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

CIVIL APPEAL NO. ABU 0035 of 2016
(High Court No. HBC 304 of 2012)

BETWEEN	:	**UMESH CHAND**
		Appellant
AND	:	**CHRISTIAN MISSION FELLOWSHIP**
		Respondent
Coram	:	**Chandra, JA** **Lecamwasam, JA** **Prematilaka, JA**
Counsel	:	**Ms. S. Dewan for the Appellant** **Ms. B. Malimali and Ms S. Tamanikaiwaimaro for the Respondent**
Date of Hearing	:	**27 February 2018**
Date of Judgment	:	**8 March 2018**

JUDGMENT

Chandra, JA

[1] I agree with the reasoning and conclusions in the judgment of Lecamwasam JA.

Lecamwasam, JA

[2] This is an appeal from the judgment of the High Court at Suva dated 17th March 2016. For ease of reference, the facts in brief are: - The Appellant alleged that he was working

as a Carpenter for the Respondent at Newtown Christian School worksite. On the date of the incident i.e. on 20th April 2010, whilst the Appellant was standing on top of a wooden staple and nailing the ply boards, the wooden planks on which the Appellant was standing gave way and caused him to fall on to the concrete floor thereby suffering a closed pylon fracture to his right ankle. Thereafter he had been rushed to the hospital where he received medical treatment for his injuries. The Appellant claimed general and special damages from the Respondent.

[3] As per the statement of defence, the Respondent denies that the Appellant was employed by the Respondent but admits that the Appellant was working on the site of its school in the employment of a company which undertook the construction of the school and further avers that the Defendant had no legal relationship whatsoever with the Plaintiff(Appellant).

[4] Having heard the case, the learned High Court Judge entered the judgment in favour of the Respondent. The instant appeal is against the above judgment on the following grounds of appeal viz:

1. *The learned trial Judge erred and / or misdirected himself in law and fact that in holding that the Appellant failed to prove on balance of probabilities that the Respondent was his employer when;*

    (i) *The Appellant had tendered evidence to show that the Respondents had confirmed in writing by its letter dated 25th January 2010 that the Appellant was an employee of the Respondent earning a weekly wage of $180.00.*

    (ii) *The Appellant had tendered evidence to show that the subsequent to his injury at work on 20th April 2010, the Respondent paid him mandatory 2/3 wages of $111.00 under the Workmen's Compensation Act Cap.94*

    (iii) *The Appellant tendered the Respondent's payment vouchers no. 26140, 26147 and 26150 which showed the amount of wages the Appellant received post his injury at work.*

(iv) The Appellant tendered his Bank Statement to show the direct deposits of 2/3 wages made by the Respondent.

2. *The learned trial Judge erred and/or misdirected himself in law and in fact in holding that the Appellant had failed to establish a prima facie case for the Respondent to meet.*

3. *The learned trial Judge erred and/or misdirected himself in law and in fact in holding that the Non-Suit was available to a Defendant in High Court proceedings.*

4. *The learned trial Judge erred and/or misdirected himself in law and in fact in failing to take into account that the procedure of Non-Suit has been abrogated by the High Court Rules of Fiji, 1988.*

5. *The learned trial Judge erred and/or misdirected himself in law and in fact in failing to take into consideration that the High Court Rules of Fiji, 1988 provides a complete and self code relating to the practice of withdrawal, discontinuance and striking out of an action.*

6. *The learned trial Judge erred in law by failing to put the Respondent to its defence.*

7. *The learned trial Judge erred in law by misconstruing the evidence and holding that the letter written by the Respondent on 25 January 2010 was written with charitable intention when no such evidence was tendered establishing this as a fact.*

8. *The learned trial Judge erred in law and in fact in misconstruing the evidence and holding that the Appellant professed ignorance of the time book/record of KK Construction Works Limited when:*

   (i) The Appellant had not seen the time book/record during his employment.

   (ii) Neither the Appellant nor any other works whose names appeared on the KK Construction Works Limited time book/record had signed on the time book/record.

   (iii) The time book/record was not properly tendered in evidence by the Respondent and thereby the Court did not have the full benefit of t hearing evidence on the time book/record belonging to KK Construction Works Limited.

9. The learned trial Judge erred and/or misdirected himself in law and in fact in failing to provide any or any sufficient reasons for not accepting the Appellant's evidence.

10. The learned trial Judge's decision is wrong and erroneous and tantamounts to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.

[5] As the Appellant has opted to address some of the grounds of appeal together, I too will deal with them in the same sequence. As such, consideration of grounds of appeal 3, 4, and 5 and the determination thereof may render the consideration of the remaining grounds of appeal redundant, (Therefore it would be pertinent to address them at the outset).

[6] As pointed out by the Appellant, the Respondent's counsel has made an application for non-suit which the learned Judge had upheld and entered judgment in favour of the Respondent.

[7] Since the promulgation of High Court Rules of Fiji in 1988, we have at our disposal a complete code of procedure which nowhere recognizes the concept of non-suit. Fijian judicial precedent too is silent on the issue of non-suit.

[8] The learned High Court Judge, at paragraph 20 of his judgment was of the following opinion:

> *"First, Counsel for the Plaintiff submitted that non-suit was no longer available in the Courts of Fiji and if it were, it was only available to the Plaintiff and not the Defendant. I am afraid neither proposition holds any water, Winter, J in* ***Faiaz Ali v Fiji Bank and Finance Sector Employees Union****[2004]FJHC 270; HBC 0088.2004(14 December 2004; only said non suit is not a fashionable practice in Fiji, and while he also said it is an appropriate relief available to a plaintiff, he never said it was not available to a defendant".*

[9] It is observed that the learned High Court Judge has wrongly construed the statement of Winter, J. in ***Faiaz Ali*** (supra) in arriving at the above conclusion. Contrary to the Learned High Court Judge's interpretation of the dictum of Winter, J, the natural inference to be drawn from the dicta is that non-suit is a relief which is available, if at all, only to a Plaintiff but certainly not to a Defendant. It thus follows that, had His lordship meant any contrary elucidation the same would have been stated in unequivocal terms.

[10] High Court Rules specifically deal with withdrawal and discontinuance under Order 21. Order 21 rule 2 deals with discontinuation of action without leave while Order 21 rule 3 deals with discontinuance with leave. Order 21 further deals with the effect of discontinuance under Order 21 rule 4, the stay of subsequent action until costs is paid under Order 21 rule 5, and with the withdrawal of summons under rule 26. On a consideration of these provisions, it follows that after the High Court Rules 1988 came into force there exists no rule or order dealing with a situation of non-suit. I therefore hold that the learned trial Judge has erred by entering judgment for the Defendant as per submissions based on non-suit.

[11] Being satisfied that the concept of non-suit has no application in Fiji, a close scrutiny of Rule 21 of High Court Rules reveals that withdrawal and discontinuance is available only to a Plaintiff (or in the case of a counterclaim to a Defendant) and therefore the Defendant has no right to move for discontinuance either, which is the relief closely resembling non-suit. The court appreciates the efforts of the Respondent in producing lengthy written submissions on the issue of non-suit. However, except for the cases of **Vye v Vye** [1969] 2 All E.R.29; **Laurie v Raglan BuildingCompany Limited** [1942] 1 KB and **Neina Graham v Chorley Borough Council** [2006] All E.R (D), almost all other cases cited by the Respondent offered no assistance to Court on the issue of non-suit. Even the decisions of the cases cited were based on findings of 'no case to answer' and not on non-suit.

[12] Further, as has been observed above, the learned trial Judge had not accorded due consideration to important items of evidence which would have had a material bearing on the merits of the case. In light of the circumstances, therefore, it is wise to glance at the salient points of evidence which I believe the learned Judge had failed to advert to in the judgment.

[13] As per paragraph 25 of the judgment, the learned High Court Judge states: "*The onus on the Plaintiff is to show or prove the Defendant was his employer at the material time. On a total review of the evidence called by the Plaintiff, I have been unable to conclude* ***who exactly was the employer at the material time.*** *For obvious reasons it behoves me not to suggest who this might be....*"

[14] In the above circumstance of apparent doubt on the issue of who exactly the employer was at the material time, which thrusts to the crux of the issue, the learned High Court Judge should not have hastened to allow an application of non-suit.

[15] Further, P4 is a letter issued by the Respondent to the Appellant confirming that the Appellant is an employee of the Respondent. P4 dated 25/01/2010 has come into being pursuant to the request of the Appellant for a letter of confirmation of employment from the Respondent in order to purchase a washing machine. .

[16] The learned Judge had very lightly disregarded this letter on the basis that it is a letter issued with a 'charitable intention'. A statement confirming employment entails legal consequences which even the most uninformed of employers ought to be conversant with. It therefore, would have been instructive to place on the table the very pertinent issue of whether an institution of the calibre of a church could plead ignorance of such consequences. In any event, the maxim *ignorantia legis neminem excusat* (ignorance of the law excuses no one), may prevent the Respondent from taking refuge behind the defence of ignorance, especially, if such act would subvert the ends of justice. In addition to this, the learned High Court Judge paid scant attention to the post-accident payments

of 2/3 of wages made by the Respondent to the Appellant up to the end of 2012, which on the face of it, extends beyond the reaches of charity.

[17] In summation, the learned trial Judge should have conferred closer scrutiny on all pertinent issues without rushing to act on the basis of non-suit. Had he been more patient and cautious as to call for a defence, this court would have been in a better position to understand for instance, the role played by Mukesh, the the alleged Foreman, Tony's (an employee of the church) involvement, wages being brought by the Respondent's van, any possible explanation to shed light on payments of P5, receipts 1- 60, and the nexus between the Respondent and the Newtown Christian Primary School, especially in view of paragraph 12 of P11 which states: *Name and Address of Holder of Title or Lease of School site*: "*Christian Mission Fellowship, P O Box 16471, Suva.*

[18] This court is further fortified by the ratio in **Henderson v Foxworth Investments Ltd** [2014] UKSC41,[2014]1 WLR 2600, where Lord Reed helpfully quoted in the lengthy written submissions of the Respondent under the heading: ***When should an Appellate Court interfere with findings of Fact;*** *has said:*

> "*it follows that in the absence of some other identifiable errors such as (without attempting an exhaustive account) a material error of law; or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, and appellate court will interfere with the findings of fact made by a trial judge if only it is satisfied that his decision cannot reasonably be explained or justified.*"

[19] I cannot but agree with the opinions expressed by their Lordship, and consider the matter at hand an appropriate instance of a demonstrable failure to consider relevant evidence with which an Appellate Court can interfere. It is often discouraged to set aside an order of a lower court on questions of fact, especially if the Judge had acted on the demeanor of a witness. However, in the instant case, the learned trial Judge had not acted on the

demeanor of a witness but has disregarded some and misconstrued other factual evidence that was placed before him.

[20] Hence, in the absence of a proper evaluation of the evidence by the learned trial Judge, it is incumbent upon this court to return the brief in this matter to the High Court to continue the case from the point at which it has stopped, (as if there was no application for non-suit) of course before a different Judge. In view of the above position, it is redundant to engage in considering the other grounds of appeal either separately or any further.

[21] Therefore, I would allow the appeal, judgment of the High Court dated 17th March 2016, should be set aside and the case is to be sent back to the High Court for further trial to proceed from the point at which it was stopped, (as if there was no application for non-suit) before a different Judge. Costs of $5,000.00 to be paid by the Respondent to the Appellant.

Prematilaka, JA

[22] I agree with the Orders proposed by Lecamwasam, JA.

Orders of the Court:

1. *The Appeal is allowed.*
2. *Judgment of the High Court dated 17th March 2016 is set aside.*
3. *The case is returned to the High Court for further trial to proceed from the point at which it was stopped, (as if there was no application for non-suit) before a different Judge.*
4. *Cost of $5,000.00 to be paid by the Respondent to the Appellant.*

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Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL