

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
APPELLANT JURISDICTION

HBA 11 of 2021

IN THE MATTER of an Appeal from the decision of the Learned Magistrate sitting at the Magistrates Court of Fiji in Nadi on the 17th day of December 2021 in Civil Action No. 100 of 2021.

BETWEEN : **VINENDRA PRASAD** and **GITA SAMUJH**
Applicants/Original Defendants

AND : **AVINESH CHAND MAHARAJ**
Respondent/Original Plaintiff

Appearances : Applicants in Person
Mr. Chand for the Defendant
Date of Hearing : 02 September 2022
Date of Ruling : 06 September 2022

R U L I N G

1. This is to place on record the decision on 02 September 2022 to dismiss the appeal.
2. On the said date, after handing down a written ruling raised on a preliminary point, I did indicate in Court to the parties that the appeal proceedings in this case is misguided and should be dismissed for the following reasons:
 - (a) The appeal matter is essentially an appeal of a consent order granted in the Magistrates Court.
 - (b) The appellants are husband and wife.
 - (c) The consent Order in question was entered into by the husband.
 - (d) The wife alleges that she was not in Court on the day when the consent order was entered.
 - (e) The wife says that the husband was subjected to undue influence and duress to enter into the arrangement which led to the consent order. She alleges that the husband is uneducated and illiterate and did not understand all that was going on – let alone the legal implications of entering into the said consent order.
 - (f) A party who wishes to set aside a consent order must come by way of a fresh writ action¹ in the same Court where the consent order was entered.
 - (g) The headnotes to **Ainsworth v Wilding** [1896] 1 Ch 673 reads as follows:

¹ (see **Ram v Martinez** [2004] FJHC 388; HBC 0168.2000L (11 March 2004); **Ainsworth v Wilding** [1896] 1 Ch 673; **Dietz v Lennig Chemicals Ltd** [1969] 1 A.C 170).

"After a judgement has been passed and entered – even where it has been taken by consent and under a mistake - the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (1) there has been a clerical mistake or an error arising from an accidental slip or omissionor (2) the judgement as drawn up does not correctly state what the Court actually decided and intended to decide – in either of which cases the application may be made by motion in the action"

WHY SET ASIDE? WHY NOT APPEAL?

3. A consent order is supposed to be “final”².
4. This means that, when you sanction an agreement with judicial seal, all the issues between the parties will be deemed to have been disposed off, finally. The Consent Order is deemed as if it was a judicial determination on the merits. Mr. Justice Nawana, in a paper delivered at the Judicial Workshop for Judges in 2012 Workshop, emphasised this point thus:

5. When a compromise agreement or a pre-judgement settlement is endorsed with the seal of court, it is tantamount to a judicial determination of the issues between the parties. This means that a consent judgement will have the same force and effect as any other judgment at the end of a trial would have. It will be covered by the doctrines of *res judicata* and *estoppel*. (*Keith v Walcott* [1929] AC 482; *Jameson v Central Electricity Generating Board* [2000] 1 AC 455. In other words, a pre-judgement settlement necessarily has the character of an order or declaration of court without trial.

5. In **E.T. v Attorney-General** (supra), the Kenyan High Court said:

When a compromise agreement is given judicial approval, it becomes more than a contract binding upon the parties. Having been sanctioned by the Court, it is a determination of the controversy and has the force and effect of a judgement and is covered by the doctrine of *res judicata*.

6. In **Harris v Caladine** (1991) 172 CLR 84; [1991] HCA 9; at [8]: Brennan J. said:

... Consent orders finally disposing of the issues between parties to proceedings in a court have always been regarded as a judicial determination of those issues and nonetheless so because they are made in accordance with a contract between the parties: **Huddersfield Banking Company, Limited v. Henry Lister and Son, Limited** (1895) 2 Ch 273; **Ainsworth v. Wilding** (1896) 1 Ch 673, at p 676; **Kinch v. Walcott** (1929) AC 482; **Permanent Trustee Co. (Canberra) Ltd. v. Stocks and Holdings (Canberra) Pty.Ltd.** (1976) 28 FLR 195, at p 199. Moreover, as a

² When the Court sanctions an agreement and the Order is sealed, the Court is said to be *functus officio* – in having dealt with the matter finally.

Hammatt PJ in Mohammed **Rasul v Hazra** Singh 8 FLR 140 at page 144 as follows:

"In my opinion, once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in court the terms upon which the action has been settled and the plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set aside in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct"

judicial order of a superior court affords protection to a person executing it (**Howard v. Gosset** (1845) 10 QB 359, at pp 453-454 (116 ER 139, at p 173); **Williams v. Smith** (1863) 14 CB(NS) 596, at pp 620-621,623,625 (143 ER 579, at pp 588,589,590); **Williams v. Williams and Nathan** (1937) 2 All ER 559, at pp 562-563), the very purpose of procuring the making of orders by consent is to ensure that the terms agreed are susceptible of enforcement as a curial order

7. One might ask: *Well! If a consent order is a "final" judgement, and a determination of the issues on the merits - why does one have to apply to set it aside? Why not appeal it then like all other final orders?*"

8. Justice Abella of Canada's Supreme Court in **Rick v Brandsema** [2009] 1 SCR 295, 2009 SCC 10 (CanLII) said that the reason why a consent order is set aside (rather than appealed) is because in real, a consent judgment is not a judicial determination on the merits.

"[A] consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment.... This rule reflects the reality that a consent judgment is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The basis for the order is the parties' agreement, not a judge's determination of what is fair and reasonable in the circumstances."

9. Is Justice Abella's view different from the one in **Harris v Caladine**? I think not!

10. I would reconcile the two by saying the following:

- (i) a consent order is just as final as any other final Order.
- (ii) true - a final order is normally appealed if the appellant is questioning an aspect of the judge's decision.
- (iii) but, a consent order is based on the parties' agreement. A judge's decision, on the other hand, is based on the parties' differences or disagreement.
- (iv) so, a party who challenges a Consent Order is actually challenging an aspect of the agreement that he had entered into. He is not challenging any decision of the Court.
- (v) to challenge the agreement, he will have to apply to set it aside.
- (vi) because the consent order is final (i.e. the judge is functus and the principles of res judicata apply), he will have to come by way of a fresh action to challenge the agreement. The fact that he has to challenge the consent order through a fresh action, rather than through the same original action - reflects the reality that a consent order is just as final as any other Order.

11. With an appeal, an appellant is saying that the decision of a judge was either wrong according to law or the facts; or was unjust because of a serious procedural problem. In contrast, when a party is challenging a Consent Order, he is not pointing a finger at the judge. Rather, he is pointing a finger at the other party or at the agreement.

12. A Consent Order may be set aside on the same grounds as the court would normally set aside any contract or agreement³. These are:

³ As Lord Denning said in **Siebe Gorman Ltd v Pneupac Ltd** [1982] 1 WLR:

- (i) Mistake
- (ii) Duress & Undue Influence
- (iii) Misrepresentation/Fraud
- (iv) Illegality

13. The cases say that the power of the Court to set aside a Consent Order is a discretionary power (see for example **Weston v Dayman** [2006] EWCA 1165 Civ). Like all other discretionary powers, it must be exercised judicially. In **Weston v Dayman** [2006] EWCA 1165 Civ) Arden, Brooke and Wall LJ, cautioned that the court, when exercising its discretion must be very wary of the sanctity of the contract between the parties:

“One of the aspects of justice is that a bargain freely made should be upheld.”

14. In my view, the appeal is misguided and must be dismissed.

ORDER

15. Appeal dismissed. No order as to costs.



.....
 Anare Tuilevuka
JUDGE
 Lautoka



....by consent " may evidence a real contract between the parties. In such a case the court will only interfere with such order on the same grounds as it would with any other contract...."

Halsbury's Laws of England Volume 3(1), 4th edition, paragraph 521, states that:

...a consent order or compromise may be set aside on a ground which would invalidate any other agreement between the parties including mistake, illegality, duress or misrepresentation.

Halsbury's Laws of England – Volume 26:

Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority.....

In **Scammell & Ors v Dicker** [2005] All ER (D) 153, Ward and Rix LJ said:

In theory it was possible that a consent order might be declared void for uncertainty, just as a consent order might be set aside for misrepresentation or fraud or for mistake....

Hammett PJ in **Mohammed Rasul v Hazra Singh** 8 FLR 140 at page 144 said as follows:

In my opinion, once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in court the terms upon which the action has been settled and the plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set aside in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct.