

**IN THE HIGH COURT OF FIJI
(APPELLATE JURISDICTION)**

Civil Appeal No. HBA 3 of 2022

IN THE MATTER of an Appeal from the
decision of the Magistrates Court in Nadi
Civil Case No. 53 of 2022

BETWEEN : **DORSAMI NAIDU** trading as Pillai Naidu & Associates, Solicitor,
Nadi
**APPELLANT
(ORIGINAL PLAINTIFF)**

AND : **PUSHPA KARAN NADAN NAICKER** of Votualevu, Nadi
**RESPONDENT
(ORIGINAL DEFENDANT)**

Before : Justice Mohamed Mackie

Appearance : Ms. S. Charan with Mr. K. Chand for the Applicant
Respondent in Person

Date of Hearing : 10th February, 2023.

Date of Submissions : Appellant on 28th November 2022 &
Respondent on 10th February, 2023.

Reply Submissions : By the Appellant on 2nd March 2023.

Date of Judgment : 3rd April, 2023

JUDGMENT

1. This is an Appeal arising out of the judgment dated 10th November, 2021 pronounced by the learned Resident Magistrate of Nadi, dismissing the Plaintiff/ Appellant's ("the Appellant's") claim for his professional fees for legal services rendered to the Defendant/ Respondent ("Respondent") in relation to the Respondent's Nadi Magistrate's court Family Action No. 11/ NAN/ 0295.
2. The learned Magistrate also ordered the Appellant to pay the Respondent \$200.00 as summarily assessed costs.
3. The Appellant, having filed his Notice of Intention to Appeal on 15th November 2021, filed his grounds of Appeal on 22nd November 2021, both of which were, undisputedly, within the prescribed time period.

4. The grounds of appeal are as follows;

1. *THAT the learned Magistrate erred in law and in fact in dismissing the Plaintiff/ Appellant's claim.*
2. *THAT the learned Magistrate erred in law and in fact in failing to take into consideration that the Defendant/ Respondent had made part payment of fees.*
3. *THAT the learned Magistrate erred in law and in fact in not allowing the Plaintiff/ appellant to file submissions be granted access to the Defendant/Respondent's submissions despite the date for ruling being adjourned from 9th November, 2021 to 10th November, 2021 without the availability of a written decision up to the date of filing this Appeal.*
4. *THAT the learned Magistrate failed to consider the email correspondence between the parties contained in the parties Bundle of Documents clearly showing that the Defendant/ Respondent had retained the Plaintiff/ appellant's services as a Counsel for a fee.*
5. *THAT the learned Magistrate erred in law and in fact in failing to consider the evidence of the Defendant/ Respondent during his Evidence in Chief and Cross Examination as to the reasons given for failure to pay the Plaintiff/ appellant's legal fees.*
6. *THAT the learned Magistrate erred in fact and in law in not giving weight to the evidence before it in favor of the Plaintiff/ appellant pointing to the fact that the legal fees were to be paid.*

5. In addition to the oral arguments advance by the Counsel for the Appellant and by the Respondent on his behalf, by appearing in person, both the parties filed their respective written submissions as well prior to the hearing and the Appellant subsequently filed his reply written submissions as per the direction by the Court.

LAW & ANALYSIS:

6. The claim is for unpaid fees and the Appellant's claim remain unliquidated until it is determined by the Court / taxing officer of Court or by agreement between the parties. Even if there is an agreement, it cannot be final and conclusive between the parties as regards to the professional fees of the legal practitioner in terms of Section 79 of the Legal Practitioners Decree, 2009 (Decree No 16).

7. Section 79 of the Legal Practitioners Decree, 2009 states as follows;

'Practitioner may sue for and recover costs

79.(1) Every practitioner shall be entitled to sue for and recover the practitioner's costs pursuant to any agreement made in accordance with the provisions of this Part, or in the absence of such agreement in accordance with the schedules of fees established by regulation pursuant to this Part, together with any proper disbursements, in respect of services rendered whether as a legal practitioner.

(2) It shall not be necessary for a practitioner to have such costs taxed prior to instituting proceedings for recovery of those costs. In the absence of taxation no claim may be

made by the practitioner for any costs which are, pursuant to such agreement or the appropriate schedule of fees , as the case may be, left to the discretion of the taxing officer.'

8. According to Section 79(2) of the Legal Practitioner's Decree, even an amount of cost pursuant to an Agreement between the Solicitor and client is left to the discretion of the taxing officer. In such a situation, the claim in this action remains unliquidated until the said sum is determined by the Court or the taxing officer irrespective of the issue of prior Agreement as to the costs between the parties. The Appellant does not state that his claim is a liquidated one.
9. In the matter at hand, evidently, there was no Agreement between the Appellant and the Respondent on the amount of legal fees and how and when it is payable by the Respondent for the services rendered by the Appellant. The evidence before the learned Magistrate clearly shows that the Appellant had appeared and rendered his services to the Respondent for over a period of 7 Months in his Family Matter on his instruction and with his consent.
10. Section 77(1) of the Legal Practitioners Act 2009 provides:

“A practitioner may make a written agreement with that practitioner’s client in relation to the amount and manner of payment for the whole or any part or parts of any past or future services fees, charges or disbursements in respect of business done or to be done by such practitioner, either by a gross sum or otherwise howsoever”.
11. When the above two provisions, namely, Section 77(1) and Section 79(1) are read together, it is not difficult to understand that a suit for recovery of fees can either be on any Agreement entered into by and between the parties or in the absence of such Agreement, it can be in accordance with the schedules of fees established by regulation pursuant to this Part.
12. According to Section 79 (2) for a practitioner to file proceedings to recover the costs, he/ she need not necessarily have the costs taxed. However, if the claim is made pursuant to any Agreement or the appropriate schedule of fees, unless the claim is taxed, no such proceeding can be commenced.
13. In the case of Appellant hereof, since there was no any sort of Agreement, and the claim was not in accordance with the schedule of fees established by the regulations, the Appellant instituted the proceedings without taxation being done as permitted by section 79 (2). But, the amount can be decided by the Court or by the taxing officer, which has to follow after the unliquidated sum is decided by the Court.

14. I shall now delve into the grounds of Appeal adduced by the Appellant.
 1. As far as ground one is concerned, I find some merits in this ground. Careful perusal of the impugned judgment shows that the learned Magistrate seems to have completely disbelieved the Appellant's evidence just because the "**Particulars of the Calculation**" dated 17th December, 2019 submitted by the Appellant on the request of the Respondent (in terms of Section 80[1]) had its heading as "**QUOTATION**".
 2. Accordingly, learned Magistrate, by forming her opinion that a Quotation cannot be treated as a proper bill of cost and by observing that the final amount mentioned therein exceeds total amount in the original Bill of Costs dated 24th May, 2017, proceeded to dismiss the whole claim.
 3. Had the learned Magistrate objectively gone into the contents of the particulars of the calculations therein, she would have found that all the items of cost and expenses therein were in relation to past, with the relevant dates and not the amounts intended to be charged in future. The explanation given by the Appellant's counsel before this Court that the terms "Quotation" was a typographical error should not have been totally disregarded. This does not mean that the Magistrate should have accepted the impugned "particulars of calculation" as it was. That could have been taken to consideration so long as it clarifies the total amount given in the Bill of Costs dated 24th May, 2021.
 4. When the particulars for the Bill of Costs in a sum \$5,000.00 was asked from the Appellant, he cannot give such particulars for a higher amount, which in this case was \$ 7,107.88. However, instead of dismissing the whole claim by finding fault with the name given thereto in the heading, the learned Magistrate could have gone into the correctness or propriety of the every single amounts shown therein and decided whether the Appellant was entitled at least for any part of the claim stated therein.
15. The Second ground of Appeal is also seems to be meritorious. The Bill of Costs was given to the Appellant on 24th May, 2017 upon receipt of which , the Respondent before the receipt of the particulars of the calculation on 17th December, 2019 demanded by him , had proceeded to pay \$1,000.00 in two installments (\$500.00 on 08th March, 2018 and another \$500.00 on 01st April , 2019). This shows the tacit admission on the part of the Respondent as to the fee payable by him , the amount of which has now has boiled down to \$4,000.00 with the credit being given to the above payment of \$1,000.00.
16. When the Bill of Costs dated 24th May 2021 is carefully scrutinized, it can be seen that the \$5,000.00 mentioned there in is shown as "Balance Fees to be paid", which means

that the Appellant has given credit to certain payments already made by the Respondent, which has to be, undoubtedly, two initial payments made on 21st November, 2016 and on 22nd March 2017, being in a sums of 250.00 and \$200.00 respectively as per the receipts marked as exhibit 3 by the Respondent.

17. Of course, the particulars of calculation dated 17th December 2019, furnished by the Appellant, apart from , purportedly, clarifying the Bill of cost dated 24th May,2021, had included new items of costs as well . The Appellant had just bolstered his claim. It could not have been accepted and acted upon. However, the fact that the Respondent had tacitly admitted the claim of \$5,000.00 by making a part payment of \$1,000.00, has escaped the attention of the learned Magistrate.
18. Above all, the Respondent towards the end of his examination in chief, by responding to a question posed by the learned Magistrate, has stated that ***“Satisfied with the charges that he has claimed Madam”***. This also shows that the Respondent had admitted the amount in the Bill of Costs provided on 24th May, 2017. This admission too has escaped the attention of the learned Magistrate.
19. As to the Third ground of Appeal, I observe that when the matter had come up on 26th October, 2021, after a continued period of closure of Court on account of Covid-19 pandemic, the application made by the Appellant for 7 days’ time to file his submission has been turned down and the Magistrate has proceeded to fix the matter for judgment on 09th November, 2021, which was not ready on that date and pronounced only on the 10th November, 2021. I find that the Appellant has been prejudiced by the said refusal.
20. Had the Appellant been given an opportunity to file his written submission and access to the Respondent’s submissions, which had not been served on the Appellant as per the record, the Appellant would have been in a position to explain the contents of the particulars of Calculation to the effect that it was not in fact a Quotation for the future, but his fees for the past appearances and for other expenses he had incurred already.
21. As far as the ground four is concerned , from the evidence and the contents of the correspondences both of them, admittedly, have had, I find the Respondent had retained the Appellant, and continued to instruct him for 7 months and obtained his services, wherein the Appellant had made around 11 Court appearances during that period.
22. The main grievance of the Respondent, according to his evidence and correspondences he had had with the Appellant, is his dissatisfaction about the services rendered by him as a co-counsel and the non-availability of the Appellant at the crucial time when the Respondent had to finally agree to the settlement in his family matter.

CONCLUSION:

23. I, find that all the grounds of Appeal are meritorious. The learned Magistrate, instead of dismissing the whole action by finding fault with the heading "Quotation" given to the particulars of calculation dated 17th December, 2021, could very well have taken into consideration that the Respondent had tacitly admitted the Bill of Costs dated 24th May, 2021 for \$5,000.00, by his subsequent payment of \$1000.00 and considering the admission made by the Respondent in his evidence about the propriety of the fees charged by the Appellant, as alluded by me in a forgoing paragraph above.

FINAL ORDERS:

- a. The Appeal is allowed.
- b. The impugned judgment dated 10th November, 2021 pronounced by the learned Resident Magistrate of Nadi is hereby set aside.
- c. The Appellant is entitled to recover the amount shown in the Bill of Cost dated 24th May, 2014, however subject to deduction of \$1000.00 paid by the Respondent subsequently.
- d. No costs is ordered on account of the proceedings before this Court.
- e. The original record, along with a copy of this judgment, shall be dispatched to the Magistrate's Court of Nadi forthwith.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 3rd day of April, 2023.

SOLICITORS:

For the Appellant: Messrs. Pillai, Naidu & Associates
For the Respondent: In person