

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No.: 16 of 2011

BETWEEN : **RAMESH PATEL** of Suva and **DEVANESH PRAKASH SHARMA** of Suva, trading as **R. PATEL LAWYERS**, a partnership of Barristers & Solicitors having its registered office at Level 5, Development Bank Centre, 360 Victoria Parade, Suva.

PLAINTIFF

AND : **RAJNI KANT** of Lot 27 Mal Street, Samabula, Suva, Managing Director

DEFENDANT

Counsel : **Mr. P. Sharma for the Plaintiff**
Mr. A. Singh for the Defendant

Date of Ruling : **26th January, 2015**

RULING

INTRODUCTION

1. This is an action where a firm of solicitors, is suing their former client for alleged nonpayment of legal fees. On 14th September, 2012 amended Statement of Defence was filed and the reply to the amended Statement of Defence was filed on 19.9.2012. 23rd May, 2013 Plaintiff filed summons to strike out Statement of Defence, and since there was neither objections filed, nor appearance seeking time to file any objections, the order for strike out of the defence was granted. After obtaining said order, the Plaintiff had obtained default judgment for the sum stated in the statement of claim. Now the Defendant is seeking setting aside of the default judgment entered in pursuant to the order made on 14th June, 2013 for the striking out of the statement of defence.

ANALYSIS

2. The Defendant filed summons to set aside default judgment. The Plaintiff had obtained default judgment for a sum of \$28,028.50 and for interest and costs, as stated in the statement of claim. The claim is for unpaid fees and the Plaintiff's claim remain unliquidated until it is determined by the taxing officer of court or by agreement between the parties. Even if there is an agreement it cannot be final and conclusive between the parties as regards to the professional fees of the legal practitioner in terms of Section 79 of the Legal Practitioners Decree, 2009 (Decree No 16).

3. Section 79 of the Legal Practitioners Decree, 2009 states as follows;

'Practitioner may sue for and recover costs

79.—(1) Every practitioner shall be entitled to sue for and recover the practitioner's costs pursuant to any agreement made in accordance with the provisions of this Part, or in the absence of such agreement in accordance with the schedules of fees established by regulation pursuant to this Part, together with any proper disbursements, in respect of services rendered whether as a legal practitioner.

*(2) It shall not be necessary for a practitioner to have such costs taxed prior to instituting proceedings for recovery of those costs. **In the absence of taxation no claim may be made by the practitioner for any costs which are, pursuant to such agreement or the appropriate schedule of fees, as the case may be, left to the discretion of the taxing officer.**' (emphasis added)*

4. From Section 79(2) of the Legal Practitioner's Decree even an agreement as to the costs between the parties, is left to the discretion of the taxing officer. In such a situation the claim in this action, remains unliquidated until the said sum is determined by the taxing officer irrespective of the issue of prior agreement as to the costs between the parties. The affidavit in support of the summons to strike out the defence filed by the Plaintiff stated the claim as an liquidated claim and this is not the correct position.

5. The order made 14th June, 2013 in terms of the summons of the Plaintiff supported by the said affidavit, in the absence of Defendant and or his solicitor was based on an affidavit made on a legally wrong premise.

6. The Defendant has submitted reasons for their non appearance on 14th June, 2013, too. The said affidavits are exhaustive and I accept the reasons given.
7. The High Court has power to review any order made in the absence of a party. This was held in **WEA Records Ltd v Visions Channel 4 Ltd and others** [1983] 2 All ER 589 and this was applied in Fiji High Court in the case of **Gulf Seafood (Fiji) Ltd v Native Land Trust Board** [2012] FJHC 853 ; HBA28.2011 (2 February 2012)(unreported).
8. It was held in **WEA Records Ltd v Visions Channel 4 Ltd and Others** [1983] 2 All ER 589 at 593,594

*In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High Court on an ex parte application. This jurisdiction is conferred by s 16(1) of the Supreme Court Act 1981. Equally there is no doubt that the **High Court has power to review and to discharge or vary any order which has been made ex parte.** This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in RSC Ord 32, r 6. Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal which, in effect, is what Peter Gibson J seems to have done. The Court of Appeal hears appeals from orders and judgments. Apart from the jurisdiction (under RSC Ord 59, r 14(3)) to entertain a renewed ex parte application, it does not hear original applications save to the extent that they are ancillary to an appeal.*

*As I have said, ex parte orders are **essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only.** Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.*

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is

*made at the trial in the absence of one party: see RSC Ord 35, r 2 and **Vint v Hudspith** (1885) 29 Ch D 322, to which counsel for the defendants very helpfully referred us this morning.(emphasis added)*

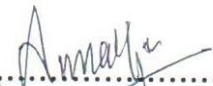
9. As stated earlier the Plaintiff's position in the affidavit in support is incorrect. The default judgment entered on the basis of order made on 14th June, 2013 is set aside. The cost of this application will be cost in the cause. The matter is adjourned to the Master for directions.

FINAL ORDERS

- a. The order made on 14th June, 2013 is set aside and the judgment entered in pursuant to that is set aside.
- b. The cost of this application will be cost in the cause.
- c. The matter is adjourned to the Master for directions.

Dated at **Suva** this **26th** day of **January, 2015**.




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Justice Deepthi Amaratunga
High Court, Suva