

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 140 of 2013

BETWEEN : **RUP DEO** of Nadi Back Road, Nadi, Businessman.

APPELLANT/DEFENDANT

AND : **AZAR ALI** of 9 Miles, Nakasi, Businessman.

RESPONDENT/PLAINTIFF

Solicitors : Pillai Naidu & Associates for the Plaintiff
Babu Singh & Associates for the Defendant

R U L I N G

INTRODUCTION

1. Before me is a summons dated 05 August 2013 for enlargement of time to file appeal, and stay of execution of a ruling of the Nadi Magistrates Court pending appeal that was handed down on 22 August 2012. The summons seeks the following:
 - a) that leave be granted to the Appellant/Applicant/Original Defendant to file appeal out of time against the decision/ruling/judgment of Resident Magistrate Thushara Rajasinghe delivered on the 22nd of August 2012.
 - b) the execution and/or enforcement of the said decision/ruling/judgment of Resident Magistrate Thushara Rajasinghe delivered on 22nd August 2012 be stayed until the determination of this application.
 - c) that costs of this application be in the cause.
 - d) any further relief or orders that this Honourable Court deems, just and appropriate.
2. The judgement in question was actually that of Resident Magistrate Samuela Qica and not of Resident Magistrate Rajasinghe (as he then was). The judgement was merely read over in Court by RM Mr. Rajasinghe because, as far as I understand, RM Mr. Qica had then, been transferred to another jurisdiction.

OBSERVATIONS

3. RM Mr. Qica began by observing that the case before him concerned an agreement between the respondent/plaintiff as vendor and the appellant/defendant as purchaser for the sale and purchase of two motor vehicles at the agreed price of \$39,000. RM Qica then goes on to observe that, pursuant to that, the appellant/defendant gave the respondent/plaintiff an initial payment of \$14,384-00. After receiving that payment, the respondent/plaintiff then supplied the appellant/defendant the two vehicles. The balance of \$24,616-00 remains owing by the appellant/defendant. The respondent/plaintiff was claiming that balance sum plus 10% interest *per anum* at the Magistrates Court. The judgement then sets out the entire *viva voce* evidence of the respondent/plaintiff in chief, under cross-

examination, and at re-examination. Part of that I now summarise. The other part I reproduce below as reported in the learned Magistrate's ruling.

EVIDENCE

4. The appellant and the respondent had known each other very well since 2003. They were flatmates for some 6 to 7 months. During that time, the respondent/plaintiff was importing cars. The appellant/defendant was interested in buying two cars. He knew that the respondent/plaintiff was importing cars. On 20 June 2003, they made the agreement (as stated above). The agreement was recorded in their respective diaries and signed. Because they knew each other well and "were like brothers", their signatures were not witnessed by anyone. They also did not want to have a solicitor draw up an agreement because of the costs involved. The agreement was that the appellant/defendant would buy two vehicles from the respondent/plaintiff. The respondent/plaintiff would import the two vehicles from Japan through a dealer who has an import license. The rest of the evidence recorded by the learned Magistrate is reproduced below:

- Amount agreed written in agreement \$39,000.00
- Agreement in diary tendered (exhibit 1). Entries done by him. All entries done in same time.
- Defendant was doing partial payments and records done on different dates. Defendant also had his diary. Defendant gave copy of his diary to him. He was keeping balance payment.
- His signature and defendant's signature on document. Original with defendant and other entries at bottom.
- Mali Khan was his supplier. The car was imported by a car dealer on his behalf (exhibit 2).
- Defendant was making partial payment. Amount paid and outstanding on record. He asked defendant to pay and has been dragging matter.
- Through his Solicitors defendant was asked to pay. Mali Khan was never known to defendant. He introduced defendant to Mali Khan.
- Mali Khan was his supplier and his sold to defendant.
- He sold one Toyota Carina and Mark II to defendant. He got cars from Japan.
- He claims for owing amount which is \$24,616.00 from defendant with interest and costs too.

In cross examination Azhar Ali stated:

- Mali Khan is his cousin brother.
- His not employer of Mali Khan.
- He imported vehicles from Japan from Mali Khan through a local licensed car dealer.
- Was shown document from Mali Khan and says that it is a fake document.
- Says that exhibit 2 was signed and received from defendant.
- Bottom is defendant's calculation and top is theirs together.
- He was not taking advantage of defendant.
- Agreement was done with him. The written agreements were done in same pen and writing. Signatures are not different but same.
- The cars when they came in were parked and defendant selected 2 cars.

- The cars were released on June to defendant.
- His evidence is with the court. Was shown TMO of \$10,000.00 Fijian dollars. Defendant gave it to him as he didn't have bank account. It was sent to Mali Khan.
- States that he waited for some time and not 3 years before pursuing action against defendant.
- Mali Khan's account is all clear. Mali Khan supplies cars from Japan.
- Says that document that he had agreement with defendant already tendered to court.

In re-examination Azha Ali stated:

- The document by Mali Khan is a fake document and not related to the two cars either.
- Confirms that his agreement with defendant is with the court.
- Request for outstanding amount to be paid by defendant.
- Defendant says he'll pay but didn't pay anything.

After the plaintiff gave evidence, defendant made an application to file non-suit against the plaintiff.

Issue

Whether the plaintiff has proved on the balance of probability that he had a valid contract with the defendant or whether plaintiff's case is not made out against the defendant?

APPELLANT'S AFFIDAVIT

5. The appellant, Rup Deo, was the defendant in the Magistrates Court Civil Action No. 138 of 2008. In his affidavit in support, sworn on 31 July 2013, Deo deposes at paragraphs 9 to 12:

9. That I intend to appeal the judgment because I verily believe that:-
 - a) There was no contractual agreement between the plaintiff/respondent and concerning the purchase of a Toyota Carina and Toyota Mark II worth \$39,000.00 (Thirty Nine Thousand dollars).
 - b) That at no time did I agree to nor sign any documents for the payment of the said sum to the Plaintiff/Respondent for the purchase of the said vehicles.
 - c) That the Plaintiff/Respondent had fraudulently drawn up documents to show my signature as approval of the said transaction. (Annexed and marked as "RD1" is a copy of the diary entries and a report from a certified forensic graphologist verifying my signature).
 - d) That I paid the sum of \$14,384 (Fourteen Thousand, Three Hundred and Eighty Four Dollars) on or about the 18th day of March to the 20th day of June 2003 to Malik Khan through the Plaintiff/Respondent who was acting as his agent.
 - e) That on the 15th day of April 2003, I paid and sent \$10,000.00 (Ten Thousand Dollars) to Malik Khan directly who was engaged with The Finance International K.K (Japan) Limited. (Annexed and marked "RD2" is a copy of the Telegraphic Transfer with City Forex).
 - f) That I deny owing the sum of \$39,000.00 to the Respondent/Plaintiff or any sum at all.
10. That the Respondent/Plaintiff will not be prejudiced by my application to seek leave to appeal the judgment entered on the 22nd day of August 2012 against us should the same be granted together with a stay of all proceedings by this Honourable Court.
11. That I am informed by my solicitors that I have meritorious grounds of appeal. (Annexed herein and marked as annexure "RD3" is a copy of my proposed grounds of appeal.
12. That in the premises I pray for order in terms of my application.

RESPONDENT/PLAINTIFF'S AFFIDAVIT

6. He deposes as follows in his affidavit sworn on 22 October 2013:

4. when the judgment was delivered on the 22nd of August, 2012, the Appellant and his lawyers were also given a copy of the judgment by the Magistrates Court.
5. the appellant's lawyer was well aware of the judgment and also the other case of judgment Debtor Summons.
6. That I agree with the appellant that a JDS was issued against him on the 13th of March 2013 and I further state that to date, the appellant has not paid a single cent to me.
7. That I agree with the appellant in regards to paragraph 6 of his affidavit.
8.
9. the time of appeal has lapsed and the matter now is at executing stage of the Judgment Debtor Summons (JDS).
10.I am being prejudiced if leave is granted. I am entitled to the fruits of litigation.
11.

ORDER XXXVII – MAGISTRATES COURT RULES

13. Order XXXVII Part 1 of the Magistrates Court Rules provides that an appellant must give notice of intention to appeal within 7 days after the decision was given and under Part III, file at the Magistrates Court his grounds of appeal within one month from the date of the decision:

- I. Notice of Intention to Appeal
 1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal:
Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.
- II. Security for Payment of Costs
 - 2.- (1) Upon receiving notice of intention to appeal, the court below may in its discretion order the appellant to give security, to the satisfaction of the court if the parties differ, in such sum as the court shall direct, either by deposit, or by bond in Form 35 of Appendix A, for the payment of all such costs as may be awarded to any respondent by the appellate court.
 - (2) Where the security is by bond-
 - (a) the bond shall, unless the court otherwise directs, be given to the respondent;
 - (b) If the appellant is unrepresented, the bond shall be prepared by the court.
- III. Grounds of Appeal
 - 3.- (1) The appellant shall within one month from the date of the decision appealed from, including the day of such date, file in the court below the grounds of his appeal, and shall cause a copy of such grounds of appeal to be served on the respondent.
 - (2) At the time the appellant files the grounds of his appeal he shall deposit with the clerk of the court below such sum as the clerk shall consider sufficient to cover the fees prescribed in Appendix B for the preparation, certification and copying of the record.

THE LAW

14. Clearly, the appellant has failed to comply with Order XXV II of the Magistrates Court Rules. In any given case, once the rules are not complied with, it becomes a

matter of discretion for the court whether or not to grant leave to appeal out of time. The onus falls heavily on an intended appellant to convince the court to grant leave. In **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund** [2010] FJCA 3; Miscellaneous Case 020 of 2009 (3 February 2010) the court there stated :-

"It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal "

15. The above suggests that a party's right of appeal exists while time runs for the filing of the requisite appeal documents. Once time runs out, that right is extinguished. It then becomes a matter of judicial discretion whether or not to grant leave to appeal out of time. Of course, that discretion must still be exercised judicially. In **Norwich & Peterborough Building Society v. Steed** (1991) 2 All ER 880 CA, the factors which must be taken into account in exercising that discretion were stated as follows:

"The court has unfettered discretion in the grant or refusal of leave. The factors which are normally taken into account in deciding whether to grant an extension of time are:

- (a) The length of the delay;
- (b) The reasons for the delay;
- (c) The chances of succeeding if time for appealing is extended; and
- (d) The degree of prejudice to the Respondent if the application is granted.

16. Mr. Justice Callanchini sitting as a single judge of the Supreme Court, reiterated the same principles in **Naba v Tower Insurance (Fiji) Ltd** [2011] FJSC 9; CBV0002.2011 (24 June 2011):

Principles

[7] The power to extend the time for an appeal is discretionary, and has to be exercised judicially, having regard to established principles. The following factors are usually considered when determining an application for an extension of time, namely (a) the length of the delay, (b) the reasons for the delay, (c) whether there is an arguable case on the appeal and (d) the degree of prejudice to the respondent if time is extended.

ANALYSIS

Length of Delay & Reasons

17. The appellant filed his summons in this court on 05 August 2013. That was some 11 months after the ruling. To explain the delay, the appellant deposes as follows at paragraphs 3 and 4 of his affidavit:

3. That when judgment was delivered on the 22nd day of August 2012, my solicitors were not aware as they had not been notified on the date of judgment.
4. That I clearly recall the Resident Magistrate stated the judgment would be on notice and that my solicitors would be notified of the date of delivery of judgment.

18. The Court records, however, tells a different story as follows:

06/06/2012

Plaintiff: Mr. Sailo for Rams Law

Defendant: Ms Swamy for Reddy Nandan

Court: - 14 days for Defendant to file submission.

- 22/08/12 for Ruling.

Samuela Qica (sgd)

RESIDENT MAGISTRATE

22/08/12

Plaintiff: Mrs Lata A for Rams Law

Defendant: Not present

Court:- Judgement of my ...brother Resident Magistrate is passed.

19. The records clearly show that the appellant/defendant through Reddy Nandan Lawyers, did file written submissions on 14 June 2012 in compliance with the RM Qica's directions of 06/06/12 (pages 23 to 25 Records of Magistrates Court). Clearly, the appellant/defendant's solicitors were represented in court on 06/06/12 as evident from the records and also in the fact that they did comply with the directions of the said date by their subsequent filing of submissions within the stipulated time. Against that, the explanation they give for not turning up in court to receive the ruling would appear to be rather flimsy.

Whether there is an Arguable Case on Appeal

20. At the end of the respondent/plaintiff's case at the Magistrate's Court, the appellant/defendant's solicitors had applied to non-suit it (the plaintiff's case). The learned magistrate heard the application and thereupon, gave his final verdict. The appellant/defendant argues two things. Firstly, he argues that the learned Magistrate's approach in proceeding to give final judgement after hearing the *non-suit* submissions was a denial of the defendant's right to give evidence and a gross breach of natural justice. Secondly, he argues that the evidence does not support the claim. In particular, he argues that at no time whatsoever, did the plaintiff ever establish that he was bound by contract to the Respondent/Plaintiff.

Does the Defendant Have a Right to Give Evidence after a Non-Suit Application?

21. In **Chandra v Ali** [2008] FJCA 32; ABU0077.2007S (11 July 2008), the Fiji Court of Appeal said:

"...it is wrong that a party should be shut out from calling evidence unless the procedure for election is explicitly carried out and scrupulously recorded".

22. Was an election at all put to the appellant/defendant by the learned Magistrate? If so, was the procedure for election explicitly carried out and scrupulously recorded? In **Chandra v Ali**, the issue before the Fiji Court of Appeal was whether or not Mr. Justice Jitoko was correct in law to have ordered that the case in question be remitted

to the Magistrate's Court for trial *de novo*. At the Magistrates Court, the defendant had applied to non-suit the plaintiff's claim at the close of the plaintiff's evidence. The learned Magistrate, after hearing submissions on the non-suit issue, had declined the application and then proceeded to give final judgement. The defendant appealed to the High Court. Amongst other things, he complained, that the learned Magistrate had failed to put him (defendant) to election as to whether he (defendant) did or did not want to call evidence before final judgement. The defendant argued that he had a procedural right to elect to call evidence before final judgement and the failure of the learned magistrate to put that election to him amounted to a grave miscarriage of justice.

23. Mr. Justice Jitoko upheld that argument. He began by citing with approval the following passage from **Yuill v Yuill** [1945] 1 ALL ER 183¹ :

It is generally accepted that where a party elected not to call evidence but instead made [a] submission of no case to answer, and which submission is rejected, the right of that party to call evidence still exists to be exercised.

24. Jitoko J then commented that the proper practice following the dismissal of a *non-suit* is for the court to call upon the defendant's counsel to elect whether or not to call evidence. He observed that the learned Magistrate had failed to do that. Instead, the learned Magistrate had directed both parties to file submissions. After finding that the learned Magistrate's failure amounted to a grave miscarriage of justice, Jitoko J then ordered that the matter be returned to the Magistrates court for a hearing *de novo* before another magistrate. The Fiji Court of Appeal agreed with the reasoning of Jitoko J (see paragraph 21 above).

COMMENTS

25. **Chandra v Ali** is on all fours with the Magistrates Court proceedings that is the subject of the appeal now before me. Jitoko J had opined, and which the Fiji Court of Appeal appears to endorse, that "*the issue was not whether the learned Magistrate had properly determined that merits of the application of non-suit, but whether he was in breach of procedural requirements in not putting counsel for the defendant to his election in connection with the calling of evidence following the dismissal of the non-suit*". There is nothing in the records before me to suggest that the appellant/respondent was ever put to an election as to whether or not he wished to call evidence. Hence, prima facie, his right to call evidence was breached by the oversight of the learned Magistrate. Taking cue from **Chandra v Ali**, it would appear

¹ He cited **Yuill v Yuill** [1945] 1 All ER 183 as follows:

On a submission of no case, a party did not *ipso facto* lose the right to call evidence if the submission failed. The right was closed only when an election expressed or implied had actually taken place.

to me that, the failure of the learned Magistrate to put the defendant to an election to call evidence, in itself, should determine the application now before me.

Does the Evidence Support the Claim?

26. Since a trial *de novo* must be done to correct the injustice, it would be inappropriate for me to comment on this question at this time. But there are some points raised in the respondent/plaintiff's own evidence that convince me that it would be in the interest of justice to order a trial *de novo*. Firstly, the respondent/plaintiff had given evidence that he was in the business of importing cars. And yet, he says that he held no import licence and was importing cars through someone else's import licence. Secondly, the appellant/defendant's cross examination of the respondent/plaintiff at the trial records the former as having given the following in evidence:

Mali Khan is his cousin brother.

His not employer of Mali Khan.

He imported vehicles from Japan from Mali Khan through a local licensed car dealer.

Was shown document from Mali Khan and says that it is a fake document.

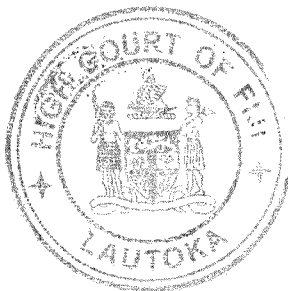
27. Without making any conclusion on whether or not the plaintiff's evidence supports his claim, my inquiry in the proceedings before me now is limited to the question of whether or not the defendant has an arguable case. I would say, judging from the case theory that emerges from his cross examination of the respondent/plaintiff, that the appellant/defendant has a reasonable defence. I say this, if anything, to accentuate the injustice in not putting him to the election to call evidence and present his case.

Degree of the prejudice to the respondent if the application is granted

28. On a balance of prejudice, I am of the view that it is in the best interest of justice and fairness that the matter be remitted to the Magistrate's Court in Nadi for a trial *de novo* so that the appellant can have the chance to show his defence and arguments and to clarify the issues that he had raised in cross-examination (see above).

CONCLUSION

38. In the final, although the prayers sought by the appellant are for leave to appeal out of time, I have decided that the best course is to permanently stay all execution of the judgement of RM Mr. Qica and to Order that this case be remitted to the Magistrates Court in Nadi for a trial *de novo*. Parties to bear their own costs.



.....
Anare Tuilevuka

JUDGE

15 September 2014