

IFTAKHAR IQBAL AHMAD KHAN v MICHAEL FENECH (ABU0019 of 2004)

COURT OF APPEAL — CIVIL JURISDICTION

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TOMPKINS, SMELLIE and SCOTT JJA

11, 18 March 2005

10 **Practice and procedure — judgments and orders — summary judgment — Respondent lent Appellant sum of money — single repayment made — notice of demand served on Appellant — Respondent sought summary judgment — Appellant’s affidavits vague, inadequate and inconsistent — whether summary judgment was proper — appeal from summary judgment dismissed —**
 15 **Compensation to Relatives Act (Cap 29) s 9 — High Court Rules O 14 — Legal Practitioners Act 1997.**

This was an appeal from a summary judgment of the High Court regarding a written agreement on a sum of money between the Defendant (Appellant) and the Plaintiff (Respondent). The Appellant was a legal practitioner and the Respondent was a
 20 businessman. The Respondent lent the Appellant a sum of money. Apart from a single repayment, there had been no other repayment made by the Appellant. Demand was made to no avail. The Respondent sought summary judgment.

The High Court’s first ruling was that the defence was unacceptably vague, especially as to the several litigation matters which the Appellant claimed to have undertaken on
 25 behalf of the Respondent. The High Court gave the Appellant a conditional leave to defend because of the disputed authenticity of the written set off agreement. The High Court’s second ruling was that the Appellant’s affidavit was inadequate and inconsistent since there were no copies of tax invoices, time costing or other appropriate business records. The Appellant alleged that the High Court erred in granting summary judgment when the issue of the disputed set off could only be resolved after the trial.

30 **Held** — The Appellant had been given ample opportunity to show cause why judgment should not be entered. The Appellant’s first affidavit, by failing to condescend upon particulars, plainly failed to show cause. The second affidavit fell far short of what could be required of a legal practitioner. The granting of summary judgment is discretionary. The condition imposed by the judge was proper. The Appellant failed to comply with the
 35 condition and therefore forfeited his right to defend.

Appeal dismissed.

Case referred to

Gordon v Cradock [1964] 1 QB 503; [1963] 2 All ER 121, cited.

40 *D. Prasad* for the Appellant

J. K. Sharma for the Respondent

[1] **Tompkins, Smellie and Scott JJA.** This is an appeal from a summary judgment of the High Court at Lautoka awarding the Respondent (Plaintiff in the
 45 High Court) \$33,334 plus interest and costs. For convenience we will refer to the parties as Plaintiff and Defendant.

[2] The Defendant is a legal practitioner. The Plaintiff is a businessman trading as “Michael’s Taxis and Tours”.

50 [3] In para 3 of his statement of claim the Plaintiff pleaded that by a written agreement made on or about 13 October 1999 the Defendant agreed to lend him \$40,000.

[4] Paragraph 4.2 of the statement of claim states that it was an express and/or implied term of the Agreement that the Defendant should:

5 ... not be entitled to claim any set off counterclaim and/or any other form of deduction from the said sum of \$40,000 lent and advanced to the Defendant notwithstanding that the Plaintiff may engage the Defendant to provide the Plaintiff with any professional legal services on or after the 13th day of October 1999.

10 [5] Paragraphs 5–7 of the statement of claim plead that on 13 October 1999 the Plaintiff lent the Defendant \$30,000 by way of a cheque and a further sum of \$10,000 in cash. Apart from a repayment of \$6666 on about 7 February 2000 there had been no other repayment. On 3 July 2000 a demand notice was served on the Defendant but no further repayment had been forthcoming. The Plaintiff claimed \$33,334 plus interest and costs.

15 [6] A defence was filed on 16 August 2001. The Defendant admitted receiving \$30,000 from the Plaintiff but denied receipt of a sum of \$10,000.

[7] The Defendant admitted repayment of \$6666 but in para 6(b) of the defence it was pleaded that:

20 the Plaintiff had several litigation matters pending and he requested that he would set off the balance of \$23,334 rather than paying fees to the Defendant.

[8] On 19 September 2001 the Plaintiff sought summary judgment under the provisions of RHC O14. He filed a very brief supporting affidavit which did not materially add to the statement of claim.

25 [9] On 12 October 2001 the Defendant filed an affidavit in answer. He merely denied the Plaintiff's claim and averred that he had a good and valid defence.

[10] On 30 April 2002 the Plaintiff filed an affidavit in reply. In paras 3.1 and 3.2 he referred to the written agreement which had been pleaded in para 3 of the statement of claim. He also exhibited what he averred was a copy of the agreement as Ex MF1. The last paragraph of the document reads:

30 this respectively money nothing to do with another business that maybe we have in future.

He also averred that the Defendant had not carried out any work for him and had not rendered him any tax invoice.

35 [11] On 24 October 2003 the Defendant answered the reply. He reiterated the claim that he had only been advanced \$30,000 by the Plaintiff. He again denied receiving the \$10,000. He again admitted paying the Plaintiff \$6666. This sum, it may be noted, precisely corresponds to 2 months' repayment as specified in the copy written agreement exhibited by the Plaintiff. Notwithstanding this admission, in para 3 of his affidavit the Defendant averred:

furthermore the Annexure MF1 in the said affidavit was written for one Dr Khan and I only witnessed the signature of the Plaintiff.

45 [12] In the final paragraph of his affidavit the Defendant averred that the Plaintiff "had executed a confirmation to set off the balance sum of \$23,334 being my costs and disbursements for several litigation works done in favour of the Plaintiff". The Defendant exhibited what he stated was a copy of the set off agreement as Ex 1 to his affidavit.

50 [13] Although we do not have a copy of any further affidavit from the Plaintiff, the hearing of the order 14 summons proceeded on the basis that the Plaintiff denied having seen the set off agreement and denied signing it.

[14] On 9 March 2004 the High Court (Connors J) delivered a first ruling. The judge noted that the defence was unacceptably vague, especially as to the “several litigation matters” which the Defendant claimed to have undertaken on behalf of the Plaintiff. In view, however, of the disputed authenticity of the written set off agreement conditional leave was given to defend.

[15] The condition was as follows:

the Defendant is granted leave to defend the proceedings conditional upon him filing with the Court full and complete details by way of affidavit of all work performed for the Plaintiff and allegedly offset from the sum of \$23,334 and including all relevant files by 3.30 pm on 19 March 2004.

[16] On 19 March 2004 the Defendant filed a further affidavit. Some details of four cases in which the Defendant claimed to have represented the Plaintiff were included.

[17] On 23 March 2004 one Mohammed Shariff Koya, a businessman, also filed an affidavit. He averred that the disputed set off agreement between the Plaintiff and the Defendant had been signed by the Plaintiff in his presence and that he had witnessed the Plaintiff’s signature.

[18] On 16 April 2004 a second ruling was delivered by the court. The judge described the Defendant’s affidavit dated 19 March as “inadequate and inconsistent”. He pointed out that:

No explanation is given as to why there are no copies of tax invoices, time costing or other appropriate business records available that might have been annexed with respect to the costs allegedly outstanding and offset. The narratives furnished are indeed a far cry from what one would expect to be furnished from a legal practitioner.

[19] The judge ruled that the Defendant had failed to comply with the condition imposed on 9 March and accordingly judgment was entered against the Defendant for the whole sum claimed. The judge explained that in arriving at his conclusion he had not taken into account the affidavit of Mohammed Shariff Koya which he found not to have been filed in compliance with the condition imposed by him in his first ruling.

[20] In his grounds of appeal the Defendant says that the High Court erred in granting summary judgment when the issues raised, in particular the matter of the disputed set off, could only satisfactorily be resolved after trial.

[21] Where application is made for summary judgment a Defendant is given the opportunity to show cause why judgment should not be entered. We agree with the judge that the Defendant’s first affidavit, by failing to condescend upon particulars plainly failed to show cause. In these circumstances, the Defendant was fortunate to have been given an opportunity to add to the material already before the court.

[22] Unfortunately, however, despite being plainly directed as to the material that he would be required to file in order to satisfy the judge that he should be given leave to defend, the Defendant failed to comply. We agree with the judge that the second affidavit fell far short of what could reasonably be required of a legal practitioner keeping proper records. We also agree that the affidavit of Mohammed Shariff Koya was irrelevant to compliance with the judge’s condition.

[23] The Defendant admitted borrowing a substantial sum of money from his client in 1999. On the face of it, this is a clear breach of para 1.06 of the schedule to the Legal Practitioners Act 1997. The loan agreement does not include a

provision for the payment of interest. There is no evidence that the Plaintiff obtained independent legal advice before agreeing to make the loan. The Defendant admits not repaying most of the money borrowed. His claim to a set off rests on the provision of legal services to the value of the set off to the Plaintiff. That is why a full and detailed account of the services was of such importance. There is nothing to prevent the Defendant from issuing proceedings for the recovery of those sums which he says are due to him from the Plaintiff.

[24] The decision whether or not to grant summary judgment is discretionary. Where conditional leave to defend is given, this court will not interfere with the judge's discretion unless there has been some error of principle or misapprehension of the facts or unless some undue weight has been given to a particular aspect of the facts: *Gordon v Cradock* [1964] 1 QB 503; [1963] 2 All ER 121 CA. In our view, the condition imposed by judge was entirely proper. The Defendant failed to comply and therefore forfeited his right to defend.

Result

The appeal is dismissed with costs which are fixed at \$1000. In view of the disquieting circumstances, we direct the Registrar to forward a copy of this judgment to the president of the Fiji Law Society.

Appeal dismissed.

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