

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

CIVIL APPEAL NO. HBA 1 OF 2020

IN THE MATTER of an Appeal from the
decision of the Ba Magistrate's Court, in
Civil Action No. 39 of 2015

BETWEEN : **BHIKHABHAI AND COMPANY LIMITED** a limited liability
company duly incorporated under the Companies Act (Cap 247) Laws
of Fiji having its registered office at Kings Road, Ba.

APPELLANT (ORIGINAL PLAINTIFF)

AND : **THE PACIFIC NZPTC LIMITED** a limited liability company duly
incorporated under the Companies Act (Cap 247) Laws of Fiji having
its registered office at Navo Sub-Division, P O Box 3422, Nadi trading
as **THE PACIFIC INSTITUTE OF TECHNOLOGY.**

RESPONDENT (ORIGINAL DEFENDANT)

Appearances : Mr N. Padarath for the appellant
Mr N. S. Khan for the respondent
Date of Hearing : 12 August 2020
Date of Judgment : 08 October 2020

J U D G M E N T

Introduction

[01] This is a timely appeal against a decision delivered by the learned Magistrate ("*the Magistrate*") on 13 September 2019, dismissing a claim brought by the appellant with costs on the ground that the action was brought against the wrong defendant.

[02] At the appeal hearing, counsel made oral submissions and tendered their respective written submissions as well.

Background

[03] Bhikhabhai and Company Ltd, (*“the plaintiff/appellant”*) launched an action against The Pacific NZPTC Limited t/a The Pacific Institute of Technology (*“the defendant/respondent”*) for recovery of unpaid rental and utility bills in the sum of \$13,369.14.

[04] The counter claim arose out of an alleged oral rental agreement between the parties. The appellant stated that the respondent was occupying the its building which is situate at 45 Kings Road, Main Street, Ba for a monthly rental of \$1,687.50.

[05] After trial, the Magistrate, having been satisfied himself that the plaintiff had instituted the action against the wrong defendant, dismissed the action with costs. The appellant appeals that decision to this Court.

Reasoning and conclusion in the court below

[06] The Magistrate’s reasoning and conclusion was that [at paragraphs 11 and 12]:

*“11. Defendant’s Exhibit 03 evidence a Company search conducted by Jone Finau. The search was conducted on 17 August, 2013. According to this document there currently exist a company with **Registration No. 14511** named **New Zealand Pacific Training Centre (Ba) Limited**. The Company was incorporated on 17 August, 2001.*

12. The plaintiff knew of the existence of this entity and did not challenge its existence. I find that the Company was set up to run the Ba operation. To argue to the contrary would be nonsense. The cheques were issued by this Company. I therefore reached the conclusion that the proper defendant to be New Zealand Pacific Training Centre (Ba) Limited.”

Grounds of appeal

[07] The appeal is premised on the following grounds:

1. That the Learned Magistrate erred in law and in fact at paragraph 11 and 12 of his judgment by holding that the correct defendant was New Zealand Pacific Training Centre (Ba) Limited to be sued when:
 - 1.1 There was no evidence to suggest or establish that New Zealand Pacific Training Centre (Ba) Limited was the tenant.
 - 1.2 The evidence which was before the Court established that the correct defendant was The Pacific NZPTC Limited.
 - 1.3 There was no obligation or duty on the plaintiff to challenge the existence or registration of New Zealand Pacific Training Centre (Ba) Limited when the plaintiff cause of action was against The Pacific NZPTC Limited.
2. The Learned Magistrate erred in fact at paragraph 12 when he found that New Zealand Pacific Training Centre (Ba) Limited was formed to run the Ba operation when the defendant did not present any substantial evidence to establish this fact and whereas substantial evidence was led by the plaintiff to establish the defendant was The Pacific NZPTC Limited, this evidence is noted at paragraph 6,7,8,9 and 10 of the judgment.
3. The Learned Magistrate further erred in fact at paragraph 12 when he found that the cheque which was tendered in evidence was written by New Zealand Pacific Training Centre (Ba) Limited when the words on the cheque clearly uses the word The Pacific NZPTC Limited.

The issue

[08] The central issue on appeal was whether or not the Magistrate erred in law and/or in fact in dismissing the appellant's action on the basis that it was brought against the wrong party.

Discussion

[09] I would deal with the grounds of appeal in turn.

Ground 1: the Learned Magistrate erred in law and in fact at paragraph 11 and 12 of his judgment by holding that the correct defendant was New Zealand Pacific Training Centre (Ba) Limited to be sued.

- [10] The appellant brought the action against “*The Pacific NZPTC Limited* (“*the respondent*”) for recovery of outstanding rents and utility bills. The respondent raised a preliminary issue that the respondent did not have any rental agreement with the appellant and it never occupied the rental premises in Ba. The Magistrate, after trial, upholding the preliminary issue held that the current defendant was New Zealand Pacific Training Centre (Ba) Limited, not the current defendant (respondent), “*The Pacific NZPTC Limited*”. Accordingly, he dismissed the appellant’s claim with costs.
- [11] Mr Padarath on behalf of the appellant argued that the respondent knew that the correct party to the verbal agreement was The Pacific NZPTC Limited trading as the Pacific Institute of Technology and if the defence was that it was not the current party then its defence was to be limited to that. However, the defendant did not plead any defence besides denying all the allegation. He further argued that the Magistrate erred by putting a burden on the plaintiff when there was no such requirement in law. The plaintiff does not dispute the existence of a company by the name of New Zealand Pacific Training Centre (Ba) Limited.
- [12] Mr Nazeem, counsel for the respondent submitted that of course clearly and it is axiomatic of challenging the existence or registration of New Zealand Pacific Training Centre (Ba) Limited to the extent of at least explaining in re-examination or rebuttal evidence as to the reason for that entity being named as being their tenants in Exhibit 1 and 2, the reason for the search of the Company and the reason for a separate cheque account when the plaintiff cause of action was against the Pacific NZPTC Limited. It was crucial when that issue was raised initially by the respondent and had to be determined by the Learned Magistrate in that whether the correct defendant had been sued by the appellant because it was not, as all documents pointed to New Zealand Pacific Training Centre (Ba) Limited being the correct defendant.
- [13] It is noteworthy that there was no written tenancy agreement in this matter.

[14] The appellant does not dispute the existence or registration of New Zealand Pacific Training Centre (Ba) Limited.

[15] In arriving at his decision, the Magistrate had considered the evidence and several documents produced by the parties. These include:

- i. *The two letters from the appellant's Lawyers Exhibit, the Exhibits 01 and 02 [Pages 88 and 90 of the record];*
- ii. *Exhibit PLO3 [Page 65 of the record];*
- iii. *Defence Exhibit 04 [page 67 of the record];*
- iv. *The evidence of the appellant's witness as recorded on page 134 of the record New Zealand Pacific Training Centre (Ba) Limited;*
- v. *Respondent's Exhibit 03 [page 77 of the record], evidence of a company search conducted by a Mr Jone Finau. According to which document there clearly exists a Company with Registration No. 14511 named New Zealand Pacific Training Centre (Ba) Limited and which Company was incorporated in 17 August 2001 and bearing that in mind Defence Exhibit 01 and 02 that the Tenancy was entered into the same year 2001 thus indicating that the company New Zealand Pacific Training (Ba) Limited was formed for operations in Ba; and*
- vi. *The 2 cheques written by NZPTC Limited – Ba [Page 60 of the record] to the appellant/plaintiff and this was admitted by the appellants/plaintiff's first witness Mr Viraj in cross-examination [plaintiff's exhibit No. 5 and 6]; and admission by respondent's witness on page 134 of the record that: NZPTC Ba Limited would be paying directly.*

[16] DEX 1 is a letter dated 16 June 2015, written by the appellant's solicitor (Samuel K. Ram) to the supervisor Water Authority of Fiji. In the second paragraph of that letter, the appellant solicitor writes that: *"Our client had rented the premises to New Zealand Pacific Training Centre (Ba) Limited ("NZPTC") and they were in occupation from 2001 to 2010 ("period of tenancy"). On the 10th March 2015 we commenced proceedings against NZPTC for outstanding rent, water rates and electricity*

bills. We have been instructed that NZPTC owed a sum of \$4,886.91 for water rates. They have defended this part of the claim by saying that they were not responsible for payment of water bills". It will be noted that there is a clear admission by the appellant's solicitor that the appellant had rented the premises to New Zealand Pacific Training Centre (Ba) Limited.

- [17] Similarly, DEX 2 is a letter of 16 June 2015, by the appellant's same solicitor to the General Manager, Fiji Electricity Authority. The second paragraph of that letter reads: "Our client had rented the premises to New Zealand Pacific Training Centre (Ba) Limited (NZPTC) and they were in occupation from 2001 to 2010 ("Period of Tenancy"). On the 10th March 2015 we have commenced proceedings against NZPTC for outstanding rent, water rates and electricity bills. They have defended the claim by saying that they were not responsible for payment of any utilities." Again, there is an admission by the appellant's solicitor that the appellant had rented the premises to New Zealand Pacific Training Centre (Ba) Limited.
- [18] PEX 3 is a letter dated 5 May 2010, from the appellant to the Centre Manager, NZPTC Ba regarding building space. The appellant had used the acronym "NZPTC" to denote New Zealand Pacific Training Centre (Ba) Limited. In this letter, the appellant, it appears, uses the short form "NZPTC Ba" to refer to New Zealand Pacific Training Centre (Ba) Limited.
- [19] The appellant's witness's evidence appears on page 134 of the record. Relevantly, the evidence was that:

Q: *How do you know that NZPTC (Ba) Limited was the tenant.*

A: *No, the Company was not the tenant.*

Cross-examination

Q: *Who was the tenant?*

A: ***NZPTC (Ba) Limited.***

- [20] The appellant's witness had also admitted that **NZPTC (Ba) Limited** was the tenant.
- [21] The two cheques (Tab 7 of Plaintiff List of Exhibits) given by The Pacific NZPTC backdated 10 October 2010, were admitted by the appellant's first witness (Mr

Viraj) in cross examination (see page 134 of the record). The words “NZPTC Limited – Ba” is, it appears, conveniently written on those cheques to denote “NZPTC (Ba) Limited”. If the cheque belonged to the respondent, the word “NZPTC Limited” should have been there. The word “NZPTC-Ba” written on these cheques should refer to NZPTC (Ba) Limited”.

[22] I would reject the appellant’s contention that the word “Ba” is written after the word “Limited”, it clearly does not form part of the company name. In my view, the word “NZPTC-Ba” had been written on the 2 cheques indicates that they were issued by “NZPTC (Ba) Limited”.

[23] In my opinion, there was ample evidence before the Magistrate for him to reach the conclusion that the proper defendant to be New Zealand Pacific Training Centre (Ba) Limited. Therefore, ground 1 fails.

Ground 2: The Learned Magistrate erred in fact at paragraph 12 when he found that New Zealand Pacific Training Centre (Ba) Limited was formed to run the Ba operation when the defendant did not present any substantial evidence to establish this fact and whereas substantial evidence was led by the plaintiff to establish the defendant was the Pacific NZPTC Limited.

[24] Having analysed the evidence presented during the trial, the Magistrate found that the Company known as New Zealand Pacific Training Centre (Ba) Limited was formed to run the Ba operation.

[25] The catch word “(Ba) Limited” suggests that the Company is going to operate in Ba.

[26] The Magistrate’s reasoning for his decision is found at paragraph 11 of his decision. He says that Defendant’s Exhibit 03 evidence a Company search conducted by Jone Finau on 17 August 2013. According to the document there currently exist a company with Registration No. 14511 named New Zealand Pacific Training Centre (Ba) Limited. The company was incorporated on 17 August 2011.

[27] In the absence of contrary evidence, it was open to the Magistrate to infer that New Zealand Pacific Training Centre (Ba) Limited was formed to run the Ba operation. Therefore, appeal ground 2 also fails.

Ground 3: The Learned Magistrate further erred in fact at paragraph 12 when he found that the cheque was tendered in evidence was written by New Zealand Pacific Training Centre (Ba) Limited when the words on the cheque clearly used the word The Pacific NZPTC Limited.

[28] In respect of this ground, counsel for the appellant submits that the cheque clearly has the name “*The Pacific NZPTC Limited*” written on the cheque.

[29] For the reasons I have given in paragraph 21 (above), ground 3 fails as well.

Conclusion

[30] For the reasons given, none of the grounds of appeal having succeeded, I affirm the Magistrate’s decision dated 13 September 2019 and proceed to dismiss the appeal with summarily assessed costs of \$1,300.00 payable to the respondent by the appellant.

Result:

1. Appeal dismissed.
2. Magistrate’s decision dated 13 September 2019 affirmed.
3. Appellant shall pay summarily assessed cost of \$1,300.00 to the respondent.

M. H. Mohamed Ajmeer
8/10/20
.....

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

08 October 2020

Solicitors:

Samuel K Ram, Barrister & Solicitor for the appellant
Nazeem Lawyers for the respondent