

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA, FIJI ISLANDS

CIVIL CASE NO.: HBC 10 OF 2004

BETWEEN : MOHAMMED RAFIQ of Vaileka Town, Rakiraki, Fiji,
Businessman.

APPELLANT

AND : R. C. MANUBHAI & CO. LTD a limited liability company
having its registered office at Ba, Fiji.

RESPONDENT

Appearances:

Mr N. Vakacakau for Appellant
Mr S.K. Ram for Respondent

JUDGMENT

1.0 **Introduction and Background**

- 1.1 This is an appeal from the decisions of the Master Mr Udit on 10th March, 2009 and the Judgment delivered by the Master Mr Anare Tuilevuka on 28th August, 2009 at the High Court of Fiji at Lautoka.
- 1.2 The Unless Order made against the Appellant by the Master on 10th March, 2009 was to serve the 3rd Party Notice by 26th March, 2009 failing which the Defence would be struck out and judgment entered as per the Statement of Claim with costs to the Plaintiff in the sum of \$2,000.00.
- 1.3 On 28th August, 2009 Master Mr Anare Tuilevuka made the Judgment striking out the Defence of the Defendant Appellant and entering Judgment for the Plaintiff with costs due to the Defendant/Appellant not complying with the unless order of Master Udit.
- 1.4 The Defendant/Appellant in the present application is now appealing against aforesaid unless order dated 26th March, 2009 and the Judgment given on 28th August, 2009.

2.0 Grounds of Appeal

2.1 The Defendant/Appellant is appealing against the said Judgment and the Unless Order on the following grounds of appeal.

- (i) That the Learned Master Mr. J. Udit on 10th March, 2009 erred in law and in fact in ordering an Unless Order against the Appellant to serve third party notice by 26th March, 2009, failing which the Defence would be struck out and judgment entered as per the statement of claim with costs to the Plaintiff in the sum of #2,000.00. That the said order was arbitrary in all circumstances.
- (ii) That the Learned Master Anare Tuilevuka on 28th August, 2009 erred in law and in fact in making arbitrary orders that:-
 - (a) The Statement of Defence to be struck out for default of third party proceedings.
 - (b) Judgment in favour of the Plaintiff as per order made on 10th of March, 2009 in the sum of \$15,878.40 inclusive of damages in the sum of \$880.00 – arbitrary without proof.
 - (c) Judgment of Interest at the rate of 13.5% per annum calculated from 01.03.03 to 28.08.09 in the sum of \$12,986.35 – arbitrary without proof.
 - (d) Cost to the Plaintiff in the sum of \$2,000.00 – arbitrary and excessive.
- (iii) The Learned Masters' Unless Orders were arbitrary and defective in that:
 - (a) The Learned Master failed to consider that the Appellant/Defendant having filed his Defence, no judgment orders could have been made for the Plaintiff based on pleadings alone in the absence of proof;
 - (b) The Learned Master made guillotine order that failure to serve third party notice will result in the Defence being struck out, when 3rd Party notice proceedings could have nothing to do as between the defence and the claim. The guillotine order did not strike out the 3rd Party Proceedings but the defence, that was arbitrary and unfair.

- (iv) The Learned Master's Orders could lead to a precedent being set where a person with a defence on merits can have judgment entered against him, without proper proof, for failing to serve an interlocutory application, that has no direct bearing to his defence.
- (v) The Learned Master erred in law and in fact in entering judgment in default without proof when the claim was for "unliquidated demand" and as such no judgment could have been entered without proof.

2.2 Accordingly the Defendant/Appellant prays:

- (a) That the orders of 10th March, 2009 and 28th August, 2009 are set aside.
- (b) The Appellant's Statement of Defence be reinstated.
- (c) Costs to be awarded to the Appellant.
- (d) Stay of all actions or execution.
- (e) Trial date for 1 day be set.

3.0 Hearing

3.1 When this matter was taken up for hearing on 01st February, 2016 Counsel appearing for the both parties made oral submissions and submitted to Court that they are also relying on the written submissions already filed in this matter.

4.0 Analysis and Determination

4.1 The main ground of appeal of the Appellant is that the unless order to strike out the Statement of Defence without Trial as to merits was arbitrary and defective, thereby bad at Law. The Appellant further submits that the Defendant having filed his Statement of Defence, no Orders could have possibly been made entering Judgment for the Plaintiff based on pleadings alone in the absence of proof when the claim was for "unliquidated demand".

4.2 It is contended by the Appellant that Master Tuilevuka was following what Master Udit had ordered and if Master Udit's Order is bad at Law then any subsequent Order made arising from Master Udit's Order is bad as well.

- 4.3 Opposing the arguments of the Appellant the Plaintiff/Respondent submits that the grounds of appeal are not in compliance with the rules of the High Court and in any event have no merits. The Respondent states further that the Master of the High Court had the power to make unless Orders and the Appellant was given sufficient opportunity to comply with the Orders but he failed to do so.
- 4.4 I cannot agree with the Appellant's argument that the Claim of the Respondent is for a "unliquidated sum". I have held in my Interlocutory Judgment dated 10th November, 2014 in this matter that the amount claimed by the Plaintiff company is a specific sum of money based on Contract for Sale and Purchase of goods between March 2003 to May 2003 and therefore the Claim is for a liquidated demand which is ascertainable as a mere matter of arithmetic (paragraph 36 to 38 of the Interlocutory Judgment dated 10th November, 2014).
- 4.5 In this matter the Defendant has taken leave of the Court to take steps to issue Notice on a 3rd party as provided by Order 16 Rule 1(i) of the High Court Rules after serving his defence on the Plaintiff. It is evident from the case record that the Defendant has taken several dates to take this step and finally failed to comply the Court order to issue the said notice by way of substituted service. The question arises as to whether the Master is entitled to issue an unless order to strike out the Defence and enter Judgment for Plaintiff on pleadings in default of the Defendant serving the 3rd Party Notice on a 3rd party.
- 4.6 In my view as the Defendant has filed his Statement of Defence Trial could have proceeded with the pleadings filed without the 3rd party notice being served on the 3rd party. It was not essential to add a 3rd party for the matter to proceed to trial on the pleadings filed. No orders could have possibly been made entering Judgment for the Plaintiff based on pleadings alone in the absence of proof.
- 4.7 Order 19 Rule 2 of the High Court Rules provides:

"2(i) where the Plaintiff's claim against a Defendant is for liquidated demand only, then, if the Defendant fails to serve a Defence on the Plaintiff, the Plaintiff may, after the expiration of the period fixed by or under these Rules for service of the Defence, enter final Judgment against that Defendant for a sum not exceeding that claimed by the Writ in respect of the demand and for costs, and proceeded with the action against the other Defendants, if any".

4.8 It is clear from the above provision that a Judgment cannot be entered for the Plaintiff in this matter based on pleadings when the Defendant has served a defence on the Plaintiff. As such I find that striking out the Defendant's Statement of Defence pursuant to an "unless order" without trial as to merits was not correct and therefore said 'unless order' is defective, thereby bad at Law.

4.9 The Order of Master Tuilevuka entering Judgment in favour of the Plaintiff was a flow on effect from Master Udit's Order. As I have determined that Master Udit's "Unless Order" is bad at Law then the subsequent Order made arising from Master Udit's Order is bad as well.

5.0 Conclusion

5.1 Taking all these matter into account I allow the appeal of the Appellant.

5.2 Accordingly I make the following Orders:

- (a) The Orders of 10th March, 2009 and 28th August, 2009 are set aside.
- (b) The Appellant's Statement of Defence is reinstated.
- (c) The matter to be mentioned to fix a Trial date.
- (d) There is no Order as to costs.



Lal S. Abeygunaratne
[Judge]



At Lautoka
21st April 2016