

IN THE HIGH COURT OF FIJI

WESTERN DIVISION

AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 76 of 2015

BETWEEN : **ABBCO BUILDERS LIMITED**, a limited liability company having its registered office at Nadi Back road, Nadi.

PLAINTIFF

AND : **CHALLENGE ENGINEERING LIMITED**, a limited liability company having its registered office at Sautamata Street, Lautoka.

FIRST DEFENDANT

AND : **HEMANT KUMAR** of Maisuria Design Limited of 28 Andrews Road, Nadi,

SECOND DEFENDANT

Mr. Chen Bunn Young for the Plaintiff
Mr. Faiz Feroz Khan for the Second Defendant

Date of Hearing: - 15th September 2015

Date of Ruling :- 15th January 2016

RULING

- (1) The matter before me stems from the “**Summons**” filed by the Second Defendant pursuant to Order 32, Rule 5(3) and (4) of the High Court Rules, 1988 and under the inherent jurisdiction of the Court seeking the grant of the following **Orders**;

1. *That 2nd Defendant's Summons to strike out the Plaintiff's Statement of Claim dated 21st day of July, 2015 be restored to the list;*
2. *That all orders made in the Plaintiff's Summons for Directions dated 16th day of July, 2015 be set aside;*
3. *That there be no orders as costs or that the costs of the application be costs in the cause;*

- (2) The Summons is supported by an Affidavit sworn by the Second Defendant.
- (3) The Summons is vigorously resisted by the Plaintiff. The Plaintiff filed an Affidavit in Opposition followed by an Affidavit in reply thereto.
- (4) The Plaintiff and the Second Defendant were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, the Plaintiff filed a careful and comprehensive written submission for which I am most grateful.
- (5) What are the circumstances that give rise to the present application?

The action was instituted by the Plaintiff on 11th May 2015 by way of Writ of Summons and Statement of Claim, claiming damages for breach of Contract. The pleading in the action begun by the Writ are closed.

The Second Defendant made an application to the Court by Summons dated 21st July 2015 to strike out the Plaintiff's claim. The Summons was returnable on 28th July 2015. Further, the Plaintiff's Summons for Directions was also returnable on 28th July 2015.

When the case was called on 28th July, 2015, there was no appearance for or on behalf of the Second Defendant. Therefore, the Court struck out the Second Defendant's Summons to strike out the Plaintiff's claim and Order in terms made on the Summons for Directions. On 30th July 2015, the Second Defendant filed Summons to reinstate the Summons to strike out the Plaintiff's statement of claim dated 21st July 2015.

- (6) Let me have a close look at the "Summons" filed by the Second Defendant for reinstatement. The question I ask myself is whether it is in accordance with the law? The Second Defendant has sought the following **Orders**;

1. *That 2nd Defendant's Summons to strike out the Plaintiff's Statement of Claim dated 21st day of July, 2015 be restored to the list;*
2. *That all orders made in the Plaintiff's Summons for Directions dated 16th day of July, 2015 be set aside;*
3. *That there be no orders as costs or that the costs of the application be costs in the cause;*

It is worth remarking that the Second Defendant has not sought an Order setting aside the decision/Order striking out the Second defendant's Summons dated 21st July 2015 to strike out the Plaintiffs claim. To be more precise, there is no formal application before this court to set aside the order striking out the Second defendant's Summons dated 21st July 2015 to strike out the Plaintiffs claim.

At this stage, it is appropriate to point out that in order to have the Second defendant's Summons dated 21st July 2015 to strike out the Plaintiffs claim reinstated, it is first necessary to obtain an Order setting aside the Order/decision that struck out the Second defendant's Summons dated 21st July 2015 to strike out the Plaintiffs claim in the first place.

The Second Defendant can only have his Summons dated 21st July 2015 to strike out the Plaintiffs claim reinstated if he is successful in an application to have the Order made by the Court on 28th July 2015, set aside in the first place.

Now let me consider what authority there is on this point;

A somewhat similar situation as this was considered by His Lordship Justice Calanchini in the Fiji Court of Appeal in "**Suresh Prasad v Housing Authority**", Misc; No; 22 of 2011, Date of decision; 26th March 2014. I am inclined to be guided by the following pronouncement made by the Fiji Court of Appeal;

"On 26 January 2011 the Appellant filed a Notice of Motion in the High Court seeking re-instatement of the action. It must be recalled that in order to have an action re-instated, it is first necessary to obtain an order setting aside the decision that terminated the action in the first place. The Appellant could only have his claim for damages for breach of contract re-instated if he was successful in an application to have the orders made by the High Court on 22 October 2002 set aside."

- (7) I must confess that I am unaware of any rule that would enable the Court to entertain an application for reinstatement of the **Summons dated 21st July 2015 to strike out the Plaintiffs claim** without a **formal application** to obtain an Order setting aside the Order that struck out the Summons dated 21st July 2015.

For the reason which I have endeavored to explain, I have no hesitation in reaching the conclusion that the Second Defendant's "**Summons for reinstatement**" is **defective. It is not in accordance with the law. The Second Defendant is not entitled to be heard in support of his application for reinstatement of the Summons dated 21st July 2015, unless and until he takes the first and essential step towards setting aside the order that struck out the Summons.** In the Court's view, the aforesaid defect/omission is fundamental, which cannot be rectified simply by the use of Court's discretion. It is not the function of this Court. In applications such as this, the technicalities are strictly construed because of the drastic consequences that follow for one of the parties upon the relief sought being granted. At this point, I cannot resist in saying that it behooved the Second Defendant and his Counsel to have exercised more diligence in this regard. I heard no word said on behalf of the Plaintiff in relation to the said fundamental omission and the defect in the Second Defendant's "Summons for reinstatement." Its validity is not directly challenged.

Nevertheless, I desire to emphasise that the Court is bound to look into the "*prerequisites*" before considering the principles on reinstatement. I regard this duty of the Court as more important than anything else in the administration of justice. I reiterate that I am unaware of any rule that would enable the Court to entertain an application for reinstatement of the Second Defendant's Summons to strike out the Plaintiff's claim, without a **formal application** to obtain an Order setting aside the Order that struck out the Summons. This Court should not hallow an irregular practice. It is not the function of this Court. The Second Defendant has embarked on a sleeveless errand in asking this Court to reinstate the Second Defendant's Summons to strike out the Plaintiff's claim, without a **formal application** to obtain an Order setting aside the Order that struck out the Summons. This should be made clear; the Second Defendant should clothe the practice in the garment of legal acceptability. The Court is here to administer justice. Despite the skillful advocacy of counsel for the Second Defendant, the conduct of the Second Defendant in deliberately deciding not to make a formal application to Court and seek an Order in the Summons in the first place an Order setting aside the Order that struck out the Summons is still not clear to me. It is difficult to speculate. It is essential to bear in mind that the concept of justice is not confined to the interests of particular litigants; it embraces and extends to the protection of the public veil. The crucial point is that the Court should arrive at a just result.

- (8) In view of the foregoing analysis there is no alternate but to dismiss the Second Defendant's Summons for reinstatement. I cannot see any other just way to finish the matter than to follow the law.

- (9) In view of the approach, I have adopted, it will be at best a matter of academic interest only or at worst an exercise in futility to discuss the parties substantive arguments and the principles on reinstatement. Essentially that is all I have to say.

FINAL ORDERS

- (1) The Second Defendant's "Summons" for reinstatement of the Summons dated 21st July 2015 to strike out the Plaintiffs claim is dismissed.
- (2) The Second Defendant is ordered to pay costs of \$500.00 (summarily assessed) to the Plaintiff which is to be paid within 14 days from the date hereof.




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Jude Nanayakkara
Master of the High Court

At Lautoka

15th January 2016