

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0057 OF 1998S  
(High Court Civil Action No. 0489 of 1997)

BETWEEN:

NATIONAL MBF FINANCE (FIJI) LIMITED

*Appellant*

AND:

NEMANIBULI

*Respondent*

Coram:

The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal  
The Hon. Sir David Tompkins, Justice of Appeal  
The Hon. Sir Rodney Gallen, Justice of Appeal

Hearing:

Tuesday, 16 May 2000, Suva

Counsel:

Mr Tevita Fa and Mr Ritesh Naidu for the Appellant  
No appearance for the Respondent

Date of Judgment: Thursday, 6 July 2000

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**JUDGMENT OF THE COURT**

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The respondent brought proceedings against the appellant seeking orders in respect of the seizure of a motor vehicle registration number CG 545 and damages in respect of that seizure. No statement of defence having been filed the respondent sought judgment by default. Subsequently however a statement of defence was filed and the respondent then applied to have the statement of defence struck out on the basis that (a) the statement of defence disclosed no reasonable cause of action and/or (b) the action was scandalous, frivolous or vexatious and/or (c) the action was an abuse of the process of the court. On that application the statement of defence was struck out and judgment entered in favour of the respondent's claim for damages which were to be assessed. It is against that judgment that this appeal has been brought.

The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the court. In this case the Judge's task was made more difficult because a considerable amount of factual material was placed before him. We wish to point out that this is inappropriate and undesirable. The Judge's task was also made more difficult by the wording of both statements of claim and defence which do not raise the questions at issue with clarity.

The relevant clauses in the statement of claim are as follows:

2. *Sometimes in September 1996, the NBF Asset Management Bank called for tenders for the sale of Motor Vehicle registration CG 545.*
3. *The Plaintiff's tender for the purchase of the said vehicle was successful and soon thereafter the Plaintiff took possession and registered his ownership with the Transport Department after having paid its full purchase price.*
4. *The Defendant Bank authorised PITA TAMANI a bailiff to seize and take into custody the said motor vehicle registration No. CG 545 who did so on the 24<sup>th</sup> September 1997 at Suva City.*
5. *That the said vehicle was utilised for transportation of barbecue and other items for sale in the Suva City area everyday.*
6. *The seizure by the Defendant's bailiff is wrongful and unlawful.*
7. *That as a result of the Defendant's wrongful and unlawful action the Plaintiff was deprived of the use of the vehicle and disabled from carrying on his sale of barbecue in the Suva City and at sports grounds during the past rugby matches and would continue to suffer loss and damages until the Defendant remains in possession and custody of the said motor vehicle."*

The relevant clauses in the statement of defence are:

- “2. *The Defendant admits paragraph 4 and it further says that it exercised its powers under the Bill of Sale Book 95 Folio 1775 given by Akbar Ali (f/n Muni Prasad) to the Defendant company on or about the 8<sup>th</sup> of June, 1995. Further the Defendant says that the Plaintiff has not acquired good title to the vehicle because at the time the National Bank of Fiji registered its Bill of Sale (Book 93, Folio 3663) to secure the indebtedness of Suman Lata Ali and Abdul Rahim, the vehicle was registered in the name of Mr. Akbar Ali.*
3. *That as to paragraph 5 of the Plaintiff's Statement of Claim, the Defendant cannot admit nor deny the same as it is not aware of the facts relied therein.*
4. *The Defendant denies paragraph 6 and 7 of the Plaintiff's Statement of Claim and puts te Defendant to strict proof thereof.”*

No doubt because of the material which was placed before him and because of the way in which the case was argued the Judge in his decision set out a factual background obtained from the papers, in some depth. For the reasons already expressed we consider it necessary only to refer to what appears to be beyond dispute that there were two Bills of Sale in existence with regard to the vehicle the subject of the action and the issue before the court was as to the validity of the first. Understandably, that validity depended upon ownership. The Judge determined the application in the end on the basis that registration under the relevant provisions of the Traffic Act (Cap. 176) was merely evidence of ownership and did not constitute conclusive evidence of ownership. In coming to this conclusion he relied upon an obiter dictum to this effect in the decision of the Fiji Court of Appeal in *Sarda Nand Biram Indra* Civil Appeal No.35 of 1991.

In this case paragraph 3 of the statement of claim in a rather oblique way alleges that the respondent had obtained ownership of the vehicle concerned. The defendant neither admitted nor denied the contentions of that paragraph but in paragraph 2 of the statement of defence the appellant

claimed to have exercised its powers of seizure under a Bill of Sale and then went on further to contend that the respondent had not acquired good title to the vehicle because of the registration upon which the appellant relied.

The paragraph is unfortunately expressed. No doubt because of the way in which the case was argued, the Judge saw it as an allegation that ownership was based upon the registration. In fact however the paragraph can be read as disclosing two separate causes of defence of which the registration issue is only one. Because of the unfortunate ambiguity of the pleadings, it is open to contention that the question of ownership as such quite apart from registration was not in issue. That is not the way in which the case appears to have been argued and the significance of registration was itself in contention as evidence of ownership.

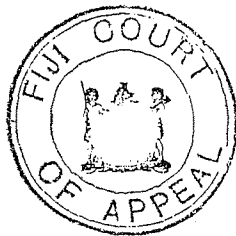
On the allegations made in this case it would be quite unreal to hold that ownership was not in issue apart from registration. Put more broadly ownership is a question of fact and the failure or otherwise of registration to establish that conclusively does not dispose of ownership in issue in the case.

It may be that other questions remained to be argued as to the effect of registration, and attention is drawn to the provisions of sub-section 8 of section 19 of the Traffic Act. For example the extent to which in the circumstances it constituted notice. But we make no comment on those. In our view the questions at issue between the parties cannot be resolved without a determination of the factual question of ownership at the relevant time or times and we accordingly conclude that it was inappropriate to strike out the defence on the ground on which the judge arrived at his conclusion.

The pleadings clearly require some amendment to ensure that the questions at issue are properly placed before the court and the attention of parties is drawn to the necessity to ensure that this is done. We propose therefore to allow the appeal but since in our view the appellant had at least some responsibility for the confusion which has occurred, we do not consider it appropriate to make any order for costs.

### The Result

1. The appeal is allowed, the judgment of the High Court set aside.
2. No order for costs.



*Thomas Eichelbaum*  
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**Sir Thomas Eichelbaum**  
**Justice of Appeal**

*David Tompkins*  
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**Sir David Tompkins**  
**Justice of Appeal**

*Rodney Gallen*  
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**Sir Rodney Gallen**  
**Justice of Appeal**

### Solicitors:

Messrs. Fa and Company Suva, for the Appellant  
Messrs. Peter Howard and Associates Suva, for the Respondent