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

CIVIL ACTION No. HBA 23 OF 2019

BETWEEN : **YOGITA A. NAND, NALESH NAND**

APPELLANTS

AND : **FIJI DEVELOPMENT BANK**

RESPONDENT

Appearance : Yogita & Nalesh Nand (self-represented) - the Appellants
Ms Raitini for the Respondent.

Date of Hearing : 9 December 2019

Date of Judgement : 12 February 2020

DECISION

1. This is an appeal from a decision of the Magistrates Court at Ba on the 7th June 2019.

BACKGROUND

2. The respondent (*the bank*) is the original plaintiff in the Magistrate's Court, and was there claiming against the appellants as original borrower (first named appellant Yogita Nand) and guarantors (second and third appellants Nalesh Nand & Champa Wati, who are respectively the husband and mother of the borrower) amounts said to be still outstanding of two loans made by the bank in 2007 and 2008 to assist the first named appellant to develop her business.

3. The appellants are self-represented. Yogita and Nalesh Nand appeared at the hearing of their appeal. It seems that the third appellant Ms Champa Wati passed away in June 2017 (after the plaintiff filed its claim in the Magistrates

Court in February 2017). There does not appear to have been an application for substitution of her executors or administrators in her place.

4. The respondents filed a defence to the bank's claim, and a counterclaim seeking $750,000,000 in damages for each of the three defendants (a total of $2.25b) for what is said (paragraph 15 of the Statement of Defence & Counterclaim) to be (inter alia) breach of contract, wrongdoing and dishonesty. The factual basis for these allegations it not set out in the defendants' pleadings, either in terms of the wrongdoing said to have been committed by the bank, or as to the losses caused to the defendants by any wrongdoing or breach.

5. The claim was heard at the Magistrates Court at Ba on 26 September 2017. The Learned Magistrate struck out the counterclaim on the basis that the Magistrates Court did not have jurisdiction (paragraph 6 of the Magistrate's judgement). The Learned Magistrate does not appear to have turned his mind to the options of:

   i. inviting the defendants to reduce the amount of their counterclaim to an amount within the jurisdiction of the Court
   ii. reporting to the High Court the pendency of a matter which in the opinion of the Court ought for any reason to be transferred to the High Court. Mr Nand says that in the course of the hearing in the Magistrate's Court he asked the Magistrate to refer the matter to the High Court. The judgment does not refer to this request.

6. There was one witness only for the bank at the hearing. She was Ms Margaret Hazelman, a member of the bank's Asset Management Unit, based at Suva. Ms Hazelman did not claim to have any personal knowledge of the bank's loans to the defendants, apart from what is apparent from the banks file. It does not appear that Ms Hazelman was subject to much in the way of cross-examination.

7. As stated (having struck out the counterclaim as set out in paragraph 5 above), the Learned Magistrate's decision was issued on 7 June 2019. The Court entered judgment in favour of the bank against the three defendants for $29379.39 (which amount the court held had not been challenged by the defendants) plus post judgment interest at 5% per annum and costs of $300. The amount for which judgment was entered is the same amount as was sought by the bank when it filed its claim by writ of summons on 7 February 2017 which in turn is the same amount as shown in the banks evidence as

being owed in September 2015. In other words the bank has not sought interest on the outstanding loan balance for any of the last four plus years.

THE APPEAL

8. In their appeal the appellants complain that the Learned Magistrate erred in the following ways (this is a summary in my words of the Notice of Appeal, which is rather less concise):

   i. he failed to have regard to all relevant documents.
   ii. he has apparently ignored the fact that the defendants have already paid more than $65,000, and yet the loans are still not fully repaid
   iii. the loan documents relied on by the bank are inconsistent, difficult to understand and confusing.
   iv. the bank declined the defendants application/proposal in or about mid-2012 for a discounted debt settlement figure (i.e. to accept a reduced repayment amount in satisfaction of the loans).
   v. the bank's handling of the loans caused the death of Ms Champa Wati (the now deceased third defendant) who died due to lack of hope in life.
   vi. the Court failed to consider transferring the matter to be dealt with in the High Court.
   vii. the bank delayed enforcing the loan from June 2014 (it is not clear what this date refers to) to 7 February 2017 (the date when the bank's writ of summons was filed).

9. At the hearing of the appeal Mr Nand (who gave his submissions with his wife sitting at his side) confirmed that the appellants do not challenge the fact they are the parties liable for the loans. He confirmed that the only issue – apart from the counterclaim - is the amount still owed to the bank. On this subject Mr Nand was not particularly clear on how much if any they do admit to owing the bank, apart from arguing that having paid more than $65,000 according to his calculation, it was impossible – he says – that they would still owe a further $29,000 as claimed by the bank.

10. On the issue of the counterclaim I am not persuaded that the Learned Magistrate erred in dismissing this at the start of the hearing. Certainly there were alternative actions he could have taken, as outlined above, and see section 32 Magistrates Court Act 1944 and O.13, r.1 Magistrates Court Rules. but given:

- the ludicrous amounts claimed by the defendants in their counterclaim,
- the absence of any proper pleadings as to the basis for the bank's alleged liability,
- the absence of any persuasive case that the amount claimed by the bank was not due and owing (i.e. if the amount claimed by the bank is properly due and owing, it is hard to see how the bank might be at fault in seeking repayments)

it would have been unfair to the bank to have further delayed the matter while the High Court reviewed the need to transfer the proceeding because of the counterclaim.

11. On the question of the amount that the appellants owe to the bank I agree that the bank's own loan documents are somewhat confusing. It seems that the bank made two loan offers to the defendants:

i. the first was dated 2 October 2007 offering a loan of $38,681.00 at 12% per annum (annual interest of $4641.72) with monthly instalments of $800.00 commencing on 31/12/07 and continuing for the six year term of the loan (total payments of $57,600). There was an establishment fee of $500.00, with 'documentation and other fees … as per the banks fees and charges brochure'.

ii. the second is dated 29 October 2008 offering an additional loan of $16,000.00 still at 12% per annum. The loan offer document specified monthly loan repayments of $1080.00 commencing on 31/01/09) and continuing for the six year term of the loan. The total of these repayments is $77,760. There is a loan establishment fee of $200.00, otherwise the terms for the second loan are the same as for the first. It is clear (otherwise why would the monthly repayment amount for the second smaller loan be greater than that for the first much larger loan?) that the monthly loan repayment amount specified in the second loan documents is the combined repayment amount for both loans.

Together these two loans totalled $54,681.00.

12. At the hearing in the Magistrates Court the bank's witness had produced a statement showing all the loan amounts, interest and other charges, and repayments by the defendants. In response to my question on the appeal Mr Nand for the defendants made it clear that there is only one query they have with that statement; a discrepancy of one day in the bank crediting a payment to the account (the appellants produced a receipt showing a payment of $1080

on 31 July 2013, whereas the bank's statement showed this payment being credited to the account on 1/08/13 (a day later). The bank's explanation for this is that if a payment is made after the tellers have closed their tills for the day, a receipt will be given, but the payment will not be credited to the account until the following day. As a result of the one day delay in payment the defendants were charged an Arrears Fee of $25.00 by the bank.

13. Apart from their concern over this payment the Appellants accepted at the appeal hearing that the statement (plaintiff's exhibit 9) accurately records the payments they have made. As referred to above, the concern that the appellants have expressed, both in this court and the court below, is that having paid over $65,000 towards interest and repayment on a loan totalling $55,000 (in round figures), how can it be that they still owe a further $29,000 as claimed by the bank?

14. Unfortunately for the appellants the figures speak for themselves. Looking at Plaintiffs Exhibit 9 (the list of loans, re-payments and charges), it is clear that the interest that the bank has charged on this loan totals over $31,000, and other bank fees and charges add a further $7500 approximately to the amount repayable. These are not taken into account in the appellants rather simplistic calculations that Mr Nand had made. Whether the amounts claimed by the banks for interest, or the amounts charged in bank fees and charges are questionable is not an issue that has been raised either in the counterclaim or on appeal. If the appellants wish to challenge these costs and charges (and I have no view on whether they are entitled to, or can still do so, and what their chances of success in that claim might be) they need to do it in a properly prepared and coherent claim alleging breach by the bank of the loan agreements and particularising the losses those breaches have caused them, not via a fanciful claim for $2.25b.

15. On the matters raised in the Notice of Appeal as listed in paragraph 8 above I find as follows:

i. he failed to have regard to all relevant documents.

It is not clear to what extent the Learned Magistrate undertook a detailed examination of the loan documents to consider whether they are as confusing as the appellants contend, but I have done so. I agree that the loan offers contain some inconsistencies (an item that is treated in one way in the first loan offer, is treated differently in the second). But the differences are minor, and obvious, and it takes no more than a basic calculation to work out what is meant. I do not agree that the other documents that the appellants say that the magistrate ignored

contain anything of use to the appellants. Instead they show a pattern of persistent failure by the appellants to maintain loan repayments that are due, and a remarkable patience on the part of the bank towards the appellants' defaults.

ii. **he has apparently ignored the fact that the defendants have already paid more than $65,000, and yet the loans are still not fully repaid**

I have dealt with this 'argument'. Assuming (because it has not been challenged by the appellants) that the bank is entitled to charge the interest and fees/charges as set out in the statement, nearly $40,000 of the $65,000 paid by the appellants has been applied towards interest and charges. This explains why there is still a further $29,000 (all these figures are approximate) still owed to the bank from the initial loans of $55,000 (see paragraph 11 above).

iii. **the loan documents relied on by the bank are inconsistent, difficult to understand and confusing.**

See my findings in paragraph 15(i) above.

iv. **the bank declined the defendants application in or about mid-2012 for a discounted debt settlement figure (i.e. to accept a reduced repayment amount in satisfaction of the loans).**

The bank's obligation (and its right) is to adhere to the terms of its loan offer. The bank is not obliged to agree to extensions sought by a defaulting borrower, or to accept less than it is entitled to. In any event the bank has been remarkably restrained in its claims, and – as I have observed – has not sought (in these proceedings at least) interest that it is probably entitled to from 2015 onwards.

v. **the bank's handling of the loans caused the death of Ms Champa Wati (the now deceased third defendant) who died due to lack of hope in life.**

There is no evidence to support this claim apart from the fact that Ms Wati has died. As I have pointed out, the bank is entitled to enforce the terms of the loan agreements, and for this claim to succeed would require some very strong evidence of knowing abuse by the bank of its rights. I have found, for the reasons expressed above, that the decision of the Learned Magistrate to dismiss the counterclaim was correct in all the circumstances. If the appellants seriously believe that there is some basis for this claim they need to take legal advice about filing separate proceedings, although this comment should not be interpreted as encouragement for them to do so.

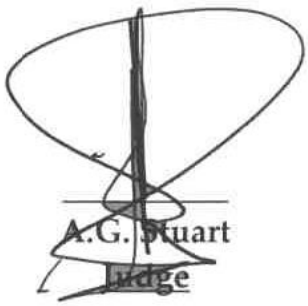
vi. **the Court failed to consider transferring the matter to be dealt with in the High Court.**

I have already dealt with this issue in paragraph 10 above.

vii. **the bank delayed enforcing the loan from June 2014 (it is not clear what this date refers to) to 7 February 2017 (the date when the bank's writ of summons was filed).**
Given that the bank has not claimed interest beyond 2015, even if this claim translates into a default by the bank, the appellants cannot point to any loss resulting from it. In any case, the bank is constrained by the Limitation Act, but otherwise is not obliged to act promptly.

16. I am satisfied that the Learned Magistrate did not err in fact or in law in dismissing the counterclaim and entering judgement for the bank.

17. The appeal is dismissed. The respondent is entitled to costs on the appeal of $300.00.



At Lautoka this 12th day of February, 2020

SOLICITORS:
Fiji Development Bank - for the Plaintiff/Respondent