

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 302 of 2022

BETWEEN: **KING ANWAR HUSSAIN** of Fantasy Island, Nadi.

PLAINTIFF

AND: **ABBAS ALI** of Fantasy Island, Nadi.

DEFENDANT

Appearances: Mr. King Anwar Hussain (In Person)
 Mr. D. S. Naidu (later) for the Plaintiff
 Mr. A. K. Narayan (Jnr.) with Ms. Lata for the Defendant
Date of Hearing: 10 August 2023
Date of Ruling: 30 August 2023

R U L I N G

INTRODUCTION

1. Before me is a summons filed by A. K Lawyers for the defendant. The Summons seeks an Order that that the statement of claim be struck out on the following grounds:
 - (i) that the claim is scandalous, frivolous or vexatious and/or otherwise an abuse of process.
 - (ii) that King Anwar Hussein (“**Hussein**”) and/or his solicitors be prohibited from commencing without leave of the Court, any further proceeding(s) and/or application(s) in respect of any claim or subject matter involving him and Abbas Ali (“**Ali**”).
 - (iii) if notice of any new proceeding(s) and/or application(s) is given by Hussein and/or his solicitors to Ali (or his solicitors) without leave first having been obtained, the proceeding(s) and/or application(s) are to be automatically dismissed.

- (iv) costs of this application be paid by Hussein and/or his solicitors, Prakashan & Associates jointly or severally, on a full solicitor/client indemnity basis; and
 - (v) such other order(s) as this Court deems just.
2. The summons is filed pursuant to Order 18 Rule 18 (1) (b) and (d) of the High Court Rules 1988. It is supported by an affidavit of Ali sworn on 05 December 2022.

BACKGROUND

3. On 25 March 2022, Hussein filed a Writ of Summons and Statement of Claim against Ali and certain other co-defendants. This action was civil Action Number 85 of 2022. The action was placed before Mr. Justice Mackie.
4. At some point, the AK Lawyers, on behalf of Ali, put Prakashan & Associates on notice, that if Prakashan & Associates did not withdraw the claim, A.K Lawyers would file an application to strike out the claim with indemnity costs. Following that, AK Lawyers then filed an application to strike out Hussein's claim.
5. Sometime thereafter, before the hearing of the striking out application, Prakashan & Associates approached AK Lawyers, as well as other lawyers involved in the case for other defendants - with a view to settling the case.
6. The parties did manage to settle and a Terms of Settlement was drawn up which they executed and then presented to the Court for endorsement. In due course, Mr. Justice Mackie granted Order in Terms of the Terms of Settlement on 26 August 2022 - and the claim was subsequently withdrawn and struck out. Neither of the parties had sought costs from the other.

THE TERMS OF SETTLEMENT

7. The Terms of Settlement provided as follows:
- [1]. That the Plaintiff withdraws the action herein.
 - [2]. That the orders (including the injunction) granted on an ex-parte application by the Plaintiff on 8th August 2022 as subsequently extended, is unconditionally discharged.
 - [3]. That the Plaintiff undertakes that he will not bring any further or further or future action, suit or proceedings in any form or manner which directly or indirectly seeks to claim any relief or remedy based on the allegations or the subject matters (factual or otherwise) pleaded in his Statement of Claim against any party to the present action or any member, officials, executive, servant, agent, contractor of the unincorporated association known as The Association of Fantasy Island Lessees.

[4]. That this Order may be pleaded in bar to any action, suit or proceedings now pending or hereinafter commenced by the Plaintiff in respect of the matters in 3 above against any party to this action or any member, officials, executive, servant, agent, contractor of the unincorporated association known as The Association of Fantasy Island Lessees.

[5]. That the action here is to be struck out/dismissed with no order as to costs.

8. However, on 11 November 2022, Hussein filed the current Writ of Summons and Statement of Claim against Ali.

DEFENDANT'S POSITION

9. According to Ali:

- (a) Hussein acts in breach of the Terms and Settlement and in particular Order No: 3 when he filed the current writ action. This is why Ali has filed this application to strike out.
- (b) the Writ of Summons and the Statement of Claim filed by Hussein on 11 November, 2022 pleads exactly the same facts and contains matters which formed part of Civil Action Number 85 of 2022. Ali and Hussein had settled this matter with a Terms of Settlement. Mackie J had later granted Order in Terms and entered Consent Orders accordingly.
- (c) the present action defies the said Consent Orders entered on 26 August, 2022 by Mackie J. Such conduct is contemptuous.
- (d) Hussein has not appealed or applied to set aside Mackie J's Consent. Accordingly, the present action is both irregular and mischievous – and an abuse of process. Hussein has even instructed the same law firm which he used in HBC 85 of 2022.

10. Ali says he wishes to bring closure between him and Hussein. He wishes to ensure that Hussein is stopped from further pursuing actions like the current one –now and in the future, as per the Terms of Settlement. Ali says the current action is causing him much inconvenience and he is incurring considerable time, effort and costs in having to retain solicitors to defend this action.
11. Ali says that, in addition to the current action, there are actually two other similar or related writ actions pending before the Master and Mr. Justice Seneviratne. In one of those, Hussein has filed various applications such as contempt proceedings, injunction, joinder application and the substantive matter.
12. Ali deposes that Hussein's conduct demonstrates that he does not have any genuine or real cause of action against Ali and that Hussein is only trying to frustrate and put Ali into further expense.

HUSSEIN'S POSITION

13. Hussein opposes the striking out application by an affidavit he has sworn on 16 May 2023. He deposes as follows at paragraphs 4 to 13:
- (a) he was not a party to the Terms of Settlement in question. He had not signed it. He also was not in Court.
 - (b) in any event, the previous action (HBC 85 of 2022) did not proceed to trial and was not decided on the merits.
 - (c) he did not instruct his lawyers in HBC 85 of 2022 to withdraw the Writ of Summons and Statement of Claim.
 - (d) Ali had threatened Hussein's lawyers with a cost of \$15,000 after Mackie J commented that certain *ex-parte* Orders granted may not be sustainable and for Hussein's lawyers to reconsider Hussein's position. Ali had also threatened to seek costs of \$15,000 if the injunction was not dissolved and the writ action not withdrawn. His solicitors had then entered into the Terms of Settlement. Hussein was not a party to the Terms of Settlement.
 - (e) the present writ action is similar to the earlier action (HBC 85 of 2022). However, the earlier action was not decided on the merits. Accordingly, there is no estoppel.
 - (f) he was not properly informed by his then solicitors that he would not be able to bring the same action again even if the previous action was not decided on the merits.

DEFENDANT'S REPLY

14. Ali filed an affidavit in reply which he swore on 06 June 2023. He deposes as follows:
- (a) even if Hussein is to be believed that he did not instruct his solicitors to enter into the Terms of Settlement, that fact would not in any way impugn the Terms of Settlement. And/or its binding effect.
 - (b) as far as Ali is concerned, Hussein was represented by his lawyers namely Prakashan & Associates who was engaged in an exchange of emails with other lawyers and leading to the Terms of Settlement.
 - (c) Ali denies the allegation that he threatened Hussein's solicitors. He was only seeking what he was rightfully entitled.

COMMENTS

15. I agree with the submissions of Mr. Narayan that a lawyer representing a client has general apparent authority to settle claims without the express authority of the client (**Mathew v**

Munster (1888) 20 QBD 141; Tagra Spare Parts & Carwash (Fiji) Ltd v Khan [2017] FJHC 51; HBC09.2017 (1 February 2017). Any such consent judgement thus binds the client.

16. If Hussein really asserts that Prakashan & Associates did enter into the Terms of Settlement without his instructions, then he must take action against his lawyers.
17. In addition to the above, we are here dealing with a Terms of Settlement which has been endorsed by the Court and which has become a Consent Order.
18. Once a Terms of Settlement is sealed as a Consent Order, the Order will thus have the effect of a final judgement and the Court will be *functus officio*– in having dealt with the matter finally.
19. As Hammett PJ said in Mohammed Rasul v Hazra Singh 8 FLR 140 at page 144:

"... once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in court the terms upon which the action has been settled and the plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set aside in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct"

20. Accordingly, a party cannot just avoid a Consent Order by arguing that the Court had not dealt with the matters on the merits. If that argument were to be upheld, it would completely undermine the finality of the Consent Order – and – as Hammett PJ said above, **“deprive the other party to a compromise to that sense of finality”**.
21. In Harris v Caladine (1991) 172 CLR 84; [1991] HCA 9; at [8]: Brennan J. emphasized that the whole point about making orders by consent is to ensure that the terms of the agreement are enforceable as a curial (or Court) Order.

... Consent orders finally disposing of the issues between parties to proceedings in a court have always been regarded as a judicial determination of those issues and nonetheless so because they are made in accordance with a contract between the parties.....Moreover, as a judicial order of a superior court affords protection to a person executing it**the very purpose of procuring the making of orders by consent is to ensure that the terms agreed are susceptible of enforcement as a curial order**

22. Justice Abella of Canada's Supreme Court in Rick v Brandsema [2009] 1 SCR 295, 2009 SCC 10 (CanLII) said that the reason why a consent order is set aside (rather than appealed) is because in real, a consent judgment is not a judicial determination on the merits.

"[A] consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment.... This rule reflects the reality that a consent judgment is not a judicial

determination on the merits of a case but only an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances."

23. Is Justice Albella's view different from the one in Harris v Caladine? I see the following as the common thread in what they are saying:
- (i) a Consent Order is just as final as any other final Order of this Court which is entered on the merits of the case.
 - (ii) true - a final Order is normally appealed if the appellant is questioning an aspect of the Judge's decision.
 - (iii) but, a Consent Order is not based on an aspect of the Judges decision. Rather, it is based on the parties' agreement. A Judges decision, on the other hand, is arrived at after due consideration of the parties' "disagreement".
 - (iv) so, a party who challenges a Consent Order is actually challenging an aspect of the agreement which he had entered into. In other words, he is not challenging any decision of the Court.
 - (v) to challenge the agreement, he will have to apply to set it aside.
 - (vi) because the consent order is final (i.e. the Judge is *functus* and the principles of *res judicata* apply), he will have to come by way of a fresh action to challenge the agreement.
 - (vii) the fact that he has to challenge the Consent Order through a fresh action, rather than through the same original action - reflects the reality that a Consent Order is just as final as any other Order.
24. I also refuse to accept the allegation that Ali's solicitors had threatened Hussein's solicitors which then led to the Terms of Settlement. It is hard to see this as a situation where a lawyer is dominating the will of another lawyer. After all, as a fiduciary, it is a duty of every lawyer to look out for their client's best interests.
25. I am also of the view that, all the issues settled between the parties in their Terms of Settlement/Consent Orders are *res judicata*. This is in addition to the fact that a Court which has entered Consent Orders on a Terms of Settlement – is *functus*. In my view, this follows as a matter of course from the principle of finality which surrounds a Consent Order.

CONCLUSION

26. Taking into account all of the above, it must follow that, unless Hussein has first set aside the Consent Orders in question, he is bound by his commitment under Clause 3 of the Terms of Settlement, and that Ali's right to plead the Consent Orders as a bar to any pending or future action, suit or proceedings, must subsist.
27. Accordingly, I direct that Hussein's Writ of Summons and Statement of Claim be struck out with costs to the defendant which I summarily assess at \$5,000 - -00 (Five Thousand Dollars Only).

28. Having said the above, in my view, it would be superfluous to make Orders in terms of prayers (ii) and (iii) of the Summons (see paragraph 1 above) because any action pending by Hussein, or which Hussein intends to file, which goes against the grain of the Terms of Settlement/Consent Orders – are not maintainable unless Hussein has applied successfully to set aside the Consent Orders.

ORDERS

1. Writ of Summons and Statement of Claim struck out as being an abuse of process and is frivolous and vexatious.
2. Costs in favour of the Defendant against Hussein which I summarily assess at \$4,500 – 00 (Four Thousand five Hundred Dollars Only).



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Anare Tuilevuka

JUDGE

Lautoka

30 August 2023

