

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 16 of 2011

BETWEEN : RAMESH PATEL of Suva and DEVANESH PRAKASH SHARMA of Suva,
trading as R. PATEL LAWYERS, a Barristers & Solicitors having its registered
office at Level 5, Development Bank Centre, 360 Victoria Parade, Suva.

PLAINTIFF

AND : RAJNI KANT of Lot 27 Mal Street, Samabula, Suva

DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Mr. Devenash Sharma for the Plaintiff
Mr. Aman Ravindra Singh for the Defendant

Date of Hearing: 14th June, 2016

Date of Ruling : 05th September, 2016

RULING

*[Summons to Strike out Plaintiff's Writ of Summons and Statement of claim AND Discontinuance
of Action with Costs pursuant to Order 18 Rule 18 and Order 21 of the High Court Rules,
1988 and the inherent jurisdiction of the Honourable Court]*

A. INTRODUCTION

1. On the outset the substantive matter was commenced in 2011 and has been pending in the system for some 5 years now.
2. The Defendant filed a summons, together with the Affidavit in Support seeking for an order to **struck out** this action against the Plaintiff with costs on the following grounds:
 - (a) it is scandalous, frivolous or vexatious.
 - (b) it may prejudice, embarrass or delay the fair trial of the action.
 - (c) it is otherwise an abuse of the process of the Court.
3. It cannot be ascertained from the court records whether any affidavit/response was filed by the Plaintiff to this striking out application.

B. LAW

4. The law on striking out pleadings and endorsements is stipulated at *Order 18 Rule 18 of the High Court Rules 1988* which states as follows-

18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- (a) *it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) *it is scandalous, frivolous or vexatious; or*
- (c) *it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) *it is otherwise an abuse of the process of the court;*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading

Defendant's case:

5. The counsel representing the Defendant attended the hearing and informed the Court as follows-
- (i) **The Defendant is no longer indebted to the Plaintiff as claimed for (Paragraph 16 of Ramesh Patel's affidavit refers).**
 - (ii) **The Plaintiff says he wishes to withdraw this case with no order as to costs. (Paragraph 17 of the Ramesh Patel's affidavit refers).**
 - (iii) **Therefore, the only issue left for the court to determine or decide on is costs since the Plaintiff has shown willingness to discontinue itself.**
 - (iv) **In the circumstances, the Defense counsel sought for this matter to be discontinued with an order for costs.**

Plaintiffs' Case:

6. The Counsel representing the Plaintiff filed their written submission and submitted-
- (a) **That the application is seeking the striking out of the Plaintiff's case on 3 grounds is misconceived because it is without any merits.**
 - (b) **The question of discontinuance comes into play in terms of *Order 21 of High Court Rules 1988*.**
 - (c) **The correct procedure is not striking out, *Order 18 Rule 18*.**
 - (d) **The answer lies in *Order 21 Rule 3*.**
 - (e) ***Order 21 Rule (1) (2)* doesn't apply since the pleadings are filed.**

(f) If the pleadings have been delivered by both parties then **Order 21 Rule 2 (3)** is applicable in this case.

(g) The Plaintiff made reference to the Affidavit of Rajni Kant (Defendant) dated 11th March, 2016 at paragraph 4 which states:-

That in response to paragraph 17 of the Affidavit the Defendant states as follows:-

- (i) *The Plaintiff after been paid the debt in full should have withdrawn the action against the Defendant;*
- (ii) *The Plaintiff failed to withdraw the case against the Defendant and the Defendant has incurred legal costs since September, 2013 to date.*

(h) The Plaintiff does not say to strike out. Therefore, **Order 21 Rule 3** comes into play. Exception is provided for at Order 21 Rule 3 which states-

3.-(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

- (i) The Defendant has not come in terms of the court procedures.
- (j) The Debt has been paid in full (paragraph 17 of Ramesh Patel's affidavit refers.)
- (k) Parties are in agreement to discontinue the Plaintiff's case.
- (l) The Defendant's debt was legal fees and is already paid by the Defendant.
- (m) Rajni Kant's affidavit states that he admits the debt and has paid in full, and to discontinue the matter.
- (n) As to costs issue of the Defendant, Mr. Kant has paid the Official Receiver and in turn, the Official Receiver paid Mr. Ramesh Patel.
- (o) The Plaintiff's counsel informs court that he is happy to discontinue the matter by consent because the debt is paid in full.
- (p) Asks for no costs and both parties to bear their own costs.

7. **In Reply**, the Defence counsel submitted:-

- (a) Maintain our earlier position that if the matter is to be discontinued, then the Defendant seeks costs of \$5000.00.
- (b) After the debt was paid in full, the matter is still continuing before this Court.
- (c) Counsel made reference to Hon. Mr. Justice Amaratunga's ruling of 26th January, 2015 and the Order made on 14th June, 2014 was set aside and judgment entered in pursuant to that is set aside.

C. **ANALYSIS AND DETERMINATION**

8. The pending application to determine herein is the **Defendant's striking out of Plaintiff's substantive action.**
9. **However, on 10th February, 2016, the Counsel representing the Plaintiff informed this Court that the Plaintiff was happy to concede to the Defendant's Striking Out application, made pursuant to Order 18 Rule 18 of the High Court Rules, 1988, provided no costs is sought for by the Defence Counsel.**
10. However, the Defence Counsel objected to the seeking of no costs preposition.
11. The matter was adjourned from 29th February, 2016 for hearing on 14th June, 2016.
12. During the hearing of this **Striking Out application**, both counsels came to a **mutual agreement that the matter be discontinued** because the debt has been paid in full by the Defendant to the Plaintiff. That being the case, the Court will not in the circumstances make any orders at this stage of the proceedings on the pending **Striking out application** but **hear and determine the issue of grant of costs (if any) to the Defendant upon a mutual agreement to discontinue the substantive matter.**
13. Therefore, the **question that now remains for court's determination** in the circumstances, is thus-

If both parties to the proceedings wish to discontinue the substantive matter rather than proceed with the interlocutory Striking Out application, should this Court order any costs to the Defendant?

14. Let me summarily examine the chronological events of this case:

The substantive action was commenced by the Plaintiff by way of a Writ of Summons and a Statement of Claim filed on 19th January, 2011; the Amended Statement of Defence filed on 14th September, 2011 and the Reply to Amended Statement of Defence filed on 19th September, 2012. The Defendant then filed the Summons to Strike Out on 19th November and Affidavit in Support on 03rd December, 2015. Affidavit in Response by the Plaintiff filed on 28th January, 2016. The Defendant's Affidavit in Reply filed on 11th March, 2016. Answering Affidavit filed on 25th July, 2016.

15. Subsequently, the Defendant on 15th October, 2013, through his then Solicitors M.A.Khan Esq. paid the sum of \$43,652.88 to the Official Receiver and on 16th October, 2013, the Official Receiver in turn paid a sum of \$41,704.25 to the Plaintiff. The difference of \$1,948.63 was kept by the Official Receiver as its costs and fees. According to the Defendant, this was a full and final settlement as deposed in his Affidavit in Support, filed on 03rd December, 2015.

16. The Question that I now pose to myself is what should have happened to the pending substantive Claim of the Plaintiff against the Defendant after the debt claimed was paid in full to the satisfaction of the Plaintiff? I also bear in mind that the debt was not paid immediately by the Defendant upon the service of the Plaintiff's Claim, but only paid on 16th October, 2013, after a lapse of about 2 years and 8 months' time frame.

17. As far as the Plaintiff is concerned:-

- (i) He could have then either withdrawn the entire matter; or
- (ii) Discontinued his substantive Claim.

According to the Court Records, the Plaintiff did not take any action after the debt was paid in full and the matter remained pending in Court.

18. On the other hand, if the Plaintiff had failed to take any action to bring the matter to an end, then the Defendant could have taken the following steps to bring the action to an end:-

- (i) Withdrawn his Acknowledgement of Service filed in this action [O21,R. 1];
- (ii) Withdrawn his Statement of Defence [O.21, R.2 (a)]; and
- (iii) Together with the Plaintiff, signed a written Consent to Withdraw the Action without the leave of the Court. [O. 21, R7].

It should be borne in mind that the Affidavit in Response deposited by Ramesh Patel (Plaintiff) and filed on 26th January, 2016 at paragraph 17 states-' The firm is agreeable to file a notice of discontinuance in the matter on the basis that the debt has been fully settled provided that the lawyers from both parties sign the Notice of Discontinuance with no order as to costs.

The Court records does not show anything done by the Defendant.

19. The Defendant made a decision to continue to defend the Plaintiff's Claim and proceeded as follows-

- (a) Filed a Summons on 28th October, 2013 for Leave to Appeal the Order granted on 14th June, 2013 and Summons filed on 16th July 2013 to Set Aside the Judgment;
- (b) Rulings were delivered on both applications;
- (c) Further cause of action with pleadings and interlocutory was subsequently filed, and the matter remained pending rather than discontinued or brought to an end when the entire debt as claimed was already paid.

20. The Defendant then filed and served a Summons seeking an order to Strike out the Plaintiff's Claim.

Whether this was the correct application in the circumstances when the Debt was already paid by the Defendant?

The reason being the Defendant prima facie obviously admitted the Plaintiff's claim and therefore decided to pay the debt and bring a finality to the matter. The Defendant did not think appropriate to proceed with his 'Summons' to establish that the Plaintiff's claim in the circumstances, is scandalous, frivolous, vexatious, and is also an abuse of the process of the Court and therefore seek an order to Strike out the Plaintiff's claim.

21. Therefore, when the debt was already paid by the Defendant as claimed, obviously the Summons seeking an order to strike out the Plaintiff's action was not the correct application in the circumstances. The application is rather misconceived because it is without any merits.
The Defendant should have resorted to other available alternatives in law in order to bring the action to an end. One of the alternatives was to **sign a written Consent to Withdraw the Action without the leave of the Court.** [O. 21, R.7] instead.
22. I will now deal with the applicable provisions of the law dealing with the **issue of the entitlement of costs by the Defendant** (if any) on discontinuance of an impending application. Therefore reference is now made to **Order 21 of High Court Rules 1988** which provides for the **withdrawal and discontinuance of an action.**
23. **Order 21 Rule 3** deals with the **Discontinuance of action, etc., with leave (O.21, r.3)** as follows:
- 3.-(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.*
- (2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25, Rule 7. (Underline is mine)*
24. It is noted herein that no formal or written application was made either by Summons or Motion to discontinue the action and seek for courts leave in the circumstances to do so. (O21.r.3). The only joint application which is being made now before this Court by the parties is an **oral application to discontinue the matter.**

Therefore, in absence of any formal or written application, this Court cannot accede to grant the leave to discontinue.

25. **Order 21 Rule 2 (7)** deals with **Discontinuance of action without leave (O.21,R.3)** and states as follows-

'(7) If the parties to action consent, the action may be withdrawn without the leave of the Court at any time before trial by a written consent to the action being withdrawn signed by all the parties.'

26. I note, there is no written consent signed and or filed by the parties in this action. Therefore, in absence of any written consent signed and filed, this Court cannot accede to the application.

The Court does reiterate that the Consent which now stands before this Court to discontinue the matter is an Oral application.

Further, is the **Oral Consent** now given by both parties to this Court good and sufficient to **discontinue or dismiss the action** bearing in mind that the debt has now been settled within the substantive matter? The answer is obviously, yes and I now proceed to do so.

27. Further, I also take into consideration the fact that the Plaintiff commenced the substantive action against the Defendant on 19th January, 2011. The matter remained pending in Court until after a lapse of 2 years and 8 months that the Defendant indirectly through the Official Receiver settled and paid off the claimed Debt to the Plaintiff.
28. The Defendant cannot just pluck a figure of \$5,000 from the air and seek an order for costs. He should have established to Court how he arrived at this figure by merely filing a breakdown evidence of figures and the nature of the costs incurred. This was not done and as such there is no evidence as to what costs in fact was incurred by the Defendant.
29. After a careful perusal of the chronological events in this case and on the balance of probability, I would blame both parties for not taking any proactive measures or steps to bring this matter to a finality for once and for all after the debt was paid in full. There is nothing substantive pending for this Court to determine since the debt has been paid off and settled.

30. **In Conclusion:**

By **Consent** of both parties, I **discontinue** the Defendants **Striking out Summons** filed on 19th November, 2015; AND

Dismiss the Plaintiff's **Writ of Summons** and the **Statement of Claim** filed on 19th January, 2011.

Further, for the abovementioned reasons, there will be **no order** made as to **costs**. Each party in the circumstances to bear their own costs.

31. For the aforesaid rational, I make the following final orders.

D. **FINAL ORDERS**

- (i) By **Consent**, the Defendant's **Striking out Application** is hereby **discontinued**.
- (ii) The Plaintiff's **Writ of Summons** and the **Statement of Claim** is hereby **dismissed**.
- (iii) There will be **no order** as to **costs**.
- (iv) Each party to the proceedings to bear their own costs.

Dated at Suva This 05th September, 2016



Distribution

MR VISHWA DATT SHARMA
Master of High Court, Suva

- 1. R.Patel Lawyers, Suva.
- 2. Aman Ravindra Singh Lawyers, Lautoka.