

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0050 OF 2020
[Civil Action HBA No: 23 of 2019(Ltka)]

BETWEEN : 1. **YOGITA ASHWINI NAND**
2. **NALESH NAND**
3. **CHAMPA WATI**

Appellants

AND : **FIJI DEVELOPMENT BANK**

Respondent

Coram : **Jitoko, P**
Andrews, JA
Clark, JA

Counsel : **No appearance for the Appellants**
A. Raitivi for the Respondent

Date of Hearing : **05 September, 2024**

Date of Judgment : **27 September, 2024**

JUDGMENT

Jitoko, P

[1] The hearing of this appeal was set down for 4th September, but the first named Appellant who is self-represented, failed to turn up. No communication whatsoever, to either the Court or the Registry, was received from her. The Court decided to adjourn the hearing to the 5th September, the next day, in the hope that the Appellant will appear. In the meantime, the Registry was able to establish that the Appellant was abroad, in Australia, and in a message she sent to the Registry, she informed the Court that she was presently studying in Sydney, and was not able to attend the hearing on the day. She requested if the Court would consider vacating the hearing and adjourning to a late November date, when this Court next assembles.

[2] Counsel for the Bank, the Respondent, vehemently opposed any further adjournment given the length of time the matter had taken through various appeal stages, and furthermore given that the Magistrates Court had ordered the Appellants to repay their debt of \$29,379.39 on 7 June 2019 which was delayed by the Appellants unsuccessful appeal to the High Court in February 2020, and immediately after, their appeal to this Court filed in March 2020. Counsel emphasised that after all the documents for the appeal including the Records had been certified, the Appellant did not appear on 6th March and again on 21st March 2024 when the matter was called to fix a hearing date. Finally on 3rd June, 2024, the Appellant was present in Court, and with her agreement, this appeal was set down for hearing on 4 September.

[3] It is in these circumstances that the Court agreed to hear an application by the Respondent for the appeal to be struck out, discontinued and/or dismissed.

Nature and Substance of the Appeal

[4] Before the Court considers the Respondent's application to strike out or for the appeal to be dismissed, it is germane that we first examine the nature and the substance of the appeal.

[5] The appeal is from the Decision by Stuart J of the Lautoka High Court on 12 February, 2020, dismissing the Appellants' appeal against the judgment of the Magistrates Court at Ba, of 7 June, 2019, dismissing the Appellants' counterclaim against the Respondent while entering the judgment in the Respondent's favour for the amount of \$29,379.39 plus post judgment interest at 5% per annum plus \$300.00 costs.

Brief Background

[6] The Respondent bank on 7 February 2017, filed a writ claiming against the 1st named Appellant (the borrower), the 2nd named Appellant, and Champa Wati, the third named Appellant, (as guarantors), the sum of \$29,379.39 together with interest at the rate of 10.1% per annum from 1 September, 2015 plus costs. The Court notes that both the guarantors have since died.

[7] The debt is the amount outstanding from the loan agreement entered into by the Respondent with the 1st named Appellant, on 2 October, 2007 for the sum \$38,681.00. The security provided was in the form of a Bill of Sale over the 1st Appellant's stock and fixtures whilst the 2nd Appellant, the husband of the 1st Appellant and the 3rd Appellant, the mother of the 2nd Appellant, both executed the Respondent's bank guarantees on 16 October 2007 and 3 October, 2008 respectively.

[8] A second tranche of the loan in the amount of \$16,000.00 was released to the 1st and 2nd Appellants, as "*new loan*" in 2009, and with the first loan of 2007 already accruing interest and standing at \$39,128.05, the total loan for a term of 6 years from January, 2009 was \$55,128.05, with the first repayment of the interest of the new total at \$1080.00 monthly.

[9] There is no argument that the Appellants had persistently failed to meet their loan repayment although the Respondent conceded that on 31 July 2012 the Appellants paid \$13,440.00 to clear the arrears and thereafter they continued to pay regular payments of

agreed interest per month until 12 November, 2013 when it ceased altogether. This is verified by Exhibit “PL09” that was made available to this court only after it requested it from the Ba Magistrates’ Court registry.

[10] The Appellants on or about 28 March 2014 requested the Respondent to consider a “*discount debt settlement*” plan, to ease their repayment burden, to which the Respondent requested more information on their source of funds which, according to the Respondent, they failed to provide.

[11] The Appellants’ account soon fell into arrears again and on 22 August 2014, the Respondent sent out a Demand Notice for the payment of the balance of the loan at \$26,021.42 outstanding as at 31 July, 2014 with interest.

[12] An attempted settlement proved unsuccessful, and on 8 June 2015, a fresh Demand Notice for the payment of the outstanding balance of the loan was served, but the Appellants have failed to pay, hence the issuance of the Writ.

Magistrates Court Proceedings

[13] The Respondent as Plaintiff in its writ filed in the Ba Magistrate’s Court on 7 February, 2017 sought judgment in the sum of \$29,379.39, being the outstanding loan standing in the names of the Appellants, then Defendants. The Respondent claimed also interest at the rate of 10.1% per annum until full payment until full payment plus costs and full payment be limited to \$50,000.00 (the Magistrates Court limit).

[14] The Appellants were self- represented and the Court noted that while the third-named Appellant had died, no effort was made for substitution.

[15] For their part, the remaining Appellants filed their defence and a counter-claim seeking \$750,000.00 in damages for each of the three (3) Appellants on the grounds of breach of contract, wrongdoing and dishonesty.

[16] The learned Magistrate struck out the counter-claim on the basis that the Court did not have jurisdiction to hear the claim, and whilst the Appellants had argued in their appeal in the High Court, that they had submitted for the matter to be referred to the High Court, there is no evidence from the Magistrates' Court record that submission for transfer had been made.

[17] In the end, the learned Magistrate on 7 June, 2019, entered judgment in favour of the Respondent in the amount claimed in its Writ plus interest and costs, as set out at paragraph [5] above.

The Appeal to the High Court

[18] The eleven (11) grounds of appeal, the Appellants filed on 1 July, 2019, prepared and submitted in person, are in the main, disputation of facts only, which His Lordship, Hon Justice Stuart has carefully and correctly recast at paragraph 8 of his judgment, as follows:

“8. In their appeal the appellants complain that the Learned Magistrate erred in the following ways (this is a summary in my words of the Notice of Appeal, which is rather less concise):

- i. he failed to have regard to all relevant documents.*
- ii. he has apparently ignored the fact that the defendants have already paid more than \$65,000, and yet the loans are still not fully repaid.*
- iii. the loan documents relied on by the bank are inconsistent, difficult to understand and confusing.*
- iv. the bank declined the defendants application/proposal in or about mid-2012 for a discounted debt settlement figure (i.e. to accept a reduced repayment amount in satisfaction of the loans).*
- v. the bank's handling of the loans caused the death of Ms Champa Wati (the now deceased third defendant) who died due to lack to hope in life.*

- vi. *the Court failed to consider transferring the matter to be dealt with in the High Court.*
- vii. *the bank delayed enforcing the loan from June 2014 (it is not clear what this date refers to) to 7 February 2017 (the date when the bank's writ of summons was filed)."*

High Court Decision

- [19] The appeal was heard on 9 December 2019. The second-named Appellant, the first-named Appellant's husband, argued their case before the Court. The Court understood from the submissions of the Appellants, that they were not challenging the facts that they are liable to the Respondent, for the two (2) loans. They were only contesting the amount they still owed to it.
- [20] The evidence of the bank as adduced through Ms Margaret Hazelman, a member of its Asset Management Unit, clarified that the Appellants had borrowed a total loan of \$55,128.05 for a term of 6 years from January, 2009 with the monthly repayment interest of \$1,080.000 per month. The Appellants then began to default in their monthly repayments since 2009, until they were forced to pay \$13,440.00 on 31 July, 2012 to help clear up the arrears. It is conceded by the Appellants that even after their 31 July 2012 payment, they soon after fell back to arrears.
- [21] The High Court had carefully examined in details all the Appellants' grounds of appeal underlined by their own submissions and assertions of alleged facts, as opposed to that of the bank's rebuttal and its insistence of conformity with accepted commercial practice.
- [22] As to the Magistrate's summary dismissal of the Appellant's counter-claim, on the ground that the amount of F\$2.25 million was well beyond its jurisdiction, the High Court found that he did not err in fact or in law in dismissing the counter-claim.

[23] In the end, the High Court dismissed the appeal in its totality, on the ground that it was without merit.

The Grounds of Appeal to this Court

[24] On 6 July 2020 the Appellants, being first and second-named Appellants only, filed their Notice of Appeal and eight (8) grounds of appeal.

[25] The eight(8) grounds of appeal are in essence very similar to the 7 grounds of appeal filed against the Magistrates Court judgment, in the High Court, only now embellished with allegations of misrepresentation and including deception by the bank. Also filed with the Notice and Grounds, was an Affidavit by the first-named Appellant, submitting that the second-named Appellant was representing the third-named Appellant who had since died, even though, the probate has yet to be granted. The affidavit then proceeded with submissions of further evidence for this Court to consider, in hearing the appeal.

[26] This Court well understands and acknowledges the rights of individuals to appear and argue their case before any Court of the land. In fact the Court often bends over backwards in order to accommodate the self-represented, before it. However, the opportunity is not a licence for individuals to make submissions and raise issues that are contrary to the procedures and rules of the Court. At the end of the day, the Court will only consider what is submitted before it that is pertinent or relevant to the matters before it.

[27] All the grounds of appeal filed by the two remaining Appellants are generally statements of their interpretation as to the issues of facts relevant to the actions taken by the Respondent, with no reference to the law and specifically, whether the bank was in breach of its legal duties in their contractual relationship. Equally, the affidavit filed with the Grounds of Appeal, quite apart from its status, do not add any substance to the appeal and specifically as to its merit. General reference to the individuals' rights and protection under the Constitution, does not add any weight to the substance of the appeal unless specifically detailed how such personal rights are adversely affected.

Submission by the Respondent

- [28] For its part, the Counsel for the Respondent submitted that all the grounds of appeal, which were essentially allegations made by the Appellants, were tested and considered in the Magistrates Court. The Respondent Counsel had, in response, tendered all the documentary evidence pertaining to the loan facilities approved by the bank to the Appellants. These include, the signed loan offers of 2 October, 2007 and 29 October, 2008, the Bills of Sale of 16 October 2007 and 20 November 2008, Guarantees of 16 October 2007, and 20 November 2008, including arrangements agreed to by the Appellants, for further additional weekly payment to offset the arrears.
- [29] The Respondent argued that it had dutifully followed the law, and the Demand Notice served on the Appellants on 24 June 2015 was only made following non-payment of arrears despite several reminders.
- [30] In short, the Respondent argues that there was an offer and acceptance. The Appellants had failed to honour the Terms of the Loan by failing to repay the loan. The debt remains outstanding, and according to the Respondent, the Appellants have intentionally refused or are unwilling to repay the money they borrowed from the bank. There are no legitimate defence raised and they have failed to provide any documentary evidence in support of their allegations and claim.
- [31] In the Counsel's submission, the trial Court as well as the High Court, were well satisfied that given that Appellants' concession that they do owe money to the bank and that they have failed to produce any evidence to substantiate their allegations of the Respondent's breach of contract, wrongdoing or even of dishonesty, their arguments have no merit and they remain liable to pay their loan to the Respondent to this day.

The Respondent's Summons to Strike Out

[32] The Court heard the Respondent's Summons to Strike Out on 5th September seeking the following orders:

“(i) *That the Appellants' Notice of Appeal against the Respondent be struck out as it did not seek leave of the Court to stay the orders granted on 12th of February, 2020.*

(ii) *That the grounds noted on the Appellants' Notice of Appeal discloses no reasonable cause of action against the Respondent and non-appearance on the day of the hearing and is an abuse of the court process.”*

The application is made pursuant to O18 r18 (1)(c) and (d) of the High Court Rules.

[33] In support of the application, Ms Karolina Lala, the acting Manager of Asset Management Department, of the Respondent, outlined in detail the history of the proceedings from the filing of its Writ action in the Ba Magistrates' Court on 7 February 2017 where the Appellants were ordered to pay the Respondents the sum of \$29,379.39 plus 5% post judgment interest and \$300 costs; to the dismissal of their appeal in the Decision of the Lautoka High Court on 12 February, 2020, and additional costs of \$300 for the unsuccessful appeal; to the filing of the Notice and Grounds of Appeal to this Court as 6 July, 2020, and finally to the agreement by both parties on 3 June, 2024 for the hearing of the appeal on 4 September, 2024.

[34] The Respondent's recovery team, according to the affidavit, were in the process of enforcing the judgment but *“this was not fully complied with since the Appellants were not forthcoming in their repayments of the debt.”*

[35] In any event, the Respondent's legal team, had pursued the matter and the delay caused by the Appellants had placed the bank *“on the losing end, on interest accruing on debt, wasted court appearance together with costs of solicitors fees”*

[36] The non-appearance of the first-named Appellant (the husband, second-named Appellant has since died on 4 February, 2023 in Sydney, Australia), the Respondent submitted, is disrespectful of the Court and a waste of the Court’s and the Respondent’s time, and in the end, it amounted to abuse of court processes.

Consideration

[37] As to Order (i) sought by the Respondent in its Summons, it is not a legal or procedural requirement for the Appellants to first seek a stay of the High Court judgment, before filing their Notice of Appeal. By the same token if there is no Stay Order, there is nothing to impede the Respondent from the execution of the judgment of the High Court, notwithstanding the appeal. Rule 34(1)(a) of the Court of Appeal Rules is clear:

“Stay of execution

34 – (1) Except so far as to Court below or the Court of Appeal may otherwise direct –

(a) an appeal shall not operate as a stay of execution or of the proceedings under the decision of the court below”

[38] As to Order (ii) sought, it is clear from all the evidence before this Court, that the Appellants’ had obtained a loan from the Respondent and had willingly signed and agreed to the conditions of the loan, including the interest rate and the repayment schedule.

[39] It was established and conceded by the Appellants in both the Magistrates’ Court and the High Court that they had been delinquent in their repayments and which had resulted in the build-up of arrears. They admitted to the fact that they owed money to the Respondent, and the only contentious issue was the amount owed. And yet, even in this regard, there is no evidence to support the claim.

Conclusion

[40] In our view, whilst the Respondent may have sufficient grounds to rely on O.18 r.18(1)(a) for this Court to strike out the proceedings for the reason that it discloses no reasonable cause of action, and also understanding the context of this proceedings. However, we are of the view that given the summary nature and the objective of the discretionary powers of the court that it would be inappropriate for the Court to strike out this proceedings under O.18 r.18.

[41] This Court may still, if where and when appropriate, exercise its inherent and discretionary powers to dismiss the appeal if it is without merit.

[42] Having carefully examined and analysed both the Appellant and the Respondents' submissions filed, including the records of the proceedings in the lower courts, this Court finds and concludes that the appeal is without merit and should be dismissed with costs.

Andrews, JA

[43] I agree with the reasoning and conclusions in the judgment of Hon Jitoko, P.

Clark, JA

[44] I am in full agreement with the judgment of Jitoko P, and the orders proposed.

Orders:

1) *The appeal is dismissed.*


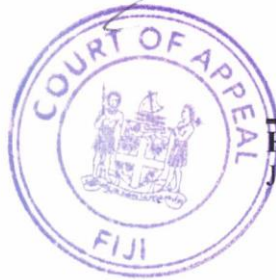
2) *The Respondent is entitled to the judgment sum of \$29,379.39, as per awarded by the Magistrates Court on 7 June, 2019 with interest of 5% from the date of Judgment to*

today, and costs of \$300 in the Magistrates Court and \$300 costs in the High Court respectively.


3) The Respondent furthermore, is entitled to costs of \$3,000.00 in this present proceedings.



Hon. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL



Hon. Justice Pamela Andrews
JUSTICE OF APPEAL



Hon. Justice Karen Clark
JUSTICE OF APPEAL