

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Appeal No. HBA 31 of 2013

[On an Appeal from a Judgment given by the Learned Acting Master of the High Court of Fiji at Lautoka on the 13th day of November 2013 in High Court Civil Action No. 150 of 2011]

BETWEEN : **SIGATOKA ELECTRIC LIMITED** a limited liability company having its registered office at Valley Road, C/- P.O. BOX 113, Sigatoka in Fiji.
Appellant/Defendant

AND : **ENGINEER PROCURE CONSTRUCT (FIJI) LTD** a limited liability company having its registered office at 5 Nagaga Street, Lautoka, Fiji.
Respondent/Plaintiff

Before : Hon. Mr. Justice R. S. S. Sapuvida

Counsel : Ms. Shah F.B. for the Appellant/Defendant
Mr. Sharma for the Respondent/Plaintiff

Date of Judgment : 29th August 2016

JUDGMENT

[1] This is an appeal filed by the defendant/appellant (the appellant) dated 29th November 2013 against the summary judgment delivered by the Acting Master Mohammed Ajmeer (as he then was) dated 13 November 2013.

- [2] A ruling with regard to the stay of the proceedings had been delivered by Hon. Justice Anare Tuilevka on 17 March 2015 and the stay was refused by the said ruling.
- [3] The matter thereafter was firstly taken up before me on 21 April 2015 as it was allocated to me by Hon. Justice Anare Tuilevka for further directions and for further proceeding of the appeal.
- [4] Having been filed the formalities by both the parties the matter was then set down for hearing on 20 July 2015.
- [5] The counsel for both parties having their oral submissions made to court at the hearing, urged further that they be given time to file their written submissions.
- [6] The parties have filed their written submissions on the following manner:
- Appellant's written submissions dated 13 July 2015 on the substantive matter on appeal
 - Respondent's written submissions dated 13 August 2015 on why the appellant's notice of motion and grounds of appeal should be struck out
 - Respondent's written submissions dated 13 August 2015 in opposition to the appellant's further application for stay of execution of Acting Master's summary judgment dated 13 November 2013.
 - The plaintiff's submissions dated 17th July 2015 in opposition to the defendant's further application for stay of execution of acting Master's judgment dated 13th November 2013.
 - Appellant's written submissions dated 18 August 2015 in response to the respondent's submissions dated 13 August 2015.
 - The respondent's written submissions dated 28 August 2015 in reply to the appellant's submissions filed on 18th August 2015.
 - The appellant's written submissions dated 24 September 2015 in reply to the respondent's submissions dated 28th August 2015.

- The respondent's written submissions dated 5 October 2015 in reply to the above.

[7] Thereafter the matter was listed for ruling on 04th December 2015.

[8] The ruling made by me in this case dated 27th April 2016 more fully clarifies as to what transpired during the period from 04th December 2015 to 27th April 2016.

[9] Now I deal with the main appeal dated 29th November 2013 filed by the appellant having given the due regard to the aforementioned submissions.

[10] Hence, the issues to be dealt with by this ruling are as follows:

- (a). Whether the summary judgment delivered by the Master on 13th November 2013 is an interlocutory or final judgment.
- (b). Whether the appellant should have applied for and obtained from this Court leave to appeal the Acting Master's judgment before filing its notice and grounds of appeal.
- (c). Whether the appellant has then satisfied the Court that it has meritorious ground/s to set aside the said judgment.

[11] The following are the grounds of appeal on which the appellant is relying on:

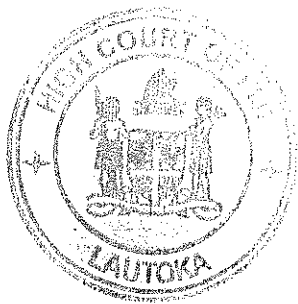
1. The learned Master erred in law and in fact in holding that the relationship between the appellant and the respondent was that of a sub-contractor when the evidence showed the same to be that of a joint venture.
2. That the learned Master erred in law and in fact in entering judgment against the appellant for \$ 623,512.50 when the respondent claimed \$959,250.06.
3. That the learned Master erred in law and in fact in arriving at an arbitrary figure of 65% of the sum claimed when the respondent had not proved its claim against the appellant and the learned Master held that a dispute existed.
4. That the learned Master erred in law and in fact in entering summary judgment in favour of the respondent despite holding that there is an issue in dispute and must go to trial.

- [12] In addition to the above, the appellant has also raised the point that the service of the writ of summons on the appellant company (originally the defendant) was not affected in compliance with the rules for service on corporate bodies and that it is a critical live issue to be decided in the instance.
- [13] Therefore, firstly this Court has to decide whether or not the service of the writ of summons on the appellant was proper before making any move to look at the Acting Master's summary judgment and decide whether it is an interlocutory or final in nature.
- [14] When the Court decides the former, it will settle the rest of the issues as to whether the summary judgment should be set aside on the ground of irregular service or not and if it should not be vacated then whether the appellant should have applied and obtained leave of the Court to appeal the summary judgment.
- [15] If I find that the summary judgment entered against the appellant is irregular, then the appellant should be entitled to have it set aside as of right and then I need not research into the other issues.
- [16] Therefore, I will now discuss the issue of "the irregular service" as points out by the appellant which is the most pivotal issue that may convert the whole process of the present application into a different facet.
- [17] However, the respondent argues that the application to set aside the Master's summary judgment should have been made within a reasonable time and before the appellant took any fresh step after becoming aware of the irregularity.
- [18] The appellant argues that the mandatory requirement for service of process on corporate bodies had not been followed by the respondent and that is critical and live issue still the court has to delve into.
- [19] It is not challenged the fact that the writ of summons was not served at the registered office of the appellant company.
- [20] By the time this action was instituted namely in April 2013 the old Company Act [Cap 247] was in operation and that under its section 391 (1), a document must be served on a company by sending it by post to the registered postal address of the company in Fiji, or by leaving it at the registered office of the company.

- [21] The respondent points out in its written submissions that the writ of summons was served on S.B. Patel & Co., the Lautoka City Agents for Pillai Naidu & Associates, the appellant's solicitors, on 26th September 2011.
- [22] That itself confirms that the respondent had not complied with the very clearly written mandatory provisions under section 391 (1) of the Companies Act [Cap 247] to serve the writ of summons at the registered office of the appellant's company.
- [23] The other dilemma is as to how the respondent identified and decided that the appellant's solicitors should be Pillai Naidu & Associates even before the writ was duly served on the appellant company?
- [24] The respondent cannot decide to whom the writ should be served. It is the Company Act which directs even the court to make orders as to what steps to be followed when it comes to the service of a writ of summons on a corporate body.
- [25] In the case of **Mohammed Sheik, Sham Shad Begum & Sheik's Rent-A-Car Ltd v Credit Corporation** [unreported] Civil Action No. HBC 0092 of 2000 delivered on 13th March 2015 Her Ladyship Hon. Justice Anjala Wati citing the Fiji Court of appeal case **Transport Publicity Ltd. V. Vishnu Deo Sharan** [unreported] Court of Appeal of Fiji Islands Case Number 17 of 1984 said that the section 391 (1) of the Companies Act prescribes the mode of service of documents on a company and is mandatory. Since service was not done in compliance with the Companies Act, the service was improper and the judgment that was obtained was irregular.
- [26] In **Mohammed Sheik** [supra] originally the impugned judgment had been entered on 14th April 2000 in the High Court of Lautoka and later having found that the irregularity under section 391 (1) of the Companies Act, Her Ladyship by her judgment delivered on 13th March 2015 set aside the said judgment stating that the judgment that obtained under the above mentioned circumstances was irregular and ought to be set aside as of right. Thereby the court directed the Master Lautoka High Court for progressive directions for it to be finalized.
- [27] Similarly in the instance, it is manifestly clear that the respondent has not followed the provisions of the companies Act to serve the writ of summons at the registered office of the appellant company and yet obtained the summary judgment against the appellant on 13 November 2013 for 65% of the total sum claimed by the respondent which is on the face of it is irregular and ought to be set aside as of right.

[28] Therefore, I set aside the summary judgment entered on 13 November 2013 against the appellant/defendant and make the following orders.

1. The cause must now be listed before the Master Lautoka High court for necessary directions for it to be finalized.
2. The costs of this application shall be costs in cause.



On the 29th day of August 2016
At Lautoka

R. S. S. Sapuvida

[JUDGE]
High Court of Fiji