IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 246 of 2011

BETWEEN : **COOKE'S UNITED REFRIGERATION & AIR CONDITIONING LTD** a limited company having its principal place of business at NATCO Building, Suva in the Republic of Fiji Islands

PLAINTIFF

AND : **FOOD PROCESSORS (FIJI) LIMTIED** a limited liability company having its registered office at Lot 68-70 Millet Street, Vatuwaqa, Suva in the Republic of the Fiji Islands.

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. N. Nawaikula for the Appellant
: Mr. R. K Naidu for the Respondent

Date of Hearing : 01.11.2019
Date of Ruling : 29.11.2019

RULING

HIGH COURT RULES: application to stay execution of judgment – setting aside of judgment due to non-appearance – O 35 R 2(2) – O 45 R 10 – delay in filing application within 7 days – extension of time – no appearance on the day of trial – conduct of the plaintiff

Cases referred to:

1. Rao v Gounder [1998] FJLawRp 1; [1998] 44 FLR 82 (22 May 1998)
2. Prakash v Parmar [2001] FJHC 174; HBC350.1996 (15 February 2001)
3. Meli Tabua v Suva City Council High Court Civil Action No. HBC 203 of 2002 (10 September 2003)
4. Shocked and another v Goldschmidt and others [1998] 1 AllER 372 (CA)

---

1. This is an application by the Plaintiff in terms of Order 45 Rule 10 & Order 35 Rule 2 of the High Court Rules to stay process of execution of this Court's judgment dated 5 March 2019, delivered by Justice M. R Hamza, following trial into the Defendant's Counterclaim after the Plaintiff's claim was struck off by the Master. The present application before Court is such that it calls for an examination of the antecedents to that judgment.

2. The Plaintiff instituted action by writ of summons on 23 August 2011, through Vakaloloma & Associates seeking *inter alia* to recover a sum of $50,922.00 for carrying out certain construction work, together with damages. The Defendant filed its Statement of Defence and Counterclaim, through Naidu Law, on 16 September 2011, and pleaded *inter alia* that the Plaintiff was its tenant and had defaulted in the payment of rentals; that, therefore, the Defendant, on 18 August 2011, issued a notice of distress for the unpaid rent and engaged the services of a licensed bailiff to execute the distress against the Plaintiff; that this action was instituted by the Plaintiff thereafter. In its Counterclaim, the Defendant claimed sums of money for expenses incurred as bailiff fees, for the hire of security services, for electricity charges and moneys advanced to the Plaintiff.
3. On 21 January 2014, the Court struck out the Plaintiff's claim for want of prosecution under Order 25 Rule 9, and fixed the matter for trial on the Defendant's Counterclaim. On the day of the trial, 27 January 2017, counsel who

appeared on behalf of the Plaintiff made an oral application for adjournment. This was refused by the Court, and the trial proceeded on the issues raised by the Counterclaim. Trial was concluded on 27 January 2017. Judgment was delivered on 5 March 2019, and sealed on 20 March 2019.

4. The Plaintiff filed an application by summons dated 2 July 2019 to set aside the judgment delivered on 5 March 2019, for process of execution to be stayed and for an order to serve court documents to Mr. Nawaikula as counsel for the Plaintiff. The Plaintiff made this Application on the basis that there was *no appearance* on the date of hearing by the Plaintiff or its Counsel. The Plaintiff relied on the affidavit of Joseph Lum Kon Wise in support of its Application filed on 2 July 2019.

5. The Defendant filed an affidavit through its Operations Manager and Company Secretary, Krutali Ben, on 6 August 2019, and opposed the Plaintiff's Application on the grounds that the orders sought by the Plaintiff, in particular order number 2, was misconceived; that the Plaintiff had filed the Application under the wrong rule; that the Application was filed out of time; the Plaintiff did not give any good reason for its non-appearance at the trial; that the Plaintiff did not have a defence on the merits (in regard to Defendant's counterclaim); that the Plaintiff was guilty of delay in making the Application; the conduct of the Plaintiff was very unsatisfactory; that the Defendant would be prejudiced if the judgment is set aside; and that public interest did not favour a re-trial. The Plaintiff did not reply the Defendant's affidavit.

6. At the hearing, counsel for the Plaintiff, Mr. Nawaikula, submitted that default judgment was entered against the Plaintiff on 5 March 2019 (contrastingly, his written submissions deny that the judgment was a default judgment). He submitted that the Plaintiff initially engaged the services of Vakaloloma and Associates; however, due to various difficulties in communicating with that firm, the Plaintiff later engaged him, Mr. Nawaikula, in July 2016, but had later taken away its instruction; thereafter, the Plaintiff once again retained Mr. Nawaukula in June 2019, after the Plaintiff was served with a notice to wind up the company for nonpayment of the judgment debt. Counsel submitted that the Plaintiff has a

good defence on the merits to the Defendant's Counter-claim, and sought to set aside the default judgment in the interests of justice.

7. He submitted further that Order 45 Rule 10 allowed an application to be made after delivery of judgment for stay of execution or other relief on the ground that matters have occurred after the judgment. He submitted that Order 35 Rule 2 was even clearer as it declared that any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the court, on the application of that partly, on such terms as it thinks just. He conceded, however, that such an application to court must be made within 7 days after the trial. Order 45 Rule 10 states that a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just. He relied on the following two authorities: Rao v Gounder[1] and Prakash v Parmar[2]. In Prakash v Parmar, Pathik J stated that the test against which an application should be considered is whether it is just in all the circumstances to set aside the judgment. Consideration such as whether the defendant's failure to appear was excusable, whether the defendant had a substantial ground of defence, whether the plaintiff would suffer irreparable injury if the judgment was set aside, should be treated as tests by which the justice of the case is to be measured.

8. Counsel for the Defendant submitted that a notice of distress was issued on 18 August 2011 to recover unpaid rent from the Plaintiff; as a result of such distress, the Plaintiff commenced this action by filing a writ of summons on 23 August 2011.; the sum in the distress was $23,356.85 FJD; thereafter, the Plaintiff filed an application for interim injunction to prevent the Defendant from executing the distress; subsequently, the Plaintiff agreed to pay the Defendant a sum of $23,356.86 dollars; thereafter, on 16 September 2011, the Defendant filed a Statement of Defence and Counter Claim.

[1] [1998] FJLawRp; [1998] 44 FLR 82 (22 May 1998)
[2] [2001] FJHC 174; HBC 350.1996 (15 February 2001)

9. Thereafter, several applications were made on behalf of Vakaloloma and Associates to withdraw as Plaintiff's counsel. On several mention dates the Plaintiff was not represented in Court. On 15 July 2016, a solicitor on instructions from Mr. Nawaikula appeared for the Plaintiff and applied for the adjournment of the trial and sought time to file a notice of change of solicitors. Trial was vacated and the Plaintiff was ordered to pay $1,500 as cost. The matter was adjourned to 28 September 2016. On 28 September 2015, the Plaintiff's counsel again requested for time to file a notice of changes of solicitors. The Plaintiff was ordered to file the notice by 30 September 2016, which was done by Mr. Nawaikula on 5 October 2016. When the matter was mentioned on 17 October 2016, once again, there was no appearance by the Plaintiff or its counsel. The matter was then adjourned to 28 October 2016 for mention, on which day there was an appearance for the Plaintiff on instructions from Mr. Nawaikula; trial was fixed on that day for 27 January 2017.

10. On 27 January 2017, Mr S. Raikanikoda appeared for the Plaintiff on behalf of Mr. Nawaikula and applied for an adjournment of the trial. That application was refused by Court. Counsel for the Defendant submitted that Plaintiff's counsel, thereupon, left the courtroom; the record, however, mentions the names of counsel for both parties on trial day. Mr. Nawaikula – who was on record as the Plaintiff's counsel at the time of the trial – submitted that the Plaintiff's counsel was not present in Court during the trial, which confirms that the counsel had left the courtroom when his application to adjourn the trial was refused. The trial then proceeded in the absence of the Plaintiff and its witnesses and was concluded on the same day, 27 January 2017. Judgment was thereafter delivered on 5 March 2019. The record reveals that trial was fixed in the presence of the Plaintiff's counsel. No application was made on that day or thereafter to vacate the trial.

11. The events after judgment, too, are important, especially as the Counsel for the Plaintiff relied on Order 45 Rule 10. On 24 March 2019, lawyers for the Defendant served a Section 515 Statutory demand on the Plaintiff demanding payment. Thereafter, on 25 March 2019, the sealed judgment was served on the Plaintiff. On 25 March 2019, the Defendant's lawyers served another letter dated

11 March 2019 demanding payment of the judgment monies. The Plaintiff did not comply with the Defendant's demands for payment.

12. Counsel for the Defendant rightly submitted that in terms of Order 35 Rule 2(2) an application under that rule was required to be made within seven days after the trial. In this case, judgment was delivered on 5 March 2019, long after the expiry of the 7 day period, and trial was concluded very much earlier. Counsel referred to the decision in Meli Tabua v Suva City Council[3], in which the court stated that if the courts were to excuse every time there was failure to comply with the rules then the time limits set by the courts and the rules themselves would be treated by litigants as non-binding guidelines. He also referred to the case of Shocked and another v Goldschmidt and others[4] in which the Court of Appeal held "*The case about setting aside judgment fall into two main categories: (a) those in which judgment is given in default of appearance or pleadings or discovery, and (b) those in which judgment is given after a trial, albeit in the absence of the party who later applies to set it aside, different considerations apply to these categories because in the second, unless deprived of the opportunity by mistake or accident or without fault on his part, the absent party has deliberately elected not to appear, and adjudication on the merits has thereupon followed".*

13. I agree with the submission of the counsel for the Defendant that the delay between the date of the judgment on 5 March 2019 and this application on 2 July 2019 is substantial. The application and the supporting affidavit give no explanation for this delay of for the failure to file an application within the time stipulated by Order 35 Rule 2 (2). There was no attempt by the Plaintiff to seek an extension of time from Court to make an application even after the lapse of the 7 day period. Such extensions can be granted by Court in terms of Order 3 Rule 4 of the High Court Rules. The application was filed after the Plaintiff was served after demand notices were sent on behalf of the Defendant.

14. As adverted to, on the date of the trial, 27 January 2017, the Plaintiff and its counsel were not present during the trial. There was no representation for the Plaintiff on the following mention dates: *21 January 2014, 27 April 2015, 14 July*

[3] High Court Civil Action No. HBC 203 of 2002 (10 September 2003)
[4] [1998] 1 AllER 372 at 377 (CA)

2045, 4 August 2015, 20 August 2015, 18 November 2015, 23 March 2016, 6 June 2016 and 17 October 2016. Counsel for the Defendant submitted that the Plaintiff's counsel made no effort to engage in a pre - trial conference despite repeated requests by the Defendant's counsel, and that summons under Order 34 Rule 2(3)(4) of the High Court Rules were filed on behalf of the Defendant to compel the Plaintiff's counsel to attend the pretrial conference. This was after the lawyers for the Defendant on 17 March 2014 issued a notice calling upon the Plaintiff to attend a pre-trial conference, but there was no attendance on behalf of the Plaintiff. On 20 April 2015, the Plaintiff's counsel Vakaloloma & Associates filed an application to withdraw as the Plaintiff's counsel due to lack of instructions and nonpayment of fees. Counsel submitted that the conduct of the Plaintiff in these proceedings was very unsatisfactory and has prolonged the proceedings of the trial.

15. I agree with the counsel's submissions that the conduct of the Plaintiff, in the action instituted by him, in all the circumstances, cannot be considered as reasonable. The Plaintiff has not complied with the relevant High Court Rules in Coming before Court, and has failed to satisfy this Court that there is any merit in its present application. I have no doubt that if the reliefs sought by the Plaintiff are granted, it will cause prejudice to the Defendant.

Orders

A. The Plaintiff's application dated 2 July 2019 is dismissed

B. The Plaintiff is ordered to pay the Defendant costs summarily assessed in a sum of $2,500/-.

Delivered at Suva this 29 day of**, 2019**

HIGH COURT OF FIJI SUVA

Justice M. Javed Mansoor
Judge of the High Court