

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL [APPELLATE] JURISDICTION

CIVIL APPEAL ACTION NO. HBA 18 OF 2018

IN THE MATTER of an appeal from the decision of the Lautoka Magistrates Court in Civil Action No. 99 of 2017.

BETWEEN : **FIJI PERFORMING RIGHT ASSOCIATION LIMITED** a duly registered company under the laws of Fiji and having its place of business at 66 McGregor Road, Suva.

APPELLANT/ORIGINAL PLAINTIFF

AND : **LAUTOKA SUGAR FESTIVAL ASSOCIATION** a body duly incorporated under the provisions of the Charitable Trusts Act and having its office at 49 Vitogo Parade, Lautoka.

RESPONDENT/ORIGINAL DEFENDANT

Appearances : Mr A. Doctor with Mr M. Hall and Mr P. Katia for the appellant
Mr K. Tunidau for the respondent

Date of Hearing : 14 February 2019

Date of Judgment: 08 May 2019

J U D G M E N T

Introduction

[01] This is an appeal from the Magistrates Court held at Lautoka. By his decision delivered on 28 September 2018, arrived at after the conclusion of the plaintiff's case, the learned Magistrate (*the Magistrate*) dismissed the plaintiff's case without costs.

[02] The appellant has also filed an application supported by an affidavit seeking leave to adduce further evidence.

The background

[03] The background facts of the case are that:

- a) Fiji Performing Rights Association Limited, the plaintiff (*'the appellant'* in these proceedings) is a non-profit organisation and tasked to administer the performing rights of its local composers and song-writing members.
- b) Lautoka Sugar Festival Association, the defendant (*'the respondent'* in these proceedings) is an entity responsible for organising the Sugar Festival which is a carnival held at Churchill park in or around September every year where a lot of music is played by the organisers as well as vendors for the different stalls at the venue.
- c) Under a license agreement with the Australian Performing Rights Association (*"APRA"*), the appellant also represents the performing rights of over 2 million foreign composers whenever their musical works are played or performed to the public throughout Fiji. The appellant, by virtue of that agreement, claimed to be the copyright owner of all the musical works registered by the appellant and APRA, and alleged that the respondent does not have any rights in any of the music it has played/performed or allowed to be played/performed during the Sugar Festival. The appellant further alleged that the bands/performers/recorded music have at all the material time played/performed copyright protected music such as:
 - a. *Baby Ko Bass Pasand Hai* composed by Shekhar Hasmukh, Rajjani;
 - b. *Mashallah* composed by Sajid Khan;
 - c. *Prem Ratan Dhan Payo* composed by Himesh Vipin, Reshammiya; and
 - d. *Daru on the House* composed by JSL Singh.

d) The appellant specifically complained that the following songs were played at the Sugar Festival in Churchill Park between 8.30pm and 12.00pm on 15 September 2016:

- a. *We will rock you by Queen;*
- b. *Thriller by Michael Jackson;*
- c. *Rockstar 101 by Rihanna feat Slash;*
- d. *Revolution by Diplo feat. Faustix & Imanos & Kai.*

e) The respondent, according to the appellant, is not authorized, nor does it have the requisite licence, to play/perform or allow others to play/perform the music listed above, nor any other music that it does not have permission or the requisite licence all songs, music that has been played/performed during the Sugar Festival for the past 6 years.

f) It was the appellant's position that the defendant was informed by the plaintiff of its legal obligations pursuant to the Copyright Act, and to cease the infringement of copyright to these works but the respondent has refused and/or neglected to obtain a license and continues to infringe on the copyright of these works. As a result, the appellant brought action in the Magistrates Court against the respondent seeking the following relief:

- (a) *Special damages in the sum of \$11,866.97 being the unpaid license fee for the material time; or in the alternative*
- (b) *An order for an account of profit and for the plaintiff to be apportioned a share of the profit; and*
- (c) *General damages;*
- (d) *An injunction restraining the defendant and/or its directors, servants, employees and/or agents from allowing offering contracting, consenting, concluding or permitting the live performance, recorded broadcast or otherwise or any copyright music on any of its properties without a license from the plaintiff;*
- (e) *Interest under the Law Reform (Miscellaneous Provisions) Death and Interest) Act [Cap 27] on the award of damages at the rate of four cents per centum per annum from time of entering up the Judgment until the same shall be satisfied, and such interest may be levied under a Writ of Execution on such Judgment; and*

(f) *Solicitors costs on an indemnity basis; and*

(g) *Total claim and costs limited to \$50,000.00 to be within the jurisdiction of this Honourable Court;*

(h) *Any other Order/relief as this Honourable Court may deem just and expedient.*

[04] The respondent filed a statement of defence, barely denied the appellant's claim and put the appellant to the strict proof of its claim. The appellant claimed that under a license agreement with APRA, the appellant also represents the performing rights of over 2 million foreign composers whenever their musical works are played or performed to the public throughout Fiji and claimed the copyright owner of all the musical works registered by the appellant and APRA, to which the respondent pleaded that: *'the defendant can neither admit nor deny'*.

[05] After the appellant's case, the respondent through its counsel informed the Magistrate that the respondent does not wish to call witnesses and sought leave to file submission on non-suit. The parties filed their respective submissions. The Magistrate upheld the submission of non-suit advanced by the respondent and dismissed the appellant's action. The appellant appeals to this court.

The decision of court below

[06] The Magistrate concludes as follows [at paras 22 to 25]:

"22. As per Section 75 of the Copy Right Act 99 it is clear that it is not an infringement of a copyright if a sound recording is played as part of the activities of or for the benefit of a club, society or any other organization if the objects of the club, society or organization are charitable or are otherwise concerned with the advancement of religion, education or social welfare. As per the objectives of the Lautoka Sugar Festival Association it is very clear that it falls well within the scope of Section 75 of the Copy Right Act.

23. *However, in this case the Court need not even consider whether the Defendant has infringed copyrights of the Plaintiff as the Plaintiff has failed to prove that the plaintiff is the copyright owner of all the musical works that were alleged to have played at the Sugar Festival.*
24. *Therefore, I do not see any reason to consider the other issues in this case for the reasons I have mentioned above. In the circumstances, I decide that the Plaintiff has failed to prove its case on a balance of probability.*
25. *Accordingly, I dismiss the Plaintiff's action without costs."*

Grounds of appeal

[07] The appellant appeals the decision of the Magistrate on the following 8 grounds:

1. *That the Learned Magistrate erred in law and in fact in finding that appellant/original plaintiff is not the copyright owner of all the musical works played by respondent/original defendant.*
2. *That the Learned Magistrate erred in law and in fact in not considering the evidence of the musical works played by the vendors for the different stalls at the carnival organized by the respondent/original defendant.*
3. *That the learned Magistrate erred in law and in fact in finding that there was no contract between the Australian Performing Rights Association ('APRA') an appellant/original plaintiff.*
4. *That the Learned Magistrate erred in law and in fact in finding that the agreement between APRA and Indian Performing Rights Society did not apply to the appellant/original plaintiff.*
5. *That the Learned Magistrate erred in law and in fact in finding that section 75 of the Copyright Act was a general exception to the infringement of copyright.*

6. *That the Learned Magistrate erred in law and in fact in finding that the respondent/original defendant satisfied section 75(2) of the Copyright Act when no evidence of this was adduced at trial.*
7. *That Learned Magistrate erred in law and in fact in not according the appellant/original plaintiff liberty to sum up his case, upon learning that the defendant will not call any witnesses.*
8. *The appellant/original plaintiff reserved the right to amend or add to the grounds of appeal at any time subject to leave being granted by, and upon such terms as may be prescribed by the appellate court.*

The legal framework

- [08] On new evidence on appeal, the Magistrates Court Rules as amended ('MCR'), Order 37, Rule 16, provides:

New evidence on appeal

16 It is not open, as of right, to any party to an appeal to adduce new evidence in support of his or her original case; but, for the furtherance of justice, the appellate court may, where it thinks fit, allow or require new evidence to be adduced. A party may, by leave of the appellate court, allege any facts essential to the issue that have come to his or her knowledge after the decision of the court below, and adduce evidence in support of such allegations. (Emphasis supplied)

- [09] The MCR, O 37, R 18, explains the general powers of the appellate court for determining the real question in controversy in the appeal, which says:

General powers of appellate court

18 The appellate court may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its finding on any question which the appellate court thinks fit to determine before final judgment in the appeal, and, generally, shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the appellate court as a court of first instance, and may rehear the whole case, or may remit it to the court below

*to be reheard, or to be otherwise dealt with as the appellate court directs.
(Emphasis added)*

- [10] Under the MCR, O 37, R 19, the appellate court has power to give any decision, that rule states:

Power of appellate court to give any decision or make any order

19 The appellate court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other orders as the case may require, including any order as to costs. These powers may be exercised by the appellate court, notwithstanding that the appellant may have asked that part of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.

- [11] The claim before the Magistrates Court was based on copyright ownership. Copyright Act, section 75 enacts:

Playing of sound recordings for purposes of club, society etc

75 (1) It is not an infringement of copyright in a sound recording to play the sound recording as part of the activities of, or for the benefit of, a club, society, or other organisation, if the conditions contained in subsection (2) are complied with.

(2) The conditions referred to in subsection (1) are-

(a) that the club, society or organisation is not established or conducted for profit;

(b) that the main objects of the club, society, or organisation are charitable or are otherwise concerned with the advancement of religion, education, or social welfare; and

(c) that the proceeds of any charge for admission to the place where the recording is to be heard are applied solely for the purposes of the club, society or organisation.

Application to adduce new evidence

- [12] Before dealing with the appeal, I would intend to deal with the application filed by the appellant to adduce new evidence on appeal.
- [13] The appeal is from the trial and final determination of the Magistrates Court. The MCR applies to this appeal. The MCR, O 37, R 16, empowers the appellate court (High Court) to allow or require new evidence to be adduced for the furtherance of justice. However, it is not open, as of right, to any party to an appeal to adduce new evidence in support of his original case. It is to be noted that, under Rule 16, the appellate court is vested with the discretion to allow such new evidence on appeal where it think fits for furtherance of justice.
- [14] Of the governing principles on adducing new evidence on appeal, **Lord Denning in *Ladd v Marshall*** [1954] 3 All 745 sets out the principles applicable in considering whether leave should be granted at the appeal to adduce further or fresh evidence as follows:
- “First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.*
- Second, evidence must be that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.*
- Third, the evidence must be such as is presumably to be believed or in other words, it may be apparently credible, although it need not be incontrovertible”. (My emphasis)*
- [15] The rule in *Ladd v Marshall* is applied to appeals from trial and final determination and not deliberately leaving over points for the purpose of appeals.
- [16] The discretion to admit fresh evidence on appeal has to be exercised in accordance with the overriding objective (*Evan v Tiger Investment Ltd* [2002] EWCA CN 161, [2002] 2BLLC 185).

[17] The appellant seeks leave to adduce further evidence, specifically:

- a. *the Contract of Reciprocal Representation & Administration between the Australian Performing Rights Association Limited and the Fiji Performing Rights Association Limited referred to paragraphs 12 – 15 of the Ruling dated 28 September 2018.*
- b. *a letter dated 23 May 2016 extending the operation of the said Contract of Reciprocal Representation & Administration, referred to in Exhibit 2.*

[18] The grounds for the application are contained in the supporting affidavit in paragraphs 3 to 12 that:

“... ”

3. *In paragraphs 1-5 of the Statement of Claim (“Claim”), the Plaintiff/Appellant avers, inter alia, that it had a license agreement with the Australian Performing Rights Association (“APRA”) and that the Appellant represents the performing rights of over 2 million foreign composers and is considered the copyright owner of all musical works (“Works”) registered by it and APRA. A copy of the said licence agreement titled ‘Contract of Reciprocal Representation and Administration’ is annexed to my affidavit marked “A”. A copy of a letter extending the term of that said licence agreement is annexed to my affidavit and marked “B”.*
4. *These claims were not denied in the Defendant/Respondents Statement of Defence.*
5. *I am informed by our legal counsel that the Magistrates Court rules requires the Court to be taken as established during the hearing, any allegation in the statement of claim that is not denied specifically or by necessary implication or stated to be not admitted.*
6. *Had this been the case, then our legal counsel was entitled to proceed with the hearing knowing that the Court had accepted as proven fact that the Appellant, pursuant to the licence agreement with APRA, was owner of the copyright for public performance of all the musical works registered to APRA including the works identified in paragraphs 8 (a)-(d) of the Statement of Claim.*

7. *Page 26 of the Agreement between APRA and IPRS, which was tendered as Plaintiff's Exhibit 2 during the Trial, shows, and the Defendant/Respondent did not dispute that, the IPRS confers its rights as copyright owner on to APRA in APRA's territories which are specifically provided in Article 6 of the said Agreement.*
8. *Article 6 of Plaintiff's Exhibit 2 states that Fiji Island is one of the territories in which APRA operates.*
9. *However in the Ruling to which this application relates, paragraphs 15 & 16 states that the Plaintiff is not a party to the Agreement between APRA and the Indian Performing Rights Society ("IPRS") and is not shown to be the copyright owner of the public performance right in the Works allegedly played by the Defendant.*
10. *I am informed by counsel that based on the undenied Claim and the APRA-IPRS Agreement, the Appellant did not tender the licence agreement between APRA and FPRA to demonstrate the FPRA is entitled to exercise the right conferred to APRA within the Fiji Islands.*
11. *I am advised by my counsel that the contract of Reciprocal Representation & Administration between APRA and the Appellant is necessary for the furtherance of justice, since the Magistrate Court did not accept to be taken as established at the Trial the first 5 paragraphs of the claim, which was mandatory requirement for the Court.*

..."

[19] The appellant wants this application to be heard and determined concurrently with the appeal.

The submissions

[20] Mr Doctor, on behalf of the appellant contends and submits that the court should follow the following propositions:

- *For the reasons already given, additional evidence will be more readily admitted in a re-hearing, than in an appeal in the strictest sense (Mickelberg v R);*
- *Evidence to fill an evidentiary gap (Prasad) will be more readily received than evidence to contradict evidence that was given and accepted at trial (Ladd v Marshall);*
- *The fact that the material was available at trial, while always a factor, will not be decisive if the decision not to tender it is explained (Prasad);*
- *A Court hearing an appeal from a summary proceeding may admit additional evidence more readily than one hearing an appeal from a full High Court hearing; ANZ v Merchant Bank, citing Coir Industries v Louvre Windows (1984), unreported);*
- *The ultimate question will be that proposed by the Rule: what course best contributes to the furtherance of justice?*

[21] On the other hand, Mr Tunidau of counsel for the respondent contended that: the appellant in this case wants to introduce on appeal a contract it had with the Australian Performing Rights Association (APRA). The contract is not a fresh evidence because the appellant tendered as *Exhibit PEX (1)* in the trial a covering letter dated 12 June 2018 that made reference to the contract. However, the contract itself was not tendered into evidence. The respondent will be prejudiced if the application is allowed. He heavily placed reliance on O 55, R 7 (2) of the HCR and *Rajesh Kumar v Nawin Prasad Sharma* (Appeal No. 26 of 2013), case decided on application made under the HCR, O 55, R 7 (2), which gives power to the court to receive further evidence on questions of facts.

[22] This appeal is from the Magistrates Court, and the MCR applies to it. O 55 relates to appeals to High Court from Court, Tribunal or General Person and Rules under O 55 do not apply to any appeal under any enactment for which rules governing appeals have been made thereunder, save to the extent that rules do not provide for any matter dealt with by these rules (see O 55, R 1 (3)). The current appeal is governed by the MCR which specifically has provision under O

37, R 16 for the appellate court to allow new evidence on appeal. Since the MCR has specific rule relating to admission of new evidence on appeal, O 55, R 7 (2) has no application to this appeal. I would, therefore, disregard all the contention put in in relation to O 55, R 7 (2) and the case (*Kumar v Sharma*) cited by the respondent as irrelevant.

- [23] The respondent vehemently objects leave being granted to the appellant to adduce further evidence on appeal. The objection is taken on the ground that it will prejudice the respondent if such evidence is allowed on appeal.

Pleadings before Magistrates Court

- [24] In the statement of claim, the appellant pleaded [at paragraph 3 and 4] the existence of the agreement with the APRA and that its effect is to make the appellant the copyright owner of all musical works registered by the appellant and APRA, and the appellant also pleaded that the works identified in paragraph 8 were themselves works in which the appellant is the copyright owner.
- [25] By its statement of defence, the respondent barely denied the allegations in the statement of claim and put the appellant to the strict proof thereof. It will be noted that the allegation of existence of the agreement with APRA, and its effect in making the appellant the copyright owner, were neither admitted nor denied.
- [26] The MCR, O 16, R 3 applies to pleadings in the Magistrates Court. R 3 (e) requires that '*the defendant's pleading shall deny all such material allegations in the statement of claim as the defendant intends to deny at the hearing.*' And R 3 (f) states:

"Allegations shall not be met generally, but specifically

(f) It shall not be sufficient to deny generally the facts alleged by the statement of claim but the defendant must deal specifically therewith, either admitting or denying the truth of each allegation of fact seriatim, as the truth or falsehood of each is within his or her knowledge, or (as the case may be) stating that he or she does not know whether such allegation or allegations is or are true or otherwise."

- [27] Mr Doctor, touching the respondent's pleading, submits that the defendant's decision to not admit, but to not deny a matter, precludes him then denying it at trial, and the party on whom the proof of that fact rests is entitled to take that into account in forming a view as to how that matter is to be proven. He further

submits that the tribunal of fact ought also to have regard to the decision of the defendant as to what would or would not be placed in issue, and that the degree of satisfaction necessary to accept a fact as proven after contest will be higher than that necessary to accept the fact if the opposing party puts up no objection and offers no contrary evidence.

- [28] It is true that the respondent neither denied nor admitted the allegation in the statement of claim that the appellant had an agreement with *APRA*, and its effect in making the appellant the copyright owner. If the respondent were unaware of such agreement, they should have denied it. The respondent had failed to deny the material fact that the appellant had copyright ownership over the works identified in para 8 of the statement of claim. In the circumstances, the appellant was entitled to take it as admitted.
- [29] The respondent objects to leave being granted to the appellant to adduce further evidence on appeal in support of its original claim. The basis of their objection is that they will be prejudiced if the appellant were allowed to adduce further evidence. I cannot accept this because the respondent did not deny the fact that the appellant had copyright ownership. Therefore, the question of prejudice will not arise if leave were granted to the appellant to adduce further evidence on appeal in support of their original claim.
- [30] The appellate court, under the MCR, O 37, R 16, has the discretion to allow or require new evidence for furtherance of justice. I would like to exercise the discretion in favour of granting leave to the appellant to adduce new evidence, i.e. the Contract of Reciprocal Representation & Administration between the Australian Performing Rights Association Limited and the Fiji Performing Rights Association Limited. In my opinion, such evidence would probably have an important influence on the result of the case. I would, therefore, grant leave and allow the appellant to adduce the agreement in support of its original claim.

The appeal

- [31] I now turn to the appeal.
- [32] At the hearing of the appeal, counsel for the appellant has confined the grounds of appeal to three principal grounds:

1. *On the evidence before him, and in the context of the pleadings, the learned Magistrate ought to have found that FPRA had proven, on the balance of probabilities, that it was the owner of copyright as it applies to the public performance of each of the musical works identified in paragraph 8 of the Statement of Claim (Appeal Grounds 1 and 3);*
2. *The plaintiff's failure to tender the Contract of Reciprocal Representation and Administration gave rise to an "evidential gap" (as a similar omission was described by Judge Anare Tuilevuka in Prasad v Dominion Insurance [2015] FJHC 596) which can and should be corrected by the admission of that document as additional evidence on appeal; and*
3. *The Defence under Section 75 was misconceived, as the plaintiff did not sue in respect of copyright in sound recordings. The case before the Magistrate miscarried when neither learned Magistrate nor the representatives of the parties appreciated the distinction, made clearly by the Copyright Act, between a musical work (a song written by a composer or lyricist) and a sound recording (the embodiment of a performance of that song in a particular device which can be used to replay the recording). Section 75 has no application to musical works (Appeal Ground 5).*

[33] I need not further discuss the issue of the admission of the document (the agreement) (ground 3 above) as I have allowed to adduce that document on appeal.

Proof of copyright ownership (ground 1 above)

[34] The appellant claimed among other things damages for violation of the appellant's copyright. The pleaded copyright ownership over all the musical works played by the respondent. The respondent did not specifically deny this particular allegation.

[35] At the trial, the appellant called two witnesses in support of its claim and tendered as *Exhibit PEX (2)* a covering letter dated 12 June 2018 which made reference to the contract the appellant had with APRA. The contract itself was not tendered as evidence.

[36] The appellant's first witness was Seru Serevi, Fijian musician and composer ('PW1'). The summary of his evidence was as follows:

- "A. *Fiji Performing Rights Association's...is affiliated worldwide through reciprocal agreement with APRA Australia.Fiji Performance Association which is affiliated to worldwide affiliation through its reciprocal agreement with APRA which is Australasian Performing [Right] Association.*
- Q: *Can you give us what is the main idea of this reciprocal agreement?*
- A: *To make sure that the composers are paid for their work that they do. And that is to collect fees from usage of music local in Fiji.*
- Q: *That is for both Australian?*
- A: *Locals and international repertoire...*
- Q: *So quite simply what you mean to say is in Fiji we collect royalties for composers in Fiji and the...Australasian Performing Right Association, is that correct?*
- A: *Yeah, for local composers and international repertoire. In other words international composers...*
- Q: *If I could just show you this document? (document is shown to the witness). Could you please explain what this document is?*
- A: *This document is renewal of our reciprocal agreement with APRA which also automatically renews our association with worldwide affiliations. (document tendered and marked as Plaintiff's Exhibit 1).*
- Q: *So we have this reciprocal agreement with APRA, what about the other countries? How are they connected with FPRA?*
- A: *We have the worldwide under the [Berne] (sic.in transcript, 'Wrong') Convention of Intellectual Property is governed by a world body but Fiji is yet to become a part of that world body. So what we are doing right now is through the association in Australia which is representing Fiji in that world body.*
- Q: *How do Fiji cover songs from other countries apart from Australia?*
- A: *Through that reciprocal agreement from Australia to other countries then from APRA to Fiji. That is how we are given the OK to collect locally.*

Q: *You mean you are given the rights?*

A: *Yeah, rights.*

Q: *So you have an agreement with APRA?*

A: *Yeah.*

Q: *And APRA has an agreement with other countries?*

A: *Yeah.*

Q: *Would you know if APRA has an agreement with the Indian Performing Rights Society Association?*

A: *They do.*

Q: *And Fiji has their agreement with the Australasian Performing Right Association that allows them to collect on behalf of Indian composers?*

A: *That is right sir.*

[37] The respondent, having opted to not to give evidence either oral or documentary, made 'no case to answer' (non-suit is an ancient terminology. It has become obsolete. In modern law, the phrase '*no case to answer*' has been used interchangeably in criminal and civil proceeding).

No case to answer

[38] Since the respondent made submission for no case to answer without adducing any evidence, the Magistrate only considered and analysed the evidence given on behalf of the appellant, came to the conclusion [at para 23 of the Magistrate's ruling] that:

"However, in this case the Court need not even consider whether the Defendant has infringed copyrights of the Plaintiff as the Plaintiff has failed to prove that the Plaintiff is the copyright owner of all the musical works that were alleged to have played at the Sugar Festival."

[39] Based on that conclusion, the Magistrate dismissed the appellant's claim without costs.

- [40] The basis for the Magistrate's decision [at 16] falls away since I have granted leave to the appellant to adduce, on appeal, the agreement the plaintiff had with APRA, which made the appellant as copyright owner of all the music and songs played or performed by the respondent at the Sugar Festival.
- [41] The allegation that the appellant was the copyright owner of all the music and songs played by the respondent at the Sugar Festival was not put in dispute. The respondent neither denied nor admitted it. In the circumstances, the Magistrate should have taken the fact as admitted. In addition, there was unchallenged and straightforward evidence of existence of the agreement with APRA. The Magistrate has failed to appreciate it. In my opinion, the Magistrate should have accepted that ownership of copyright is established.
- [42] The appellate court may make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal and has full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the appellant court as a court of first instance, may rehear the whole case (see MCR, O 37, R 18). Moreover, the appellant court has the power to give any judgment and make any order that ought to have been made (see MCR, O 37, R 19).
- [43] I, having considered the pleadings, the evidence given on behalf of the appellant in trial before the Magistrates Court including the evidence admitted on appeal, find a case to answer, and in the absence of any evidence to the contrary, I also find that the appellant had established, on the balance of probability that the appellant is the copyright owner of the music the respondent had played/performed or allowed to be played/performed during the Sugar Festival, and that the respondent had copyright protected music as alleged.

Section 75 of the Copyright Act 1999

- [44] The respondent had raised the defence of section 57 during the cross examination of the witnesses called by the appellant. This defence was not expressly pleaded in the statement of defence. It appears that this defence had been taken by surprise without any notice to the appellant.
- [45] The Magistrate found [at 22] that:

"22. As per Section 75 of the Copy Right Act 99 it is clear that it is not an infringement of a copyright if a sound recording is played as part of the activities of or for the benefit of a club, society or any other organization if the objects of the club, society or organization are charitable or are otherwise concerned with the advancement of religion, education or social welfare. As per the objectives of the Lautoka Sugar Festival Association it is very clear that it falls well within the scope of Section 75 of the Copy Right Act."

- [46] Mr Doctor contended that: section 75 appears in Part 4 of the Act, which is titled "*Acts permitted in relation to copyright works*". Part 4 is itself divided into divisions. Some of those divisions deal with uses of copyright work by particular types of institution, such as education institutions or libraries, but others deal with exemptions and apply to particular types of copyright work. The exemptions that apply in respect of musical works are found in Division 5, in Section 62 to 72. Section 75 appears in Division 6 titled "*Computer programs, sound recordings and audio visual works*". It therefore expressly provides an exception provided in Part 4 Division 5, and no relevant exemption that applied to the public performance of musical work. The language of the section is itself quite explicit: it refers to the infringement of copyright in a sound recording and makes no reference to a musical work. The essence of his contention is that section 75 does not affect the copy right in the underlying literary or musical work.
- [47] On this point, Mr Tunidau on behalf of the respondent submits that under section 75 (1) and (2) of the Copyright Act the respondent has not infringed the copyrights of any party including the appellant. The Magistrate was therefore correct in his conclusion [at 22] and he considered not only section 75 (1) and (2) of the Copyright Act but as well as the evidence of the two witnesses called by the appellant and the Constitution of the respondent which outlines its objectives.
- [48] The section 75 defence is a question of law that should be decided by the court. Lay witnesses' evidence in this regards is, in my opinion, is irrelevant. In order to determine the issue of section 75 defence the court should examine the section itself coupled with the pleadings.

- [49] The statement of defence does not plead this defence. It does not even say that the respondent is a charitable organisation. The section 75 defence has come up during the cross examination, and the respondent's Constitution has also been marked through the appellant's witness.
- [50] The defence raised during cross examination was not fully argued before the Magistrate. The Magistrate found that section 75 applies and there was no infringement of copyright as the objectives of the respondent falls within the scope of that section.
- [51] In terms of section 75, it is not an infringement of a copyright if a sound recording is played as part of the activities of or for the benefit of a club, society or any other organisation if the objects of the club, society or organisation are charitable or are otherwise concerned with the advancement of religion, education or social welfare.
- [52] It will be noted that section 75 expressly speaks of a sound recording not literary or musical work. The appellant alleged violation of musical work and not sound recording.
- [53] I agree with the appellant's submission that the exemption in section 75 does not apply to the public performance of a musical work. This translates that the section 75 defence was not available to the respondent as the appellant's claim relates to the public performance of a musical work. Therefore, the Magistrate's decision that the respondent's action falls within the scope of section 75 cannot stand, and it should be set aside. So I do.

Conclusion

- [54] For all these reason, I would set aside the Magistrate's decision dated 28 September 2018. Instead, I would substitute a judgment in favour of the appellant.
- [55] The appellant seeks an injunction as in paragraph (d) of the writ of summons and specific damages in the sum of the unpaid licence fees, \$11,866.97. The quantum of specific damages was not challenged at the trial. In order to avoid the necessity for further hearing, the appellant did not press its claim for an account of profits or for general damages. I would, therefore, grant the injunction

sought in paragraph (d) of the writ of summons and specific damages in the sum of \$11,866.97. In addition, the respondent will also pay the summarily assessed costs of \$2,000.00 to the appellant.

The result

1. Leave granted to the appellant to adduce further evidence on appeal.
2. Appeal allowed.
3. The Magistrate's order dated 28 September 2018 set aside.
4. The respondent shall pay the sum of \$11,866.97 to the appellant.
5. The respondent and/or its directors, servants, employees and/or agents shall be restrained from allowing offering contracting, consenting, concluding or permitting the live performance, recorded broadcast or otherwise or any copyright music on any of its properties without a license from the appellant.
6. The respondent shall pay the summarily assessed costs of \$2,000.00 to the appellant.

H.M. Mohamed Ajmeer
8/5/19

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

08 May 2019

Solicitors:

For the appellant: M/s Siwatibau and Sloan, Barristers & Solicitors

For the respondent: M/s Kevueli Tunidau Lawyers, Barristers & Solicitors