IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: 304 of 2012

BETWEEN	:	Umesh Chand
		Plaintiff
AND	:	Christian Mission Fellowship
		Defendant
BEFORE	:	The Hon. Mr Justice David Alfred
Counsel	:	Ms S Devan for the Plaintiff Ms Barbara Malimali for the Defendant
Dates of Hearing	:	20, 21 October, and 20 November 2015, 29 February and 1 March 2016
Date of Judgment	:	17 March 2016

JUDGMENT

1. According to the Statement of Claim, the Plaintiff was employed by the Defendant and was working as a carpenter for the Defendant at New Town Christian School job site. Para 4 of the Statement of Claim sets out the "implied term of the said contract of employment between the Plaintiff and the Defendant..." in (a) to (e) thereunder. On or about 20 April 2010 the Plaintiff while engaged upon his work

was caused to fall and sustain injuries. He therefore claims general and special damages and alternatively for Workmen's Compensation against the Defendant.

2. The Statement of Defence denies the Plaintiff was employed by the Defendant but admits it was working at its school but under the employment of a company contracted to the Plaintiff. The Defendant had no legal relationship what so ever with the Plaintiff.

3. The Plaintiff by his Reply to Defence joined issue with the Defendant.

4. Minutes of the Pre-Trial Conference (Minutes) held on 2 July 2014, include, inter alia, the following:
   (1) One of the Facts in Dispute: That the Plaintiff at all material times was employed by the Defendant.
   (2) One of the Issues to be determined at Trial: Whether the Plaintiff was employed by the Defendant.

5. The Hearing commenced on 20 October and continued on 21 October and 20 November 2015, and 29 February 2016 in the course of which the Plaintiff and his witnesses gave evidence. At the conclusion of the Plaintiff's case on the last date, the Counsel for the Defendant submitted that there was no case for them to answer. She quoted the following cases in support.
   (1) *Vye v Vye* [1969] 2 All E.R pg 34.
   (2) *Harry Chandra .... Appellant and Ramat Ali ... Respondent*, Court of Appeal Fiji Civil Appeal No. ABU 0077 of 2007S.

6. Counsel continued that, no case had been established at law and alternatively that the evidence for the Plaintiff was so unsatisfactory that the burden of proof had not been discharged. The issue was who was the Plaintiff's employer. These were no contract with the Defendant and none had been exhibited. In the documents produced nowhere is the Defendant stated as the employer. The New

Town Christian School is a separate legal entity from the Defendant. The Plaintiff had failed to prove the Defendant was his employer. The Church paid the Plaintiff on a compassionate basis and not because the Plaintiff was its employee.

7. Counsel for the Plaintiff now submitted. She said non-suit was not available to the Defendant, as it was not in the Rules of the High Court (RHC). It is still available to the Defendant to apply to strike out the pleading under Order 18 rule 18 of the RHC. She referred to the following cases:
   (1) *Mohammed Akhtar and Ram Narayan ... Appellants* and *Faiyaz Sidiq Koya Sidiq and Faizal Riyad Koya ... Respondents* in Fiji Court of Appeal Civil Appeal No. ABU 8 of 2010.
   (2) *Faiyaz Ali and Fiji Bank & Finance Sector Employees Union and 2 Others*, Suva High Court Civil Action No. HBC 0088 of 2004.

8. Counsel continued that non-suit was only available to a Plaintiff, relying on *Faiyaz Ali*. And discontinuance and withdrawal of a claim under Order 21 of the RHC was also only available to a Plaintiff. The Defendant had no right to apply for the non-suit.

9. I have perused *Mohammed Akhtar* and one thing stands out with the utmost clearness that it concerns a stay of proceedings and not a non-suit.

10. Counsel for the Defendant then replied saying Order 18 rule 18 and Order 21 of the RHC were not applicable to the instant case.

11. The submissions continued on 1 March 2016 with the Plaintiff's Counsel saying there were no rules in the RHC relating to non-suit. She relied on *Faiyaz Ali* to say that non suit was not available to the Defendant.

12. In accordance with the applicable practice of the Courts, I informed the Counsel for the Defendant that I would not rule on her submission unless she stated she would not be calling any evidence.

13. My doing so was based on the persuasive authority of the decision of the English Court of Appeal in: *Laurie v Raglan Building Co.* [1942] 1K.B. at page 155 where Lord Greene M. R said "After the evidence for the plaintiff had been concluded on the question of liability, counsel for the defendants submitted that there was no case for him to answer. It is unfortunate, I think, that the learned judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this court, of refusing to rule on the submission unless counsel for the defendant said that he was going to call no evidence."

14. However, Counsel said she would call evidence and also submit non-suit. I did not accept her standpoint and put her to her election whether she would call evidence. Counsel then took instructions from her client's representatives and confirmed that the Defendant elected not to call any evidence and submitted there was no case to answer.

15. I then instructed both Counsel to file their closing submissions on the questions of non-suit, liability and quantum, by 8 March 2016 and reserved my judgment to be delivered thereafter. The words "non-suit" are used interchangeably with "no case to answer." Both submissions having been filed and perused by me, I now proceed to deliver my judgment.

16. At the outset, I shall consider the issue whether at the conclusion of the evidence of the Plaintiff, who is the party on whom the onus lies, I should hold the Defendant has no case to answer. (see the White Book, 1995, page 619, para 35/7/2).

17. The Defendant clearly bases its submission on the contention that the Plaintiff had failed to prove it was his employer on circa 20 April 2010 (the material time) when the accident occurred which gave rise to his claim. This requires me to trawl through the evidence called by the Plaintiff to discern whether I am entitled to rule that the case lacks substance and there should therefore be an end of it as a case has not been made out against the Defendant.

18. The Plaintiff's material salient evidence regarding the issue of whether the Defendant was his employer at the material time, which is the pivot of the case, is reproduced as follows:

(a) In Examination In Chief:

"I have no employment contract with the Defendant. The foreman hired me to build a school as a carpenter. MH requested for an employment letter when I wanted to purchase a washing machine. I requested Mukesh for an employment letter and he sent me to the Defendant to get the letter. (tendered as Exhibit P4).

My employer is New Town Christian School and the place of accident is the New Town Christian School jobsite. New Town Christian School was my employer and they were giving me the wages.

My name is there" (in the Time Book of K.K Construction Works Ltd - Tab 1 of the Defendant's Bundle of Documents).

(b) Under Cross-Examination:

"The foreman Mukesh hired me.

Mukesh is K.K Construction. My wife gave the sick sheet to Mukesh. Mukesh was the man I answered to.

The Church stopped paying me because Mukesh was my employer and my boss. In tab 8 of the Plaintiff's Bundle of Documents (Notice by Employer of Accident causing injury to a workman) my employer is New Town Christian School. Nowhere is it written down that CMF (the Defendant) is my employer.

I complained to the Labour Department against Joy Construction for

the medical expenses. Neither Joy Construction nor K.K Construction nor the Primary School have said that CMF (the Defendant) is my employer."

This then is the evidence at the end of the Plaintiff's case.

19. Before I pronounce my judgment, there are one or two matters that I need to refer to.

20. First, Counsel for the Plaintiff submitted that non-suit was no longer available in the Courts of Fiji and if it were, it was only available to the Plaintiff and not the Defendant. I am afraid neither proposition holds any water. Winter J in Faiyaz Ali only said non suit is not a fashionable practice in Fiji, and while he also said it is an appropriate relief available to a plaintiff, he never said it was not available to a defendant.

21. Then, Counsel for the Defendant submitted, if her application for non-suit failed, she was entitled to elect to call evidence. She based her stand on the Court of Appeal decision in *Harry Chandra.* Not to put too fine a point on it, what the Court, relying on *Yuil v Yuil*, was saying was Counsel making a no case submission was only entitled to call evidence, if the judge had not put him to his election.

22. In *Yuil,* the English Court of Appeal said where either through oversight or through a misapprehension (as there) as to the nature of counsel's argument, the judge does not put counsel to his election and no election in fact takes place, counsel was entitled to call his evidence just as if he never made the submission. As I have no intention of repeating the judge, Wallington J's error, I, of course, was very careful to put Counsel to her election, before I would rule,

and she (and her clients who were present) elected to call no evidence but to submit no case to answer.

23. Before I come to the principal question in this case, it will be convenient to dispose of Exhibit P4. This is a letter written by the Defendant at the request of the Plaintiff to assist him, in his own words, "to purchase a washing machine." No further weight can be given to it than that it was a letter written with a charitable intention (the good neighbor principle) by the church (the Defendant) to assist one of its members, the Plaintiff. Any presumption that it might be a letter of confirmation of employment for any other purpose is counter balanced if not negated by the fact that the Plaintiff, during his examination in chief by his own Counsel, stated his name was in the Time Book of K.K. Construction Works Ltd (K.K. Ltd). Although the Plaintiff professed ignorance of this document, it belies any assumption that the Defendant could have been his employer at the material time. This is because it stands to reason that K.K. Ltd would not have included the Plaintiff's name and recorded the paying of wages unless indeed he was their employee.

24. The Plaintiff muddied the waters by saying under cross-examination that he had complained to the Labour Department against Joy Construction, for the medical expenses. Again, he would not have done this unless he considered Joy Construction to be his employer.

25. The onus on the Plaintiff is to show or prove the Defendant was his employer at the material time. On a total review of the evidence called by the Plaintiff, I have been unable to conclude who exactly was the employer at the material time. For obvious reasons it behoves me not to suggest who this might be. Suffice it to say, the Plaintiff has failed to prove on a balance of probabilities it was the Defendant who was his employer and his claim herein therefore fails. This being my decision, I shall again for self-evident reasons refrain from expressing my opinion on the other 2 issues of liability and quantum. The Plaintiff's claim in

the tort of negligence is extant against the entity/person who was actually his employer at the material time. If he is minded or advised to file a claim, he can still do so as the period of limitation runs for 6 years from the date of the accident on circa 20 April 2010. It will then be the province of the judge who hears the claim to decide these issues, free from any opinion or view I might have expressed herein.

26. In fine, I enter judgment for the Defendant and, in the particular circumstances of this case, I shall make no order as to costs.

Delivered at Suva, this 17th day of March 2016.

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David Alfred
JUDGE
High Court of Fiji