IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 122 of 2003

BETWEEN : **VISUN DEO** father's name Ram Lakhan of Lovu, Lautoka, Senior Motor Mechanic.

PLAINTIFF

AND : **YOGENDRA KUMAR** father's name Jai Kissun of Saweni, Lautoka.

FIRST DEFENDANT

AND : **NIRANJANS AUTOPART LIMITED** a limited liability company having its registered office at Suva and carrying on business at Suva and at Lautoka as dealers in motor vehicle and garage proprietors.

SECOND DEFENDANT

RULING

BACKGROUND

[1]. On 04 April 2003, Iqbal Khan & Associates filed a writ of summons and statement of claim. The facts alleged are as follows. The plaintiff, Visun Deo, was employed by Niranjans Autoport Limited (**"Niranjans"**) as a senior motor mechanic. On 24 October 2002, Deo was travelling in vehicle registration number DH476. At some point along Royal Palm Road in Navutu in Lautoka, DH 476 veered off the road and hit a Fiji Electricity Authority post. Deo suffered personal injuries. DH 476 was owned by Niranjans. At all material times, at vehicle was driven by the first defendant, Yogendra Kumar, who was also an employee of Niranjans.

[2]. The defendants admit that Deo was travelling as an employee of Niranjans and that he (Deo) suffered injuries as a result of the accident. The extent of the injuries is[1].

COURT PROCEEDINGS

[3]. Order in Terms of Summons for Directions was granted on 06 October 2004. Both parties filed their lists of documents in 2004. The minutes of Connors J for Monday 24 July 2006 record counsel as having advised that there was a settlement offer in writing. On that basis, the trial fixed for that date was vacated. On 18 August 2006, counsel for the defendants sought further time to consider the proposal for settlement that was then, still on the table. Again, the matter was then adjourned to 08 September 2006 for mention only. On 08 September 2006,

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[1] **Paragraph 2** of the Statement of Claim pleads:
"as an employee of the 2nd defendant in the motor vehicle registration number DH 476 driven by the 1st defendant"
And also, at **paragraph 4** that:
"the plaintiff suffered injuries in the accident, the extent of which is not admitted...".

counsel informed the court that settlement had failed. The matter was then adjourned to the "B" date fixture for trial.

[4]. After several more adjournments, the matter was fixed for trial on Monday 07 May 2007. However, on the said trial date, Ms. Muir appeared for Mr. Iqbal Khan and Mr. Roopesh Singh for AK Lawyers and advised Connors J in court that the matter was settled. The following notation of Connors J appears on the court records:

"Settled"
"Notice of Discontinuance to be filed".

APPLICATION BEFORE THIS COURT

[5]. On 18 December 2007, just over seven months after the Court had noted "settlement", Kevueli Tunidau Lawyers filed a Notice of Change of Solicitors and a Summons to set aside the Consent Order dated 07 May 2007 unconditionally. He also sought orders that the action be entered for trial. The application was filed under Order 13 Rule 9 and 10 of the High Court Rules 1988.

[6]. The plaintiff misconceives that there was, in this case, a consent order entered on 07 May 2007 by Connors J. As stated, Connors J had merely noted that the matter was *"settled"* and directed *"Notice of Discontinuance to be filed"*. To this day, no Notice of Discontinuance has been filed. Notably, the parties did not hand up to Connors J any Terms of Settlement for judicial sanction. One can only deduce that this was not done because they chose not to.

[7]. Connors J's words indicate that the parties had settled their case out of court.

ARE PARTIES BOUND BY THEIR OUT-OF-COURT SETTLEMENT?

[8]. The details of the out-court settlement reached are set out in an affidavit of one Elizabeth Saverio (see below) filed for and on behalf of the defendant. In that affidavit, Saverio deposes clearly that, after much to-*ing* and fro-*ing*, both counsel had settled amicably at the sum of $20,000.

> 4. *I admit that when the matter was called on 7th May, 2007 the agents of the plaintiff's former solicitors appeared with agents of the defendants' solicitors and the Court was advised that the matter was settled and was discontinued.*
> 5. *The basis on which this settlement was reached was as follows:-*
> i. *On 22nd March, 2007 the defendants offered the plaintiff's former solicitors a sum of $12,000.00 in full and final settlement of the matter. I annex a copy of the letter marked* ***"ES-1"****.*
> ii. *On 1st May, 2007 the plaintiff's former solicitors rejected the offer and counter offered $45,000.00. I annex a copy of that letter marked* ***"ES-2"****.*
> iii. *After certain verbal discussions between the plaintiff's former solicitors and the defendants' solicitors the plaintiff's former solicitors made a verbal offer of $20,000.00 to settle the matter. The plaintiff's former solicitors wrote to the defendants' solicitor on 2nd May, 2007 and confirmed that the plaintiff will accept the sum of $20,000.00 in full and final settlement of the matter. I annex a copy of the letter marked* ***"ES-3"****.*

*iv. The defendants' solicitors wrote back on 2nd May, 2007 acknowledging the plaintiff's former solicitors confirmation that it has accepted the defendants' offer of $20,000.00 in full and final settlement of the matter. I annex a copy of the letter marked **"ES-4"**.*

[9]. The plaintiff does not refute that the said out-of-court settlement did happen. He says though that he never instructed his counsel to settle his case as such. Accordingly, he argues that the *"consent order"* should be set aside[2].

[10]. My views are as follows.

[11]. Firstly, as I have stated above, no consent order was ever entered by the court in this case. So it is irrelevant for me to even consider the principles of setting aside a consent order.

[12]. Secondly what happened in this case was a settlement out-of-court. Again, as stated, the out-of-court settlement is binding as between the parties if it has the force of contract law.

NO CONSENT ORDER. CONTRACT – HOW?

[13]. A consent order happens when the court gives judicial sanction to a terms of settlement (usually written) reached between the parties. Parties sometimes settle out of court, and choose not to disclose their terms of settlement[3].

[14]. When parties settle out of court, their settlement would still bind them in the same way that a contract binds, provided the elements of a valid contract are made out. This is trite throughout the common law world.

[15]. The Kenyan High Court's statement of the principles in **E.T. v Attorney-General & Another** [2012] eKLR[4] is very useful in its description of the principles involved:

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[2] The plaintiff deposes as follows:

The affidavit in support is sworn by a Mr. Ram Lakhan who deposes as follows:

1. *That I am duly authorised by my son the applicant to make this affidavit and the facts deposed to hereunder is also supported by my wife, Sheoraji.*
2. *That after Visun Deo's accident myself, my wife and Visun visited Iqbal Khan and Associates to seek compensation for the injuries.*
3. *That myself, my wife and Visun met IQBAL KHAN in his office and in my presence Mr. Iqbal Khan confirmed that the injuries claimed should be to the amount of $80,000.00(Eighty Thousand Dollars).*
4. *That at no time at all was there any discussion by Mr. Iqbal Khan or any of his office staff with myself, my wife or Visun that the amount of $80,000.00 be reduced to $20,000.00.*
5. *That myself and my wife visited IQBAL KHAN & ASSOCIATES on numerous occasions to enquire and follow up on the progress of the case since our son Visun had gone to Brisbane, Australia.*
6. *That during our subsequent numerous visits to IQBAL KHAN & ASSOCIATES we were attended to by Law Clerk MR. JANARDHAN NAIDU.*
7. *That Mr. Naidu never advised us that the sum claimed for our son's injuries had been reduced or to be settled at $20,000.00.*
8. *That whenever myself and my wife enquired with IQBAL KHAN & ASSOCIATES Mr. Naidu usually advised us that the case was adjourned for several reasons. Some reasons Mr. Naidu advised us were that Mr. Iqbal Khan was away overseas, in Suva, or was sick and/or Mr. A.K. Narayan the counsel for the other side was either sick, overseas or in Suva for another case.*
9. *That to my knowledge neither me nor my son had agreed to any settlement to the amount of $20,000.00 nor have we signed any document consenting to such settlement.*
10. *That I am aware and confirmed that upon my visits to IQBAL KHAN& ASSOCIATES office, Mr. Naidu had mooted discussions on settlement with me to the amount of $80,000.00 (Eighty Thousand dollars) which in my view was a good settlement figure. I conveyed the same to my son Visun who was satisfied with this amount. I confirm that this was the only settlement amount that I know of and nothing else.*
11. *That at no time during myself and my wife's several visits to IQBAL KHAN & ASSOCIATES I was advised that negotiation on settlement was taking place with the Defendants Solicitors for the sum of $20,000.00.*
12. *That on or before the first week of May 2007 myself and my wife were advised by Mr. Naidu of IQBAL KHAN & ASSOCIATES that a hearing of the case scheduled for May 2007 would not take place and that another hearing date would be assigned. Mr. Naidu also advised us that he would fax a letter to Visun advising him not to come to Fiji because of this reason with Mr. Naidu. At no time did Mr. Naidu advised us that the case was settled on 07.05.07.*

[3] (whether the court can still require the terms of settlement to be reduced in writing and handed up to court for judicial sanction, is a moot point).

A compromise agreement is a contract whereby the parties make reciprocal concessions in order to resolve their differences and thus avoid litigation or to put an end to one already commenced. When it complies with the requisites and principles of contracts, it becomes a valid agreement, which has the force of law between the parties.(my emphasis)
When a compromise agreement is given judicial approval, it becomes more than a contract binding upon the parties. Having been sanctioned by the Court, it is a determination of the controversy and has the force and effect of a judgement and is covered by the doctrine of res judicata. (my emphasis)

[16]. In this case, no terms of settlement was ever handed up to Connors J for judicial sanction. The settlement agreement reached between the parties does not have the force or effect of judgement so as to invoke the principles of *res judicata* or any *estoppel*. However, as long as the settlement complies with the principles of contract law, it will have the force of law on the parties.

[17]. Neither counsel has raised the issue of whether or not the settlement reached is devoid of any legal force. I proceed henceforth on the assumption that the Terms of Settlement, though without judicial sanction, has the force of law between the parties on the principles of contract law.

OBSERVATIONS

[18]. Had Connors J judicially sanctioned a Terms of Settlement, and entered a consent order accordingly, it would be hard to convince any court to set aside that consent order. An application to set aside such an Order must be made in a whole new separate action altogether (as per Mr. Justice Connors in **Ram v Martinez** [2004] FJHC 388). Once a Court has decided an issue, an estoppel is thereby created, and estops any party from raising the same issue in any later litigation (except by appeal of course). Hence, in **Fidelitas Shipping Co Ltd -v- V/O Exportchleb** [1965] 2 ALLER 4, Lord Denning MR at 8 would say:-

"...within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctively determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again".

[19]. For the court, it becomes *functus officio*, having discharged its duty once and for all, and having no residual discretion to review its own final orders (save in certain circumstances e.g. SLIP Rule, Clerical Mistake and the common law power to recall/review judgment which is yet to be passed and entered and not yet drawn up).

[20]. At common law, courts have full power to rehear or review a case until judgment is drawn up, passed and entered. But once entered, the judgment could not be set aside subject to any right of appeal (see Scutt J's Ruling in **Naigulevu v**

[4] see http://kenyalaw.org/Downloads_Free Cases/84402.pdf.

National Bank of Fiji (No. 2) [2009] FJHC 65; Civil; Action 598.2007 (10 March 2009), see also **Pitatails & Ors v Sherefettin** [1986] QB 868 cited by Scutt J in **Naigulevu**). There is a view, that when an oral judgment is given, the successful party ought to be able to assume that the judgment is a valid and effective one, and, though not yet res judicata, great caution should be exercised before permitting a re-hearing (see **Venkata's Case** (1886) 11 App Cas, at pp. 663-664 as per Lord Watson delivering the opinion of the Privy Council).

[21]. The public policy that underlies the principle of finality was thus described by Lord Wilberforce in **Ampthill Peerage** (1976) 2 WLR 777:

> *English law .... place(s) high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes.* [It]*...is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."*
> (my emphasis)

[22]. The same applies in the case of consent orders. However, because a consent order is essentially based on an agreement between the parties, the order may be set aside on the same grounds as the court would normally set aside any contract or agreement. As Lord Denning said in **Siebe Gorman Ltd v Pneupac Ltd** [1982] 1 WLR:

> "....by consent" may evidence a real contract between the parties. In such a case the court will only interfere with such order on the same grounds as it would with any other contract...."

[23]. **Halsbury's Laws of England** Volume 3(1), 4th edition, paragraph 521, states that:

> ...a consent order or compromise may be set aside on a ground which would invalidate any other agreement between the parties including mistake, illegality, duress or misrepresentation.

[24]. In **Scammell & Ors v Dicker**[2005] All ER (D) 153, Ward and Rix LJJ said:

> In theory it was possible that a consent order might be declared void for uncertainty, just as a consent order might be set aside for misrepresentation or fraud or for mistake....

[25]. Hammett PJ in **Mohammed Rasul v Hazra Singh** 8 FLR 140at p. 144 as follows:

> *In my opinion, 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.*

DISCUSSION

[26]. This case does not concern a consent order. The question simply is: assuming that Iqbal Khan & Associates did act without the plaintiff's authority to settle the matter out-of-court, can that settlement be set aside on account of the fact that it all happened without the plaintiff's instructions. In **Mathews v Munster** (1888) 20 QBD 141, the House of Lords held that a counsel who settled a claim on behalf of his client, in the absence of, and without the instructions of, his client, had the apparent general authority to do so. Accordingly, any consent judgment entered upon that compromise could not be set aside. The headnote to the case reads:

> *On the trial of an action for malicious prosecution the defendant's counsel, in the absence of the defendant and without his express authority, assented to a verdict for the plaintiff for 350l. with costs upon the understanding that all imputations against the plaintiff were withdrawn:-*
> *Held, that this settlement was a matter which was within the apparent general authority of counsel and was binding on the defendant.*

[27]. Lord Esher MR in **Matthews** said:

> *In the course of the case and while the defendant was not present in Court, his counsel, desirous to do what in his judgment was best for his client, submitted to a verdict for the plaintiffs for a particular amount, and that certain imputations on the plaintiff's conduct should be withdrawn, that is, he submitted to a verdict on terms. The defendant now seeks to set aside this verdict and to have a new trial on the ground that counsel in agreeing to it did that which they had no authority to do.*
>
> *This state of things raises the question of the relationship between counsel and his client, which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and never have adopted that phraseology, which seems to me to be misleading. No counsel can be advocate for any person against the will of such person, and as he cannot put himself in that position so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for* ***he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues,*** *so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court,* ***and until his authority is withdrawn he has, with regard to all matters***

that properly relate to the conduct of the case, unlimited power to do that which is best for his client.

I apprehend that it is not contended that this power cannot be controlled by the Court. It is clear that it can be, for the power is exercised in matters which are before the Court, and carried on under its supervision. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the Court has authority to overrule the action of the advocate.

I have said that the relation of an advocate to his client can be put an end to at any moment, but that the withdrawing of the authority must be made known to the other side, and this shews that the client cannot give directions to his counsel to limit his authority over the conduct of the cause and oblige him to carry them out, all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so.

Now let me consider what authority there is on this point. In ***Swinfen v. Lord Chelmsford*** *(1), Pollock, C.B., in delivering the judgment of the Court said (2),*

> *"We are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it – such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial –we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it."*

The instances that are given shew that one of the things that counsel may do, so long as the request of the client to him to act as advocate is in force, is to assent to a verdict for a particular amount and upon certain conditions and terms; and the consent of the advocate to a verdict against his client and the withdrawing of imputations is a matter within the expression "conduct of the cause and all that is incidental to it". If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed. This case is a still stronger one, for the client was not present, and it is not pretended that he ever withdrew his authority to counsel, but he now comes forward and asks that because he does not like what has been done it should be set aside as between himself and his opponent. This the Court will not do, and this appeal must be dismissed. (my emphasis)

[28]. Bowen LJ said:

> *The case was called on the second day, and the defendant, instead of coming into court where he might have exercised his influence on the course the case might take, was absent. During his absence he left his counsel with complete command and with authority to do whatever he thought best. Counsel agreed to a verdict for the plaintiffs, which the Court below refused to set aside.*
>
> *It seems to me that within certain limits the retainer shews that counsel has authority to bind his client. What those limits are seems to me to be laid down by Pollock, C.B., in the passage that has been read. Counsel is clothed by his retailer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party. It has been frequently discussed, as far back as the time of Best, C.J., if not further, whether counsel can be called the agent of his client, but on this it is sufficient to say that even if he is called an agent he is not one in the ordinary sense, but has a particular authority, the origin of the limit of which it is not necessary to examine. What is to be done if the client is in Court? Is it the duty of counsel to consult him? I should say – yes, with regard to important matters in which the client has an interest. It does not follow that counsel will submit to carry out the view of the client if it appears that it would be injurious to the client's interest. He has the alternative of*

returning his brief. I should be sorry to say that counsel ought not to consult his client on such a matter as compromise of the action, but that is a point we have not go to consider, for in the present case the client was not present and cannot complain if his counsel, who was in command and had authority to do the best for his client, compromised the suit within the reasonable limits of his authority to compromise. In this particular case it was clear what was done as within the reasonable scope of the advocate's authority within the rule laid down by Pollock, C.B.(my emphasis)

[29]. Fry LJ said:

Prior to the compromise in this case counsel had received no instructions as to a compromise. In the compromise itself there was nothing collateral to the action, nothing unjust, and there was no mistake of fact on the part of counsel. In the absence of all these matters it was plainly the duty of counsel to do that which he considered best for his client. I think it would be disastrous-I do not say in the interest of the bar but-in the interest of litigants if we had to decide otherwise, for such a result would often necessitate the refusal, because the client happened to be absent, of an offer of compromise highly advantageous to him. (my emphasis)

[30]. The High Court of Malaysia in **Yap Chee Meng v Ajinomoto (Malaysia) Berhad** [1978] 2 MLJ 249, succinctly summarises the approach to be taken and reiterated that a solicitor is authorized to effect the clients' settlement:

It is quite clear, therefore, that there are two contradicting versions of what exactly were the instructions plaintiff gave to his solicitor AEH.
Whatever may the truth be, how does it affect the defendants. This raises the question with regard to the relationship between solicitor and client. (my emphasis)
It is settled law that a solicitor once retained has full authority to act on behalf of his client and this authority extends to negotiations to effect settlement out of court.....

[31]. In Singapore, a solicitor instructed to conduct legal proceedings has an implied authority of the client to compromise them, once legal proceedings have commenced, in the absence of instructions to the contrary. This was the position in **Bank of China v Maria Chia Sook Lan** [1976] 1 MLJ 41 at 48 and upheld on appeal by the Singaporean Court of Appeal in **Maria Chia Sook Lan v Bank of China** [1976] 1 MLJ 49.

COMMENTS ABOUT THIS CASE

[32]. In this case before me, there is no evidence of fraud, undue influence or misrepresentation involved. But even if there was, such evidence will have to be that of the fraud, undue influence, or misrepresentation (or any other valid ground to set aside a contract) of the defendant to be sufficient to unsettle the settlement between Iqbal Khan & Associates and AK Lawyers. Flowing from this, I say that, even if Deo is able to establish any impropriety against his lawyers (Iqbal Khan & Associates), that will only be sufficient to found a separate cause of action against his solicitors, but will not be enough to set aside settlement in question.

[33]. I say that, bearing in mind that one also has to factor-in the position and interest of the defendant in this scenario who has entered into and concluded the settlement *bona fides*. The observations of the High Court of Malaysia in **Yap Chee Meng v Ajinomoto** (supra) is on all fours:

> *As a general rule, it is against public policy to allow settlements concluded between solicitors on behalf of their respective clients in accident cases to be challenged with impunity. To do so would open the flood-gates of endless litigation initiated by parties who become wise after the event. It will also discourage the practice of out of court settlements. That would be a great pity. But a settlement is a contract and like all contracts it is voidable on specific grounds e.g. undue influence, misrepresentation, fraud or mistake. If this can be shown it is then the duty of the court to interfere so that justice is done. In this case, prima facie there is a valid settlement, conducted between advocates and solicitors 5 of this court.*

CONCLUSION

[34]. The plaintiff only alleges that he did not instruct Messrs Iqbal Khan & Associates to settle the case. This point is irrelevant, in the context of setting aside a consent order, or even an out of court settlement, for the reasons stated above. It is a matter between Deo and Iqbal Khan & Associates what exact authority the latter had. From the defendant's perspective, Iqbal Khan & Associates retained full authority to act for and bind his client, Deo. The defendant need not inquire further as to whether or not Iqbal Khan had actual authority. It is of course still open to the plaintiff to pursue a separate claim against Iqbal Khan – but that is for him to choose.

[35]. Accordingly, I dismiss the application. Costs follow the event. I order nominal costs in favour of the defendants in the sum of three hundred dollars only.

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Anare Tuilevuka
JUDGE
08 September 2014