IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No.: HBC 145 of 2014

BETWEEN : **SADA NAND** of Berar Place, Field Forty, Lautoka, as the Administrator of the **ESTATE OF VIKASH CHAND** late of Field Forty, Lautoka, Driver, Deceased, Intestate.

PLAINTIFF

A N D : **PREM ARUN SINGH** of Rifle Range, Lautoka.

DEFENDANT

Counsel : **Mr. Ronald Rajesh Gordon for the Plaintiff**
(Ms.) Salote Vakaotia Veitokiyaki for the Defendant

Date of Trial : Thursday, 21st June, 2018
Date of Ruling : Monday, 17th September, 2018

RULING

[1] This action was brought by the Plaintiff as the Administrator of the Estate of his late son, "Vikash Chand" (the deceased) who died due to a motor vehicle accident occurred on 26th August, 2011.

[2] The Plaintiff brings this Claim in negligence against the Defendant. The Plaintiff claimed damages for the death of his son which he alleged was due to the negligence of the Defendant (the Driver).

[3] The Plaintiff summoned four (4) witnesses to testify before the Court and concluded his case.

[4] After the presentation of evidence for the Plaintiff had been concluded on the question of liability and quantum, Counsel for the Defendant requested that a non-suit be ordered.

[5] Counsel for the Defendant indicated that she would call evidence in relation to liability and quantum in the event that her application was not successful.

[6] The Defendant's application to non-suit the Plaintiff was vigorously resisted by the Plaintiff.

[7] The crucial question for this Court is whether this Court could entertain a submission of non-suit.

[8] I state with conviction that the Defendant has no right to move for non-suit. The direct authority is **"Umesh Chand v Christian Mission Fellowship", Civil Appeal No.: ABU 0035 of 2016, date of Judgment 08th March, 2018**. It is directly in point against the Defendant. It contained the very significant passages following;

> *[8] The learned High Court Judge, at paragraph 20 of his judgment was of the following opinion:*
>
> *"First, Counsel for the Plaintiff submitted that non-suit was no longer available in the Courts of Fiji and if it were, it was only available to the Plaintiff and not the Defendant. I am afraid neither proposition holds any water, Winter, J in Faiaz Ali v Fiji Bank and Finance Sector Employees Union [2004] FJHC 270; HBC 0088.2004 (14 December 2004; only said non-suit is not a fashionable practice in Fiji, and while he also said it is an appropriate relief available to a plaintiff, he never said it was not available to a Defendant".*
>
> *[9] It is observed that the learned High Court Judge has wrongly construed the statement of Winter, J. in Faiaz Ali (supra) in arriving at the above conclusion. Contrary to the Learned High Court Judge's interpretation of the dictum of Winter, J, the natural inference to be drawn from the dicta is that non-suit is a relief which is available, if at all, only to a Plaintiff but certainly not to a Defendant. It thus follows that, had His Lordship meant any contrary elucidation the same would have been stated in unequivocal terms.*
>
> *[10] High Court Rules specifically deal with withdrawal and discontinuance under Order 21. Order 21 rule 2 deals with discontinuance of action without leave*

while Order 21 rule 3 deals with discontinuance with leave. Order 21 further deals with the effect of discontinuance under Order 21 rule 4, the stay of subsequent action until costs is paid under Order 21 rule 5, and with the withdrawal of summons under rule 26. On a consideration of these provisions, it follows that after the High Court Rules 1988 came into force there exists no rule or order dealing with a situation of non-suit. I therefore hold that the learned trial Judge has erred by entering Judgment for the Defendant as per submissions based on non-suit.

[11] Being satisfied that the concept of non-suit has no application in Fiji, a close scrutiny of Rule 21 of High Court Rules reveals that withdrawal and discontinuance is available only to a Plaintiff (or in the case of a counterclaim to a Defendant) and therefore the Defendant has no right to move for discontinuance either, which is the relief closely resembling non-suit. The court appreciates the efforts of the Respondent in producing lengthy written submissions on the issue of non-suit. However, except for the case of <u>Vye v Vye</u> [1969] 2 All E.R. 29; Laurie v Raglan Building Company Limited [1942] 1 KB and Neina Graham v Chorley Borough Council [2006] All E.R (D), almost all other cases cited by the Respondent offered no assistance to Court on the issue of non-suit. Even the decisions of the cases cited were based on findings of "no case to answer' and not on non-suit.

[12] Further, as has been observed above, the learned trial Judge had not accorded due consideration to important items of evidence which would have had a material bearing on the merits of the case. In light of the circumstances, therefore, it is wise to glance at the salient points of evidence which I believe the learned Judge had failed to advert to in the judgment.

[9] In the face of the dicta of Fiji Court of Appeal in "**<u>Umesh Chand v Christian Mission Fellowship</u>**" (supra) I have no recourse open to me but to refuse to entertain submission of non-suit.

[10] In argument before this Court, Counsel for the Plaintiff made submissions which may be summarized:

> *"In the present case we respectfully submit that the effect of the erroneous and/or misconceived non-suit application by the Defendant is that the Defendant has in effect elected to not call any evidence and has closed its case.*
> *The Defendant is now no longer permitted to call or adduce any evidence".*

[11] In the current climate, I find it a source of amazement.

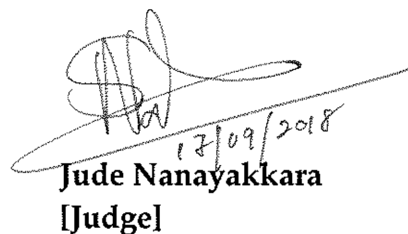
On a submission by the defence that there is no case to answer (non-suit), the practice is for the Judge, **before giving a ruling**, to require the Defendant to elect whether he will call evidence or not. **The whole of the evidence should be before the Court when the Judge is asked to rule non-suit, and consequently if the Defendant elects to call evidence the ruling should only be given after his evidence has been called.** The reason for the practice is that if a ruling in favour of the Defendant is reversed on appeal, the expense and delay of a new trial is saved, because the Defendant cannot say that his evidence has not been put before the Court. If the Judge does not put the Defendant to his election, and no election in fact takes place, the Defendant can call his evidence as if no submission had ever been made.

[12] **Orders:**

1. I refuse to entertain and rule on the Defendant's application to non-suit the Plaintiff on the ground that the High Court Rules, 1988 made no provision for non-suiting and therefore non-suiting no longer exists.

2. The further trial to proceed from the point at which it was stopped.

3. I make no order as to costs.



17/09/2018

Jude Nanayakkara
[Judge]

At Lautoka,
Monday, 17th September, 2018.