [2014] 22 PRNZ 479 at [18] and [31].

- misled a client into paying \$1,726,207.96 (including GST) for additional works carried out by Yakka to his own personal account and the bank account of ANL, only forwarding \$460,000 to Yakka;
  - arranged for ANL to invoice a client for work performed by Yakka;
  - undertook projects for ANL during his employment with Yakka;
  - withheld work opportunities from Yakka and diverted them to ANL;
  - arranged for ANL to tender for projects against Yakka while also preparing Yakka's tender for the same projects;
  - misled Yaka as to who the successful tenderer was;
  - hired equipment on Yakka's account but used it for the benefit of ANL;
  - arranged for waste material to be tipped onto a site which Yakka has had to remove at its expense;
  - arranged for various items to the value of \$56,043.91 (including GST) to be removed from a site and taken for the benefit of ANL;
  - encouraged employees to resign;
  - failed to perform his duties; and
  - used Yakka's confidential information for his own benefit and the benefit of ANL.

[22] Having read the affidavit of Mr Levien, I am satisfied that at this preliminary stage, the necessary sufficiency of evidence is established in respect of a claim which would come within the exclusive jurisdiction of the Authority. It is intended that the statement of problem be filed within 24 hours of the orders being executed and served. It is well established that an application for a freezing order may be made whether or

not a proceeding has been issued, although good and proper reasons must be given for not taking such a step. Yakka's reasons for not having filed the statement of problem prior to this application being made relate to the risk of dissipation, which I will deal with below. I accept that appropriate justification for not having filed the statement of problem as yet exists in this case.

### Assets within the jurisdiction

[23] I am satisfied, on the basis of the evidence before the Court, that there are assets owned by Mr Naicker within the jurisdiction.

### **Risk of dissipation**

[24] Yakka submits that there is a real risk that the respondent will dissipate assets, precluding it from recovering any losses, as evidenced by Mr Naicker's conduct subsequent to him ending his employment.

[25] Such conduct includes allegedly advising a third party that he wanted to transfer property to a family trust and selling a property in Keri Vista Rise on 14 May 2021 for \$950,000.

[26] Of particular note, however, are his actions subsequent to the High Court freezing order. In an affidavit filed in the High Court proceedings, Mr Naicker has admitted being in breach of the High Court freezing order by removing funds from ANL's bank account to his personal account.<sup>8</sup> This is despite having previously removed himself as a director and shareholder of ANL. He says the actions were the result of a misunderstanding and he has subsequently repaid the funds or accounted for them. I accept, however, that such actions give rise to concern in relation to dissipation.

[27] The allegations against Mr Naicker are essentially ones of dishonesty. While those allegations are denied by him, the threshold for establishing his likely disposition of assets should not be high.<sup>9</sup>

<sup>8</sup> \$500,000.

<sup>9</sup> *Covington Group Holdings Ltd v Zong (No 3)* [2004] 17 PRNZ 819 (HC) at [58(e)].

[28] I accept there is a legitimate basis for concluding that there is a danger of dissipation.

### **Possible defences**

[29] To satisfy the obligation to the Court when an application proceeds without notice, the statement of defence in the High Court proceedings, affidavits filed by Mr Naicker and correspondence from his solicitors have been placed before the Court. Mr Naicker's defence is, in essence, that Yakka consented to the contractual arrangements, that there was an agreement that he could move materials from the Hobsonville Road site, and that Yakka owes him money.

[30] Accordingly, there is a relatively clear picture of the defences that will be raised by Mr Naicker. However, it is not the job of the Court in this instance to determine issues of credibility or contestability.

[31] Having heard counsel and considered the material provided, I am satisfied that at this early stage, Yakka has a good arguable case for bringing a claim in the Authority.

### **Undertaking as to damages**

[32] Yakka has provided an undertaking as to damages with its application. It has provided evidence from its accounting records showing that its present financial situation is sound and that it would have the ability to pay an award of damages.

### **Balance of convenience and overall justice**

[33] If Mr Naicker's assets were dissipated, there is a real risk that any determination of the Authority will be rendered nugatory.

[34] Any hardship to Mr Naicker will be mitigated by the provision in the [High Court Rules](#) that a freezing order must not prohibit dealing with assets covered by the order for the purpose of paying ordinary living expenses, or legal expenses related to the freezing order.

[35] The prejudice that may be caused by a freezing order over the assets may be mitigated by the fact that it can be reviewed within a short period, and by reserving leave to all parties, including Mr Naicker, to apply on short notice in the interim for any necessary modification.

### **Conclusion**

[36] A freezing order is appropriate. Having regard to all the circumstances disclosed by the affidavit evidence, I am satisfied that there is a danger that any judgment in favour of Yakka will be wholly or partly unsatisfied because Mr Naicker's assets may be disposed of, dealt with or diminished in value. I am also satisfied, on the basis of Mr Levien's

evidence, that it is in the interests of justice to grant the application for ancillary orders as sought.

[37] The orders are to have effect until 5 pm on Tuesday 19 October 2021 unless, prior to that date, they are continued or renewed.

[38] The orders made are to be reviewed by the Court at Auckland on Monday 18 October 2021.[10](#)

[39] Mr Donovan is to update the Court as to all relevant circumstances by a memorandum which is to be filed and served by 4.30 pm on Friday 15 October 2021.

[40] Any party may apply in the meantime to modify the terms of the order on one business day's notice.

[41] I direct that Yakka is to serve a copy of all documents filed in the Court, as well as a copy of the orders made and this judgment, on Mr Naicker through his solicitors, Simpson Grierson, as soon as possible.

[42] The Court is to be advised as soon as the documents have been served. The judgment will be published after that notification has been received.

10 The relevant COVID-19 Alert Levels will determine the manner in which this hearing will be held.

[43] Costs are reserved.

Kathryn Beck Judge

Judgment signed at 4.30 pm on 1 October 2021

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