

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 65 of 2020

BETWEEN : **AMRAIYA NAIDU** of 50 Sikeci Place, Laucala Beach Estate,
Suva, Retired School Principal

Appellant/Plaintiff

AND : **RAJEN SWAMY** of Lot 62, Bau Street, Flagstaff, Suva,
Businessman

Respondent/Defendant

Before : **Banuve, J**

Counsels : R. Singh with J. Kumar for the Appellant/Plaintiff
B. Ram for the Respondent/Defendant

Date of Hearing : 13th June 2024

Date of Ruling : 09th August 2024

RULING

Introduction

1. On 22nd April 2022 in an Interlocutory Ruling the Master dismissed the Appellant's Summons for Summary Judgment seeking final judgment against the Respondent, as follows:
 - (i) Judgment in the sum of FJD 200,000 against the Respondent.
 - (ii) Interest on the judgment sum pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.
 - (iii) Costs.
 - (iv) Such further and other orders as the Court deems just.
2. On 14th April 2023, the Appellant was granted leave by the High Court to appeal the decision of the Master of the High Court.
3. The Appellant seeks the following orders pursuant to Order 59 rules 8 and 12 of the *High Court Rules* 1988;
 - (i) An Order that the Interlocutory Ruling be wholly set aside.
 - (ii) Orders for final judgment against the Respondent as follows
 - (a) Judgment in the sum of FJD\$200,000 against the Respondent
 - (b) Interest on the judgment sum pursuant to the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act* 1935.
 - (c) Costs
 - (d) Such further and other orders as the Court deems just.
 - (iii) The costs of this appeal be paid by the Respondent.
 - (iv) Such further and other orders as the Court deems just.
4. The Grounds of Appeal are that
 1. The learned Master erred in law and in fact and failed to exercise her discretion judicially and in accordance with applicable legal principles in concluding that the case was not a proper one to be determined on an Order 14 application and the issue of the 2013 debt is being acknowledged and

whether the claim is not barred by section 4 of the Limitation Act should be tried via viva voce evidence when;

(a) *The learned Master had already in the Interlocutory Ruling found at paragraph 18 that there is sufficient evidence on 30th January 2013 the Appellant received into his bank account with ANZ a sum of \$200,000 and later on 31st January 2013 he transferred the said sum to the Respondent.*

(b) *There is uncontested evidence by the Appellant that*

(i) *The Lending Agreement was intended to formalize the earlier 2013 oral contract between the Appellant and the Respondent.*

(ii) *The Respondent acknowledged the Debt by signing the Lending Agreement dated 10th April 2019.*

(iii) *The Appellant's right to claim against the Respondent is deemed to have accrued on 10th April 2019. The Debt and any proceedings to pursue it are not time barred.*

(c) *There are no triable issues or bona fide defences which the Respondent has raised, (or can raise). Accordingly, under the principles of Anglo-Italian Bank v Wells (1878) 38 LT 201, the Court has a duty to enter summary judgment in favor of the Appellant.*

(d) *Even on the basis of the matters pleaded in the Statement of Defence filed in this Action, it would be improbable (and disingenuous) for the Respondent to claim that the Lending Agreement was not an acknowledgment of the Debt but a separate /new loan agreement when*

(i) *The Lending Agreement had the same parties, that is, the Appellant and the Respondent.*

(ii) *It conceived the same amount, that is FJD\$200,000*

(iii) *It related to the same purpose (business investment), in particular purchase of the Flagstaff Laundry.*

(iv) *As a matter of common sense, there would be no reason for the Appellant to lend a further FJD\$200,000 to the same person for the same purpose when the existing Debt remained unpaid.*

2. The learned Master erred in law in making the Interlocutory Ruling by not finding that in the circumstances, final judgment should be entered in favor of the Appellant as a matter of justice.

5. The Plaintiff's Submissions:

Ground 1

The Plaintiff contends that the learned Master erred in law and fact and failed to exercise her discretion judicially and in accordance with applicable legal principles and that the issues of the *acknowledgment of the 2013 debt* and *the effect of section 4 of the Limitation Act* were not proper ones to be determined on an Order 14 application but rather ought to be tried on evidence.

- (1) The principles relating to the entry of summary judgment under Order 14, rule 4(1) of the *High Court Rules 1988* were discussed by the Fiji Court of Appeal in *Carpenters Fiji Ltd v Joe's Farm Produce Ltd* – Civil Appeal No ABU 00019 of 2016¹;
 - (a) *The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim, which ought to be tried.*
 - (b) *The defendant may show cause against the Plaintiff's claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*
 - (c) *It is generally incumbent on a defendant resisting summary judgment to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied to support it.*

¹ Cite Supreme Court Practice 1999 Volume 1; *Pemberton v Chappel* (1987) 1 NZLR 1; *Anglo Italian Bank v Wells* (1878) 38 LT 201; *Powszechny Bank Zwiakowy W Polsce v Paros* (1932) 2 KB 353.

- (2) The burden of proof remains with the Plaintiff to prove that the Defendant does not have a defence, which has any realistic prospect of success. Once the Plaintiff satisfies the court of this, the persuasive or evidential burden shifts to the Defendant to satisfy the court that judgment should not be given against him.²
- (3) In accordance with the principles of summary judgment, there was no need to determine the issues of the acknowledgement of debt and whether the claim was barred by section 4 of the Limitation Act, by viva voce evidence, at trial.

Evidence of the Debt

- (4) It is clear from the Summary Judgment Affidavit that on 31st January 2013, the Appellant had transferred a sum of FJD\$200,000 to the Respondent for “business development” which was the purchase of Flagstaff Laundry and the exchange of messages between the Appellant and the Respondent in 2018 and 2019 provides circumstantial evidence that the Appellant was following up with the Respondent and the latter was avoiding him.
- (5) The learned Master had in the Interlocutory Ruling found that there was sufficient evidence that on 30th January 2013 the Appellant received into his account with ANZ a sum of \$200, 000 and later on 31st January 2013 the sum was transferred to the Respondent.

Uncontested Affidavit Evidence

- (6) The Respondent did not file a response to the application for summary judgment nor raise any triable issues before the Master thus the following facts were uncontested;
 - (a) The Lending Agreement formalized the oral contract between the Appellant and the Respondent.

² *Hibiscus Air Pty Ltd v. Air Pacific Ltd* –Civil Action No HBC 46 of 2006

- (b) The Respondent acknowledged the Debt by signing the Lending Agreement dated 10th April 2019.
- (c) The Appellant's right to claim against the Respondent is deemed to have accrued on 10th April 2019. The debt and any proceedings to pursue it are therefore not time barred.

No defence or triable issues

- (7) The Respondent did not file an affidavit in opposition in the summary judgment application thus the Appellant's evidence was uncontested.³
- (8) Although the Respondent did not file an affidavit in reply to the Application for Summary Judgment, the Court may have a look at the Statement of Defence filed instead which in these instance were unsustainable;

(a) The parties entered into a lending Agreement for which the Plaintiff has not actually lent the money on 10th April 2019, therefore, no obligations as per Lending Agreement exists.

(b) The Plaintiff's demands for any monies lent on 31st January 2013 and any proceedings to recover subsequent monies are barred by section 4 of the Limitation Act 1971.

- (9) If the examination of the Statement of Defence disclose it to be without merit then the Plaintiff is entitled to summary judgment- *Fiji Development Bank (Fiji) Ltd v Niu Industries (Fiji) Ltd & Others*- Civil Action No. HBC 139 of 2016.

Acknowledgement of Debt

- (10) The Lending Agreement should be considered as a whole. In doing so, the court must have regard to all the relevant circumstances. If there are two

³ *Westpac Banking Corporation v Singh* [1998] FJHC 173

possible constructions, the court is entitled to prefer the construction which is consistent with business commonsense and to reject the other.

(11) Section 13 of the Limitation Act provides:

(1) Every acknowledgement referred to in section 12 shall be in writing and signed by the person making the acknowledgment.

(2) Any such acknowledgment or payment may be made by the agent of the person by whom it is required to be made under the provisions of section 12 and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged, or as the case may be, in respect of whose claim the payment is being made.⁴

(12) The Lending Agreement states that the borrower is desirous of investing on the laundry business at Flagstaff, Suva and the borrower approached the lender to loan the sum of two hundred thousand dollars (\$200,000) to finance the purchase of the business.

(13) The borrower did not purchase any business in 2019. The unchallenged evidence before the Master was for the purchase of the business, Flagstaff Laundry. The loan was subsequently acknowledged in 2019.

Ground 2

The learned Master erred in law in making the Interlocutory Ruling, by not finding that in the circumstances, final judgment should be entered in favor of the Appellant as a matter of justice.

(14) The summary judgment is a procedural canon used during civil litigation to promptly and expeditiously dispose any case without trial proper. An applicant is entitled for a summary judgment as a matter of law if there is no defence and no dispute as to the material facts of the case.⁵

⁴ *Commercial Images (Aust) Pty Ltd (in liq) v Manicaros* (2023) QDC 77

⁵ *Kidman v Chandra* [2017] FJHC 712

- (15) If the matter were to proceed to trial the Appellant would incur substantial costs, including those associated with pre-trial steps such as discovery and pre-trial conferences. There may also be additional costs that might arise from applying for or opposing any necessary interlocutory applications.
- (16) The Master erred in not finding that final judgment should be entered when there is no genuine dispute of material facts.

6. The Defendant's Submissions

The Pleadings

- (17) The Respondent in his Defence:
 - (a) contests the debt claimed by the Plaintiff.
 - (b) contests the contents of the Agreement and its validity
 - (c) raises difficult questions of law
 - (d) asserts the Claim should be struck off as it does not have a cause of action
 - (e) these factors point towards the element that this matter needs to be tried rather than summarily decided.

The Oral Agreement

- (18) The Appellant did not come to Court with clean hands and his version of the oral agreement was not true. The Respondent submits that the terms of the oral agreement was that;
 - (a) The Appellant will invest \$200,000 in the laundry business which the Respondent was purchasing and the shared profits will be payable after 8 years (from January 2021)
 - (b) It was more like an insurance policy that the Appellant was purchasing.
 - (c) On 31 January 2013 the Appellant transferred \$200,000 in the Respondent's account with the narration "business investment".

The Written Agreement

- (19) Pursuant to the Agreement dated 10 April 2019, the Appellant is the Lender whilst the Respondent is the Borrower who wishes to invest in the Laundry Business at Flagstaff, Suva. The Borrower approached the Lender to loan the sum of \$200,000 to finance the purchase of the business and the latter agreed to lend the said sum.
- (20) The money is given on the condition that the Borrower shall repay the same, interest free on or before 31 January 2019.
- (21) The Respondent decided not to proceed with the deal and the Appellant got angry and claimed for his initial business investment of \$200,000 to be returned, citing it was a loan.
- (22) As stated in his Defence, the Respondent denies the debt claimed as the \$200,000 was not a loan, but a business investment.

The Limitation Act

- (23) Six years, 18 days (31 January 2013 -11 February 2020) has lapsed before the Appellant filed the Claim and as such is barred.
- (24) The limitation period is extended by section 12 (1)(a) of the *Limitation Act* 1971. Mere evidence of payment of an amount that is less than the amount claimed is not necessarily the same thing as part payment of a larger debt.

7. ANALYSIS

- (25) The Court has analyzed the competing issues raised by the parties and is grateful for the written submissions provided by the parties at the hearing of the appeal on 13th June 2024.

Evidential Basis and the Acknowledgment of Debt

- (26) In *Carpenters Fiji Ltd v Joes Farm Produce Ltd* [2006] FJCA 60, the Court of Appeal stated that;

- (a) *The purpose of Order 14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a bona fide defence or raise an issue against the claim which ought to be tried*
- (b) *The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*
- (c) ***It is generally incumbent on a defendant resisting summary judgment to file an affidavit which deals specifically with the Plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied to support it.***
- (27) In the present case, the Defendant did not file an affidavit setting out clearly and precisely the facts relied on to support his defence, in response to the application for summary judgment against him.
- (28) This is not necessarily determinative, as the Court ruled in ***Westpac Banking Corporation v Singh*** [1998] FJHC 173 that "*although the defendants have not filed affidavits in reply to show cause, the Court has before it a Statement of Defence which has been filed in each case. The Court must look at these defences.*"
- (29) The learned Master took into account the Statement of Defence, filed by the Defendant on 17th March 2020, in formulating the Interlocutory Ruling delivered on 22nd April 2022.
- (30) In the Interlocutory Ruling the Master declined to grant the orders sought by the Plaintiff in the Summons for Summary Judgment.
- (31) The Interlocutory Ruling issued by the learned Master needs to have been premised on an *evidential foundation* to support the Statement of Defence filed by the Defendant on 17th March 2020. If not, the plaintiffs verification stands unchallenged and ought to be accepted unless it is patently wrong.⁶

⁶ Metal Works & Joinery Ltd v FIRCA, as cited in FDB v Niu Industries & Others, Civil Action No. HBC139 of 2016

- (32) The Respondent in his Statement of Defence filed on 17th March 2020 relies on the following defence;
- (i) *The Defendant further states that parties entered into a Lending Agreement for which the Plaintiff had not actually lent the money on 10 April 2019. Therefore, no obligation as per Lending Agreement exists.*
 - (ii) *The Plaintiff's demands for any monies lent on 31st January 2013 lent on 31st January 2013 and any proceedings to recover subsequent monies are barred by section 4 of the Limitation Act 1971.*
- (33) There are a number of issues that are uncontested in the Defence, as summarized by the Plaintiff in comprehensive submissions filed on 10th June 2024, which the Court adopts in this ruling ;⁷
- (a) *The Lending Agreement intended to formalize the earlier 2013 oral contract between the Appellant and the Respondent.*
 - (b) *The Respondent acknowledged the Debt by signing the Lending Agreement dated 10 April 2019.*
 - (c) *The Appellant's right to claim against the Respondent is deemed to have accrued on 10 April 2019. The Debt and any proceedings to pursue it are therefore not time barred.*
- (34) Given the issues identified as uncontested in the Statement of Defence, the Court finds that the Lending Agreement dated 10th April 2019 constitutes an acknowledgment of the oral contract between the parties of 31st January 2013, and the Plaintiff's right to claim against the Defendant is deemed to have accrued on 10th April 2019, and therefore not barred pursuant to sections 12 and 13 of the *Limitation Act 1971*.
- (35) It difficult to reconcile the finding of the learned Master in the Interlocutory Ruling with the *evidential basis* available to her.

⁷ Paragraph 25

- (36) Was the Master's approach in refusing the grant of summary judgment nevertheless, correct on principle, despite the issues that have been identified by the Plaintiff as *uncontested by the Defendant*?
- (37) The Court finds that the approach adopted by the Master in dismissing the application for summary judgment did not correctly reflect settled principle. As stated in *Fiji Development Bank v Niu Industries (Fiji) Ltd & Others-Civil Action No HBC 139 of 2016* the court stated that:
- "As per the established principles hereinabove, it is essential that an examination of the 1st and 2nd Defendants Statement of Defence be conducted to determine whether there is any merit. Should there be any merit invariably the application for summary judgment must fail. However if the defence is found to be without merit and is a mere sham then the Plaintiff is entitled to summary judgment"*
- (38) There was no evidential basis for the Master to have reached the conclusion that there was no acknowledgement of the 2013 debt, given her citation also in the Interlocutory Ruling of the uncontested evidence of the plaintiff that;
- (i) There was *sufficient* evidence of a sum of \$200,000 being received into the Plaintiff's ANZ bank account on 30th January 2013 and transferred to the Defendant on 31st January 2013;
 - (ii) The Lending Agreement which the Plaintiff claims is an *acknowledgment of the debt given to the Defendant in 2013* is dated 10th April 2019.
 - (iii) The said agreement reads that the lender has agreed to loan the sum of \$200,000 and that the money is *given on the condition that the borrower repays the same interest free on or before 31st January 2019*.
- (39) The approach adopted by the learned Master in the Interlocutory Ruling of 22nd April 2022, erred from the settled approach applicable to the evaluation of evidence to be made on an application for summary judgment, on at least 2 grounds;

- (i) Elevated the general denial raised by the Defendant in his Statement of Defence, to be a defence warranting a further hearing on evidence when there was no basis for it, nor was there a *real substantial issue or question of law to be tried or a dispute as to facts or law* which raises a reasonable doubt whether the Plaintiff was entitled to judgment, *given there was no evidential basis provided by the Defendant either by filing an affidavit of merit or pleaded in the Statement of Defence*.⁸
- (ii) Whilst the learned Master did not have the benefit of an *affidavit on merit* available to her to determine the application for summary judgment, she misapplied the principle stated by the Privy Council; (*relating to affidavit evidence*) in *Eng Mee Young & Others v Letchumanan*-[1980] AC 331 to the general denials in the Statement of Defence “... to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement (on an affidavit), however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or either statements by the same deponent, or inherently improbable in itself it may be”.⁹
- (40) Based on established principle the Court has reviewed the Interlocutory Ruling issued by the Master on 22nd April 2022, and the pleadings filed by the parties in particular the Statement of Defence filed on 17th March 2022, and find it to be without merit to warrant a hearing *viva voce* and that the Plaintiff is entitled to the orders it seeks in the Notice of Appeal filed on 21st April 2023.

ORDERS

- 1. An Order that the Interlocutory Ruling of 22nd April 2022 be wholly set aside.**
- 2. Orders for final judgment against the Respondent/Defendant as follows;**

⁸ Halsbury’s Law of England (4th Ed) Volume 37, paragraphs 414-415 as cited by Sharma, J in *Fiji Development Bank v Niu Industries (Fiji) Ltd & Others* –Civil Action HBC 139 of 2016

⁹ P 341

- (a) Judgment in the sum of FJD\$200,000 against the Respondent/Defendant.
- (b) Interest on the judgment sum at 8% from 10th April 2019 to the date of Judgment pursuant to the *Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935*.
- (c) Costs summarily assessed at FJD \$1,000.00 to be paid within 14 days of the delivery of this judgment.



Savenaca Banuve
Savenaca Banuve
Judge

At Suva
9th August 2024