

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL JURISDICTION

Civil Action No. HBC 102 of 2011

BETWEEN : **ALEEMS INVESTMENTS LIMITED** a limited liability company duly incorporated in Fiji having its registered office at c\ -HLB Crosbie & Associates, Top Floor, HLB House, 3 Cruikshank Road, Nadi Airport.

PLAINTIFF

AND : **KHAN BUSES LIMITED** a limited liability company incorporated and registered under the laws of Fiji and having its registered office at Navutu Industries, Queens Highway Lautoka, P.O. Box 6549, Lautoka

DEFENDANT

Before : **Master M H Mohamed Ajmeer**

Counsel:

Ms L Goundar for the plaintiff
Mr V Sharma for the defendant

Date of Hearing : 25 April 2014
Date of Judgment : 20 June 2014

J U D G M E N T

Introduction

[1] **ALEEMS INVESTMENT LTD**, plaintiff filed 4 February 2014 a summons seeking summary judgment (“the application”) against

KHAN BUSES LIMITED, defendant. The application is supported by an affidavit of Krishna Sami Naidu (“the supporting affidavit”). The supporting affidavit annexes documents marked “A”-“G”.

[2] The application is made pursuant to Order 14 rule 1 of the High Court Rules, 1988 and inherent jurisdiction of the court, which seeks the following orders:

- a. *For final judgment be entered against the defendant for the amount claimed in the Amended Statement of Claim with damages, costs and interest to be assessed;*
- b. *That the defendant pay costs of this application on Solicitor client and/or indemnity basis in the sum of FJ\$10,000.00 [ten Thousand Dollars]; and*
- c. *Such further Orders as this Honourable Court deems just.*

[3] In the supporting affidavit the plaintiff stated as follows:

1. ***THAT on or about the 28th day of January, 2005 the Defendants requested the Plaintiff to lend monies to the Defendant in the sum of FJ\$408,862.63. The said debt was paid to Habib Bank Limited by the Plaintiff on behalf of the Defendant in order to avoid the Winding Up of the Defendant by the Bank.***
2. *That on or about the 7th day of July 2009, the Plaintiff initiated Winding up Proceedings against the Defendant.*
3. *THAT Justice Inoke presided in the abovementioned Winding Up Proceedings and ordered as follows:*
 - (i) *The petition filed herein on 9 July 2009 is permanently stayed.*
 - (ii) *Any further proceedings, however commenced, in respect of the arrangements entered into between the parties and Habib Bank on 7 March 2000 and the said Petition, other than an appeal in respect of this Judgment, are also stayed*

and the court registries are directed not to accept or issue any such proceedings.

(iii) *The Petitioner shall pay the respondents costs of \$5,000.00 within 14 days.*

(iv) *THAT the Judgment of Justice Inoke was later appealed by the Plaintiff whereby the Court of Appeal reversed the Orders of Justice Inoke and ordered the Plaintiff to proceed with its debt recovery matter against the Defendant. **The Court of Appeal in its Judgment further stated inter alia that if the Plaintiff's application was one of Order 14 Application for Summary Judgment on a debt, no reasonable tribunal properly self directed would grant leave for Defendant in this matter to defend conditionally or unconditionally** (Emphasis provided).*

[4] The defendant opposed the application for summary judgment and filed affidavit of Mohammed Naved Yakub Khan and stated:

- a. The defendant denies owing any monies to the plaintiff.
- b. The defendant admits that the plaintiff paid **\$FJ 408,862.63** into its Habib Bank account however the same was not sums borrowed by the defendant.
- c. That I crave leave of this Honourable Court to read and rely on the affidavits of Mohammed Nasir Khan sworn on 17th July 2009 and filed in Winding Up cause no. 15/2009 which clearly explains the circumstances of the dealing between the plaintiffs, the defendant Ashleems Investments Ltd and Habib Bank.
- d. That I also crave leave of this Honourable Court to read and rely on my supplementary affidavit sworn on 4th August 2011 and filed on 4th of August 2011, Affidavit of Mohinesh Maharaj sworn on 29th July 2011 and filed herein and affidavit of Kanni Goundar sworn on 3rd August 2011. These affidavits were filed in support of the defendant's application to set aside default judgment and the writ of FIFA.
- e. The setting aside application was heard on 4th August 2011 and in the ruling delivered on 26th August 2011 his Lordship Mr Justice

Inoke held that the defendant based on the fact produced in court, had a meritorious defence and the default judgment and writ of FIFA issued in execution were set aside.

- f. That subsequent to the ruling of 26th August 2011 statement of defence was filed by the defendant on 13th September 2011 a reply to defense was filed by the plaintiff on or about 10th January 2012. Summons for Directions was filed on or about 25th June 2012. Order in terms of Summons for Directions filed on 29th August 2012. Plaintiffs list of documents and affidavit verifying same on or about 29th January 2013.
- g. That the Plaintiff by Summon dated 5th September 2013 applied for leave to amend the claim and which was opposed by the defendant. Leave was subsequently granted and the plaintiff had amended the writ of summons and statement of claim on 1st November 2013.
- h. That the defendant in the amended statement of defence filed on or about 20th November, 2013 has amongst other defence raised the defence of Limitation pursuant to section 4 of the Limitation Act Cap 35.
- i. That the Plaintiff is now after being served with the amended statement of defence is seeking for summary judgment.

Background

[5] **Writ of summons:** the plaintiff, by way of writ of summons filed 1 July 2011 with statement of claim indorsed brought these proceedings against the defendant claiming the sum of \$408,802.63 being the money lent to the defendant on request. According to the plaintiff, on or about the 28th of January 2008, on the defendant's request, the plaintiff lent monies to the defendant in the sum of \$408,802.63. On or about the 28th of January, the plaintiff paid the amount to Habib Bank Limited (the bank) on behalf of the defendant. The amount paid was paid in order to avoid the winding up of the defendant by the bank.

[6] **Statement of Defence:** the defendant filed statement of defence and stated that the sum of \$408,802.63 that the Plaintiff paid Habib BANK

Limited was to satisfy the claims for monies advanced by the Defendant to the Plaintiff, together with bank overdraft interest.

- [7] **Amended Statement of Claim:** Following leave being granted the plaintiff amended its statement of claim and stated that on or about the **28th of January 2005**, on the defendant's request, the plaintiff lent monies to the defendant in the sum of \$408,862.63.
- [8] **Amended statement of Defence:** The defendant then filed amended statement of defence and stated that the sum of \$408,862.63 that the plaintiff paid Habib Bank Limited was to satisfy the claims for monies advanced by the defendant to the plaintiff together with bank overdraft interest. Also, stated that the amended writ of summons be struck off and dismissed pursuant to section 4 of the Limitations Act, CAP 35, 1971.
- [9] **Reply to Amended statement of Defence:** In the reply to the amended statement of defence the plaintiff stated that the plaintiff denies each and every assertion made therein and puts the defendant to strict proof of the same. The plaintiff further stated that the Plaintiff denies that its Amended Writ of Summons is statutory barred.

The law

- [10] Ord. 14, r.1 of the HCR provides provisions for application for summary judgment, which provides that:

1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than-

(a) an action which includes a claim by the plaintiff for libel, slander, malicious prosecution or false imprisonment,

(b) an action which includes a claim by the plaintiff based on an allegation of fraud.

(3) This Order shall not apply to an action to which Order 86 applies.

[11] Ord.18, r. 18 has in it provisions in relation to Striking out pleadings and endorsements (O.18, r.18). That rule provides:

18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Discussion

[12] The plaintiff applies for summary judgment vis a vis the defendant in the sum of \$408,862.63, being the moneys lent to the defendant on its request. The application for summary judgment has bloomed after some three years of the filing of the writ of summons.

[13] In the interim, on 1 November 2013 the plaintiff filed amended statement of claim amending the date of the money lent to the defendant as **28 January 2005** instead of **28 January 2008**, the date given in the initial writ of summons. The court granted leave to do so on application made by the plaintiff.

[14] The filing of amended statement of claim resulted in the defendant filing an amended statement of defence wherein the defendant denying the allegation that the plaintiff lent money to the defendant, has raised the **defence of limitation**. In the reply to the amended statement of defence the plaintiff says the claim was not statutory barred. But did not explain how it is not statutory barred.

[15] Previously, on 28 July 2011 the plaintiff in this action obtained a default judgment and issued a writ of FiFa against the defendant. The defendant made an application to set aside the default judgment and the writ of FiFi. Justice Inoke (as he then was) decided the setting aside application on merits and concluded that:

“[16] I think the defendant has a defence on the merits. There are other parties which I think may be necessary parties to this action such as Ashleem Investment Limited and the Habib Bank. In the circumstances therefore I am satisfied that I should exercise my discretion and set aside the default judgment entered on 28 July 2011 and the Writ of FiFa issued in execution thereof, permanently stay execution of the writ and allow the defendant to defend.” (Emphasis provided).

[16] On 7 July 2009 the plaintiff initiated winding up proceedings (Winding up Cause No. 15 of 2009) against the defendant on account of the very same alleged debt. Again Justice Inoke (as he was then) made final judgment staying the winding up petition permanently. The plaintiff appealed to the Fiji Court of Appeal. The Fiji Court of Appeal (in **Aleems Investment Ltd v Khan Buses Ltd** [2011] FJCA 4; ABU0036.2009 (24 January 2011)) reversed Justice Inoke’s judgment. However, the winding up petition was withdrawn before the Court of Appeal and accordingly the Court ordered that the petition stands dismissed. In the course of the judgment the Fiji Court of Appeal stated, inter alia that:

“...if this were an Order 14 application for summary judgment on a debt no reasonable tribunal properly self directed would grant leave to defend conditionally or unconditionally”.

- [17] It is only after the Court of Appeal's abovementioned remarks the application to enter summary judgment pursuant to Ord. 14 has emerged.
- [18] Ms Goundar, counsel for the plaintiff contended that the Court of Appeal has held that, if this were an Order 14 application for summary judgment on a debt no reasonable tribunal properly self directed would grant leave to defend conditionally or unconditionally and therefore the defendant has not disclosed substantial triable issues of law and fact.
- [19] For my part, I would say the Court of Appeal made the above remarks as *obiter dicta*. Therefore it will not form a binding judgment. Even if it is formed a binding judgment, that has no application for the present application. The Court Appeal decided the matter in a different situation on different facts at that time. The facts are different now in the current proceedings after amendments of pleadings.
- [20] I will therefore decide the present application on the basis that there are new pleadings before the court for the purpose these proceedings.
- [21] Major change in the claim has been brought in the amended statement of claim. The date the plaintiff allegedly lent money to the defendant has been changed as **28 January 2005**. In the original statement of claim it was **28 January 2008**. There has been three year different between the initial date and the amended date. This clearly indicates that the plaintiff is not consistent even on the date when it lent money to the defendant.
- [22] The plaintiff says that they lent money to the defendant in the sum of \$408,862.63. Why the plaintiff lent such a huge amount of money to the defendant without security? Was there any agreement between the parties? What was the repayment arrangement? If so, what was interest rate agreed upon? The pleading of the plaintiff does not provide any of these particulars.
- [23] In contrast, the defendant denies that the plaintiff lent moneys to the defendant. The defendant in the amended statement of defence says

that the sum of \$408,862.63 that the plaintiff paid Habib Bank Limited was to satisfy the claim for monies advanced by the defendant to the plaintiff, together with bank overdraft interest. The defendant also does not provide any particulars of the advanced money to the plaintiff. The defendant has also taken up limitation defence. Pursuant to section 4 of the Limitation Act, actions founded on simple contract, etc. shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[24] The plaintiff alleges it lent money to the defendant on 28 January 2005. The writ of summons was filed on 1 July 2011. The action was brought to recover the money lent after nearly 6 years and 5 months of the date lent. Whether the claim is statutory barred or not is a question of law and fact that may be tried before the commencement of trial as a preliminary issue. In these proceedings, without any explanation, the plaintiff denies that the claim is statutory barred.

[25] In **Janardhan v Khan** [2005] FJHC 612; HBC0358.2004 (5 July 2005), Justice D. D. Finnigan stated that:

“This claim is the lynch-pin that holds the rest of the matter together. It can be decided on its own limited facts [as covered in counsels’ submissions], **but the evidence needs to be heard and evaluated. The application of any limitation defences cannot be decided until after that. Whether the limitation defences need to be treated as a pre-trial issue cannot itself be decided in the meantime**” (Emphasis provided).

[26] The plaintiff says it lent money to the defendant. The defendant says ‘no’, the plaintiff did not lend the money that was to satisfy the claim for monies advanced by the defendant to the plaintiff. In my judgment, these issues cannot be decided by affidavits. These issues must be determined at trial after oral evidence tested by cross examination. I therefore reject the contention that the defendant’s defence is frivolous, scandalous and/or discloses no defence to claim included in the writ. The pleading of the defendant does not come within the scope of Ord.18, r.18.

[27] In this case the plaintiff is unable to prove his claim clearly through affidavit. The defendant has shown cause against the plaintiff's claim on the merits, e.g. that the plaintiff has shown there is a dispute as to the facts and law which ought to be tried. In the circumstances the plaintiff is not entitled to enter a summary judgment against the defendant.

Cost

[28] I now return to the issue of costs. The defendant is entitled to costs incurred in defending these proceedings. The plaintiff has brought a hopeless application for summary judgment when there was a dispute to the facts.

[29] Ord. 14, r. 7 (1) of the HCR provides:

"7.-(1) If the plaintiff makes an application under rule 1 where the case is not within this Order or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 62, and, in particular, to rule 2(1) thereof, the Court may dismiss the application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith." (Emphasis provided).

[30] The court may dismiss an application for summary judgment if the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend. It appears to me that the plaintiff has made this application knowing very well that the defendant disputed the debt as alleged by the plaintiff.

[31] The defendant seeks costs in the sum of \$10,000.00 as the plaintiff had claimed the exact same amount on its summons for summary judgment. The defendant's counsel had made few appearances and filed written submission in order to defend this application. I therefore considering all summarily assess the costs at \$1,500.00, which is included disbursements.

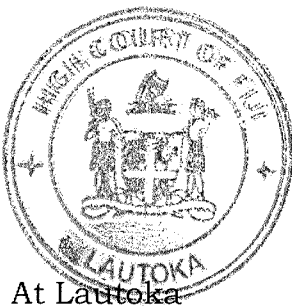
Conclusion

[32] For the reasons set out above, I conclude that the plaintiff is unable to prove its claim by affidavit evidence to which the defendant is unable to set up a good defence or raise an issue which ought to be tried. I therefore proceed to dismiss and strike out the application for summary judgment filed 4 February 2014 by the plaintiff with the summarily assessed cost of \$1,500 including disbursements.

Final Outcome

The plaintiff's application filed 4 February 2014 to enter summary judgment under Ord. 14 is dismissed and struck out with summarily assessed cost of \$1,500.00 (including disbursements) to be paid within 21 days.

Order accordingly.



At Lautoka

20/06/14

M H Mohamed Ajmeer

M H Mohamed Ajmeer

Master of the High Court

Solicitors:

For the plaintiff: Messrs Leena Goundar Lawyers, Barristers & Solicitors

For the Defendant: Messrs Vijay Naidu Associates, Barristers & Solicitors