

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CIVIL APPEAL NO. HBA 1 OF 2019**

**IN THE MATTER** of an appeal  
from the decision of the Nadi  
Magistrate's Court in Civil  
Action No. 138 of 2013

**BETWEEN** : **ARVIND NAICKER & ASHIKA NAICKER** t/a Rahul's DVD Rush  
& Cosmetics of Kwongs Building, Market Road, Nadi.

**ORIGINAL DEFENDANTS/APPELLANTS**

**AND** : **MUNIAM MUDALIAR** t/a Number 1 Quality Sports, formerly of  
Nakasi, currently of Auckland, New Zealand.

**ORIGINAL PLAINTIFF/RESPONDENT**

**Appearances** : Mr J. Reddy for the defendants/appellants  
Mr J. Sharma for the plaintiff/respondent  
**Date of Hearing** : 18 September 2019  
**Date of Judgment** : 26 September 2019

## **J U D G M E N T**

### **Introduction**

[01] This is a timely appeal from the Magistrates Court sitting at Nadi.

[02] The appeal arises out of the learned Magistrate's (*the Magistrate*) ruling on the payment of the judgment sum of \$50,000.00. On 17 November 2016, the Magistrate, after the means test, made the following orders:

- a) *Defendants to pay Judgment sum \$50,000.00 by five \$10,000.00 monthly instalments, starting from next month.*
- b) *Payment to be made to the Nadi Magistrates Court Registry.*
- c) *In default of any instalment 6 weeks imprisonment, issue a committal warrant (suspended till payment).*

## **Background**

[03] The appellants defaulted in the payment and an order of commitment was issued against them. They were produced in court on the committal warrant. The Magistrate granted further time to make the instalment payment. In the meantime, the appellants applied to the Magistrate for a fresh means test on the basis they were unable to pay the instalment as ordered, \$10,000.00 a month. Their application for a further means test was refused by the Magistrate on the basis that she is *functus* and she has no jurisdiction to vary order made on the judgment debtors summons by her predecessor after the means test. They appealed to this court against that refusal.

## **Decision in the court below**

[04] On 6 November 2018, the Magistrate made her ruling dismissing the appellants' application for variation of instalment payment (*the ruling*). The relevant conclusion of the Magistrate appears at para 25 of her ruling. It reads:

*"25. Based on the facts stated above I believe this matter was already decided by this Court and now I have no jurisdiction to vary the said order and to stop the Plaintiff/Respondent enjoying the fruit of the judgment."*

## Grounds of appeal

[05] The appellants appeal the ruling on 6 grounds namely:

1. *The Learned Magistrate erred and/or misdirected herself in law and in fact in considering the fact that she cannot vary the order given earlier by her predecessor, R/M Ms Chandani Dias when in fact the application of the appellant was not to vary the substantive order but was to consider an application calling for another means test when there were changes in circumstances of the appellants when she in fact had powers under the law to do so.*
2. *The Learned Magistrate erred and/or misdirected herself in law and in fact in not allowing an opportunity to natural justice to the appellants to explain their dire financial situation under the rules of natural justice given the JDS sum ordered to be paid as a huge lump sum when in fact they do not have the means to do so was pleaded in their application proper.*
3. *The Learned Magistrate erred and/or misdirected herself in law and in fact when she mentioned that the appellant's have not disposed their assets to settle the matter which is an assumption on her part given that the appellant's do not have any assets to pay off their debt and the estate property which she has spoken about in her judgment remains to be devised to them.*
4. *The Learned Magistrate erred and/or misdirected in law and in fact when she did not consider that there was a change in circumstance of the appellants warranting a variation of the order.*
5. *The Learned Magistrate erred and/or misdirected herself in enforcing the order of 17 November 2016, when the appellants' personal circumstances would render compliance impossible given the change in their circumstances and their inability to pay the said debt as a lump sum of \$10,000.00 at once over 5 equal payments.*
6. *The Learned Magistrate erred and/or misdirected herself in abiding by the initial order when she had powers for another means test when there were*

*circumstances beyond the control of the appellants to pay their debts as a huge lump sum payment.*

## **The Law**

[06] Order 36, R 20 (1) of the Magistrates' Courts Rules, as amended ('HCR') provides:

### *"Order on judgment summons*

*20 (1) On the hearing of a judgment summons, the Magistrate, if he or she is of opinion that an order of commitment ought not to be made, may refuse to make any order, or may make a fresh order for payment of the amount remaining due and unpaid under the judgment or order, either at a specified time or by instalments.*

### *Suspension of order of commitment*

*(2) If an order of commitment is made, the Magistrate may direct that the execution of such order be suspended to enable the debtor to pay the amount in respect of which such order is made, by instalments or otherwise. When such direction is given, notice thereof shall be sent to the debtor, unless he or she be present in court when such direction is given.*

*The Magistrate may, from time to time, upon the application of either party after reasonable notice to the other party of the time and place when such application will be heard, vary the amount of such instalments by such amount as will in his or her opinion meet the ability of the judgment debtor to pay the same." [My emphasis]*

## **The issue**

[07] The central issue on appeal was whether the Magistrate had jurisdiction to vary the amount of instalments she or her predecessor had already ordered on the judgment debtor summons after a means test.

## Discussion

- [08] The appeal was not fully argued by the parties as they had agreed to a different payment arrangement towards the judgment sum.
- [09] However, I think I should deal with the issue raised on this appeal as it is an important issue in relation to a Magistrate's jurisdiction on variation of the amount of instalments made on judgment summons.
- [10] The predecessor Magistrate made an order on judgment summons that the appellants should pay the judgment (\$50,000.00) by a monthly instalment of \$10,000.00. The appellants defaulted in the payment. As a result, they were arrested and produced before the Magistrate. The Magistrate granted further time for them to make payment. Before making the payment as ordered the appellant applied to the successor Magistrate for variation of the instalment amount on the ground that they are unable to pay the same. The Magistrate (current) refused that application on the basis that she has no jurisdiction as she is *functus*.
- [11] It appears that counsel who appeared for the appellant did bring O 36, R 20 (2) of the MCR to the notice of the Magistrate.
- [12] R 20 (2) states that: *The Magistrate may, ... vary the amount of such instalments by such amount as will in his or her opinion meet the ability of the judgment debtor to pay the same*'. Therefore, the Magistrate has the jurisdiction to vary the amount of instalments made on judgment summons, whether made by the Magistrate or his or her predecessor, upon the application of either party.

[13] Apparently, the Magistrate has misdirected herself when she dismissed the appellants' variation application for want of jurisdiction. The principles of '*functus officio*' were not applicable in the circumstance of the case. I would therefore set aside the Magistrate's order dated 6 November 2018, made dismissing the appellants' application for variation on instalment amount determined on the judgment summons.

### **The variation application**

[14] I now turn to the application filed by the appellants in the Magistrates Court.

[15] I think that I should exercise the powers vested in this court by the MCR, O 37, R 18 and 19. Both rules provide:

#### *"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.*

#### *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."*

- [16] Under R 18, the appellant court (this court) has 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.
- [17] Acting under R 18, I proceed to deal with the appellants' variation application filed with an affidavit of Ashika Naicker, the second name appellant. In their application they seek that they be put to another means test to determine their ability to pay the judgment. Essentially, they seek variation of the amount of instalment ordered on judgment summons.
- [18] The application is made under the MCR, O 26, R 1 which says that interlocutory applications may be made by motion at any stage of a cause or matter.
- [19] When I took up the matter for hearing, the parties informed the court that they come to an agreement for payment of the judgment (*'the agreement'*) and produced the agreement, which is signed by both parties, in court and sought orders in terms of the same. The following are the terms of that agreement:

*"Terms of Settlement*

1. *The Original Defendants/Appellants have agreed to pay the total sum of \$50,000.00 to the original Plaintiff/Respondent as the original judgment sum awarded to the original Plaintiff/Respondent, in the manner following:*
  - a. *The sum of \$2000.00 to be paid on 30<sup>th</sup> August 2019. The Original Defendant/Appellant shall continue paying the sum of \$2000.00 every six months thereafter until the full judgment sum is paid; and*

b. *The sum of \$100.00 to be paid on weekly basis with effect from 06<sup>th</sup> September, 2019 until the full judgment sum is paid.*

[20] I accordingly allow the appellants' application for variation of the instalment amount and make order in terms of the agreement. I would vary the Magistrate's instalment order dated 17 November 2016, as per the terms of settlement.

[21] I would make no order as to costs.

**The result**

- 1) Appeal allowed.
- 2) Magistrate's order dated 6 November 2018 be set aside.
- 3) Magistrate's order dated 17 November 2016 varied.
- 4) No order as to costs.

*M. H. Mohamed Ajmeer*  
.....  
*26/9/19*

**M. H. Mohamed Ajmeer**

JUDGE



**At Lautoka**

**26 September 2019**

Solicitors:

Jiten Reddy Lawyers, Barristers & Solicitors for the appellants

Janend Sharma Lawyers, Barristers & Solicitors for the respondent