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IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 200 OF 1979

000079

Between:

SUVA CITY COUNCIL, a Statutory Body constituted under the provisions of the Local Government Act, 1972. — PLAINTIFF

- and -

MOHAMMED ASLAM s/o RAHAMATULLAH of 15 Amputch Street, Suva in Fiji, Haulage Operator. — DEFENDANT

Mr. H.K. Nagin for the Plaintiff.
Mr. H.M. Patel for the Defendant.

J U D G M E N T

This is an appeal to a Judge in Chambers from an Order of the Chief Registrar assessing damages in this action at $1,282.20.

Before considering the grounds of appeal I consider it necessary to refer to a number of matters disclosed by the Record. A number of orders made by this Court should not in my view have been made. Reference to these may result in more attention being paid in future to the Rules of the Supreme Court by practitioners who prepare orders and judgments for sealing by the Court and those officials in the Court responsible for the sealing.

The Council commenced this action by Writ of Summons on the 11th May, 1979 seeking the following orders:

"(a) for an order restraining the Defendant by himself and/or his servants and/or agents or otherwise from obstructing the said streets or creating any nuisance therein AND from carrying on any work whatsoever on the said streets;

(b) for an order requiring the Defendant to remove from the said streets all his trucks and/or other obstructions which prevent and restrict the user of the said streets by the public; OR ALTERNATIVELY for a Declaration that the Plaintiff itself be at liberty to remove the said trucks and/or other obstructions from the said streets at the costs and expense of the defendant;

(c) for an order that the Defendant do cease to operate any trade business or calling from 15 Amputch Street, Suva in Fiji or from residential premises known as 15 Amputch Street, Suva in Fiji."

More care should have been taken by the Council's solicitors in framing the relief sought. The orders sought are vague and go beyond the relief the Council was entitled to and also sought orders restraining the defendant from doing acts which were legal. Since the orders were sought by the Council in the terms above stated and the defendant's solicitors consented to the first two of them I make no further comment other than to state that this Court made and sealed orders in the form sought by the plaintiff.

The defendant's solicitors, Messrs. Lateef and Lateef, entered an Appearance for the defendant but did not deliver a Defence.

Neither the solicitors for the Council nor the solicitors for the defendant appear to have considered whether the action was properly instituted.

The Statement of Claim alleges a public nuisance by the defendant who was stated to be operating a haulage contracting business and as a dealer in second hand trucks from his residence at 15 Amputch Street, Suva. He is alleged to have illegally parked 20 to 25 heavy trucks both derelict and operational on the streets where he carried out repairs and serviced the vehicles. It was also alleged that such operations caused substantial annoyance to neighbours by day and night and had caused "excessive damage to the road surface of the streets." It was also stated that the defendant

on the 9th June, 1977 had been convicted of two offences under the Suva (Control and the use of Street) By Laws 1969 and a further offence under the By Laws on 19th January, 1979. The defendant had also been requested on several occasions to remove the trucks but had neglected to do so.

The powers of the Council with regard to streets in Suva are specified in the Local Government Act 1972 sections 107-118. There are also the By Laws made thereunder which I have already referred to relating to control of streets.

Section 115 of the Act provides penalties for specified injuries and obstructions to streets. Section 115 (1)(g) makes it an offence if any person "does or causes or permits to be done any act whatsoever by which any injury is done to any street or any work or thing in, on or under a street". This section also specifies a procedure which may be followed to deal with encroachment on or obstruction of a street. If the procedure is followed, it enables the Council, if there is non-compliance by the offender with the notice served on him, to remove the encroachment or obstruction and entitles the Council to recover the costs and expenses incurred in repairing and making good any injury or damage caused by an encroachment or obstruction.

The usual rule is that where an act creates liabilities and provides procedures to be followed and remedies for enforcing them such procedures and remedies must be followed. A Court will not normally grant relief where such statutory remedies are not pursued.

The Council is not empowered in its own name to take action to abate a public nuisance if it seeks to ignore the statutory remedies it has for abating nuisances on streets. It must bring a relator action in the name of the Attorney General.

In A.G. (On the relation of Manchester Corporation) v. Harris & Others (1960) 3 All E.R. 207 it was held that where an individual persistently broke the law and there was no sufficient sanction to prevent the breach, the Court might in its discretion grant, at the suit of the Attorney General as representing the whole public, an injunction. The

defendants in that case had in three years been convicted of 142 offences !

In Devonport Corporation v. Tozer (1903) 1 Ch. 759 Collins M.R. said at p. 762 :

> ".....where the local authority who have certain special rights to sue in their own name for certain specific remedies, but have not done so, and are trying to put in suit, a public wrong they must do it in the recognised way, namely at the suit of the Attorney General."

In the instant case the Council should either have pursued the remedies provided in the Act or brought a relator action in the name of the Attorney General.

Judgment has however been entered in this action and consent orders made. I mention the matter for the future guidance of the Council's solicitors.

On the defendant's failure to deliver a Defence the Council moved under Order 19 Rule 3 Rules of the Supreme Court to enter up judgment in default of delivery of a defence for damages to be assessed. The Court sealed this judgment on the 6th June, 1980.

The Council was not entitled to move under Order 19 Rule 3 for interlocutory judgment as the claim was not for unliquidated damages only. Its solicitors should have moved under Order 19 Rule 7. They realised their mistake two days after the interlocutory judgment was sealed and moved under Order 19 Rule 7 without seeking to set aside the interlocutory judgment.

Under Order 19 Rule 7 the Judge, on the hearing of the Application for Judgment is obligated to give such judgment "as the plaintiff appears entitled to on his Statement of Claim."

In Young v. Thomas (1892) 2 Ch. 134 Lindley L.J. at p. 136 said :

> "so far as the rights of the plaintiff and the relief claimed in the action are concerned, the judge is to look at the statement of claim and nothing else....."

This was a case where the plaintiff moved for judgment in default of delivery of a defence under a similar rule to Order 19 Rule 7.

In Charles v. Shepherd (1892) 2 Q.B.D. 622 it was held that on a motion for judgment under the same rule as was considered in Young v. Thomas a judge may order interlocutory judgment to be entered and may refer the whole claim to an official referee to ascertain and report to the Court the amount due to the plaintiff. Lord Esher M.R. in that case said :

> "....the court is not bound to give judgment to the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for ....."

That case involved a judgment for an account.

Both counsel appeared before a judge in Chambers on two occasions. On the first occasion Mr. Lateef for the defendant agreed to the first two orders sought by the Council but objected to the third. The two consent orders were made. On the adjourned hearing for some reason which does not appear on the file the learned judge made the following Order :

> "Order in terms of paragraph (c) of the prayer in the Statement of Claim. Defendant to file defence within 21 days on remaining issues under writ."

I can only assume that it was in issue whether the streets had been damaged and to what extent they had been damaged.

Neither counsel apparently informed the learned judge that an interlocutory judgment had been sealed nor that the summons before him was for final judgment in default of defence. No defence was filed by the defendant pursuant to that order and the Council for the second time moved under Order 19 Rule 3 and had judgment entered in default of defence for damages to be assessed. The Court sealed this

second judgment.

On the 1st November, 1979 both counsel (i.e. Mr. Nagin and Mr. Lateef) appeared before the Chief Registrar Mr. Fry. The defendant was not personally present. Mr. Lateef sought leave to withdraw after informing Mr. Fry that he was no longer acting for the defendant. Leave was granted.

Mr. Lateef did not comply with Order 67 Rule 6 relating to withdrawal of a solicitor who has ceased to act for a party. To make matters worse the then Chief Registrar did not adjourn the hearing and direct that the defendant be notified of the adjourned date. He proceeded to hear evidence in the absence of the defendant and made his assessment of damages. However, an affidavit sworn and filed by the defendant discloses he was notified on 31st October, 1979 that Mr. H. Lateef was seeking to withdraw. He stated therein that due to a religious festival and short notice he could not attend or arrange for a solicitor to appear before the Chief Registrar the next day on the assessment of damages.

If damage to the extent later alleged by the Council was caused by the defendant that damage should have been specified and quantified in the Statement of Claim. The basis should have been laid for a liquidated demand for damages. No such basis was laid. The damage was quantifiable and required no assessment. Had the basis been laid in the Statement of Claim final judgment could have been given by the Court on the plaintiff's application under Order 19 Rule 7 for judgment. The defendant however would no doubt have defended the action if he or his solicitors had appreciated that the Council was seeking to recover liquidated damages to the extent it later claimed.

The Chief Registrar wrote what he termed a "Judgment". He assessed costs at $1,282.20 and purported to order that costs be taxed if not agreed. Such an order as to costs had already been made by the Court. No certificat by the Chief Registrar pursuant to Order 37 Rule 2 appears to have been filed. It appears to me that the Chief

Registrar was trying the issue and not assessing damages.

Mr. H.M. Patel then appeared for the defendant and took out a summons to set aside the judgment for damages and costs. The Summons was set down for hearing on the 7th December, 1979 but was struck out as there was no appearance by the defendant or his solicitors.

A further Summons was then taken out by Mr. H.M. Patel supported by an affidavit by the defendant in identical terms to his affidavit filed in support of the earlier Summons. No explanation was offered for the non-appearance of the defendant or his solicitors on the prior occasion.

The matter came before me for the first time on the 8th January, 1980 when I pointed out that the proper course was an appeal to a judge in chambers under Order 58 Rule 1. Mr. Nagin for the Council agreed to such an appeal out of time and leave was granted to the defendant to appeal and the Council to cross appeal before the 8th February, 1980.

The Order made by me was the forerunner of some further problems.

Mr. Patel purported to give notice of appeal to a judge but indicated therein that it was an appeal to the Court in its Appellate Jurisdiction. The Court officials then proceeded to prepare a Record which would normally be required if the appeal was from this Court to the Court of Appeal.

In due course the appeal was listed for hearing in open Court. After indicating to Council that I was unhappy with the Chief Registrar's assessment without disclosing my reasons, I adjourned the matter for hearing later in chambers. When I was then advised that parties were considering settlement I adjourned the hearing sine die but to be brought on in any event for hearing before the 31st August, 1980. On the 27th August, 1980 the matter came before me again in open Court when I listened to argument of counsel and adjourned to consider my decision.

It will be gathered from what I have already said that in this action two separate and identical interlocutory

judgments (except as to dates) have been sealed, there are two final orders, one purporting to be a prohibitory injunction but defective in form due to the plaintiff's solicitors negligence in drawing up the order which order also incorporates a mandatory injunction and an alternative declaration. The other order is also a prohibitory injunction ordering the defendant to cease to operate "any trade or calling" from the defendant's residential premises. Finally there is now final judgment for the sum of $1,282.20. As regards this final judgment for $1,282.20, the defendant's solicitors had this judgment entered up by filing the judgment for sealing on the 11th February, 1980. Mr. Patel overlooked the fact that he was appealing against the Chief Registrar's assessment and not from a judgment.

The final judgment was a result of a misunderstanding by Mr. Patel and should have been rejected by this Court when presented for sealing. The plaintiff's solicitors have not referred to the final judgment and the hearing of the appeal was understood by both parties to be against the assessment of damages by the Chief Registrar. What was in issue was the quantum of such damages.

I consider the final judgment is an irregular one in all the circumstances and accordingly I set it aside.

If there is to be any finality in this matter I can only proceed on the basis that it was admitted that the defendant caused damage to the streets of Suva and attempt to assess damages myself.

The grounds of appeal are as follows :

" 1. That the Learned Chief Registrar erred in law and in fact in admitting the whole of the plaintiff's witness's evidence when it was mostly hearsay on material points.

2. That the Learned Chief Registrar erred in law and in fact by awarding damages to the plaintiff for the sum of $1282.20 which is grossly excessive in all respects of the case.

3. That in the light of the case as a whole the defendant should be allowed to adduce new evidence at the hearing of the appeal in regards to matters concerning the damage claimed by the plaintiff and/or assessed by the Chief Registrar."

The third ground was not pursued.

I am satisfied that the appellant's abnormal operations with his trucks must have caused some damage to the streets. He must be taken to have admitted causing "excessive damage to the road surface" of two streets as claimed by the plaintiff.

I accept that statement as indicating that some damage would in any event have been caused to the streets by normal and legal use of vehicles using the streets but abnormal use by the defendant has caused additional and excessive damage.

Special damages were not pleaded nor any damage specified or quantified but the defendant's solicitors at no time has raised this issue nor sought further particulars.

The presentation of the plaintiff's case to the Chief Registrar was unsatisfactory. Only one witness was called. What his qualifications are is not known. He saw the site in mid July 1979 and he said he made a report on the damage he saw on the road. The only damage he testified to was that there were truck marks reversing into the drain and some parts of the drain were damaged so that on some parts of the drain water flowed out onto the road. He mentioned that there was a lot of oil and fuel on the road which he said damages the road seal. He did not say it had damaged the seal but in answer to a question from the Chief Registrar he said 160 square yards were damaged. This area would have to be paved and sealed. He said 670 feet of the drain was damaged. He produced a report which he said had been prepared by him and the Council's Senior Engineer.

The report which the witness produced was a letter from the Council's Senior Engineer to its solicitor being an estimate of the damaged road seal, headwalls and drainage.

The Chief Registrar reduced the Council's estimate of damage from $1,819.20 to $1,282.20 which the Council has not challenged.

The Council only pleaded that there was excessive damage to the road surface of the streets and must be confined

to that damage. The estimate of $288 for damaged drains and $187.80 for damaged headwalls to a driveway should have been ignored by the Chief Registrar. Deducting these figures from his assessment leaves the sum of $806.40. This sum represents the actual alleged damage to the road surface but it was not established that the defendant was responsible for all the damage.

Some of the damage to the road would be done by the concentration of heavy trucks using the streets. Such use is legal use. The only illegal use of the trucks which in my view would cause damage to the streets as pleaded and established by evidence was the repairs and servicing of them on the streets resulting in spillage of oil and fuel and damage to the road seal.

The damage caused to the road surface as a direct result of the alleged nuisance has not been established but there is no doubt some damage was caused. In my view that damage was of a minor nature.

I allow the appeal and set aside the Chief Registrar's assessment. I assess damages at $250 and give judgment to the plaintiff for that sum. The defendant is to have the costs of this appeal.

As to costs, taxation will prove a difficult task for the Chief Registrar. The Council cannot be permitted costs and disbursements for applications that should not have been made. Likewise on this appeal the defendant cannot have costs of entering up final judgment or for abortive applications.

(R.G. KERMODE)
J U D G E

SUVA,
15 October, 1980.