

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBA 05 of 2023

BETWEEN: **DHARMENDRA SINGH t/a EPAY KIOSK-VSHOP (LAUTOKA)** of 53
Golf Link, Crescent, Lautoka.

FIRST APPELLANT

A N D: **ARUN LATA** of 3 Syria Lane, Namoli Avenue, Lautoka, Director.

SECOND APPELLANT

A N D: **NEWMAN PTE LIMITED** a limited liability Company having its
registered office at 8 & 9 Freeston Road, Walu Bay, Suva, Fiji.

RESPONDENT

Appearances: Ms. Devi S. for the Appellants
 Mr. Kalim M. for the Respondent

Date of Hearing: 30 November 2023

Date of Ruling: 20 March 2026

R U L I N G

INTRODUCTION

1. On 28 February 2023, the Learned Magistrate Mr. Jagath Hemantha issued a Ruling following the trial of Civil Case No. 169 of 2020 in which he granted the following Orders in favour of the plaintiff (respondent now), Newman Pte Limited (“NPL”):
 - (i) Judgement in the sum of \$15,478.16 entered in favour of the plaintiff.
 - (ii) Interest on the Judgement sum at the rate of 5% per annum until full payment but limited to the jurisdiction of the Magistrates Court.
 - (iii) Costs on a full Solicitor/Client indemnity basis.

2. On 07 March 2023, the defendants, Mr. Dharmendra Singh (“Singh”) and Ms. Arun Lata (“Lata”), filed their *Notice of Intention to Appeal* in person. Their *Grounds of Appeal* were filed on 04 March 2023¹.

¹ They filed the following eleven grounds of appeal:

Dismissal of Appeal

3. On 28 March 2023, Falcon Chambers filed in the Magistrates Court (for Singh and Lata) a Notice of Change of Solicitors *in lieu of* Messrs. Faiz Khan Lawyers. On the second call-over date of 10 May 2023, Mr. Vakacakau appeared for Singh and Lata for the second time. Mr. Kumar appeared on instructions of Patel & Sharma. I directed the parties to file and serve written submissions in twenty-eight days. I then adjourned the matter to 12 June 2023 for hearing.
4. Patel & Sharma Lawyers filed their written submissions for and on behalf of NPL on 07 June 2023. However, Falcon Chambers did not file any written submissions. When the matter was called on **12 June 2023** for hearing, no appearance was entered for Singh and/or Lata. I then dismissed the appeal on account of the non-appearance of the appellants or their counsel and their failure to comply with directions for the filing of written submissions. I then summarily assessed and ordered costs in the sum of \$1,000 in favour of NPL.

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1. That the Learned Trial Magistrate erred and/or misdirected himself in law and in fact in arriving at a judgment sum of \$15,478.16 against the Appellants without properly analyzing each and every evidence adduced before the Honorable Court through witness testimony and documentary evidences.
 2. That the Learned Trial Magistrate erred in law and in fact when he did not consider the fact that the 1st Appellant was not a person in authority to certify the personal guarantee on behalf of his wife the 2nd Appellant herein.
 3. That the Learned Trial Magistrate erred in law and in fact in holding that the personal guarantee was legal and enforceable against the 2nd Appellant when the same was void in the eyes of the law.
 4. That the Learned Trial Magistrate erred in law and in fact when he accepted that the Cash Back Rec or a M-Paisa transaction advise slip had a typographical error; being reference No. 1043 on particulars outlined in paragraph 5 of the Plaintiff's Statement of Claim and reference no. 1643 on the or a M- Paisa transaction advise slip.
 5. That the Learned Trial Magistrate erred in law and in fact when he failed to consider that the value of all the amounts stated in the two tax invoice numbers 281257 and 281867 were not identical or matched with the sum of \$9564,55 being outstanding debt as alleged by the respondent in its Statement of claim when compared with the actual invoices tendered as evidence in Court by the Respondent witness.
 6. That the Learned Trial Magistrate erred in law and in fact when he failed to analyze and accept the payment of \$10,800 made by the 1st Appellant to the Respondent.
 7. That the Learned Trial Magistrate erred in law and in fact when he did not consider the fact that the Respondent's alleged debt was periodically pleaded in its Statement of Claim and no monthly or yearly Statement of Accounts was sent to the 1st Appellant to notify him of this outstanding debt nor any Statement was presented or tendered in Court as evidence to proof that the 1st Appellant had an outstanding account with the Respondent.
 8. That the Learned Trial Magistrate erred in law and in fact when he failed to consider the demand notice was not served on the 2nd Appellant at any material time.
 9. That the Learned Trial Magistrate erred in law and in fact when he failed to consider the fact that the 1st appellant had replied via letter dated 20 October, 2019 disputing the debt claimed by the Respondent as per its Demand notices.
 10. That the Learned Trial Magistrate erred in law and in fact when he did awarded interest on judgment sum at the rate of 5% per annum until full payment but limited to the jurisdiction of the Court.
 11. That the Learned Trial Magistrate erred in law and in fact when he awarded costs on solicitor client indemnity basis against both the Appellants when the cost could have been summarily assessed based on the case precedents.

Summons to Reinstate Appeal

5. On 18 July 2023, Falcon Chambers filed a *Summons to Reinstate Appeal* pursuant to Order 2 Rule 1, Order 3 Rule 4 (1), Order 32 Rule 5 and Order 35 Rule 2 of the High Court Rules 1988. The application is supported by an affidavit jointly sworn by Singh and Lata on 17 July 2023. They depose that no one appeared from Falcon Chambers on 12 June 2023 because of an “*administrative oversight on their part*”². Furthermore, they were away in New Zealand on the day to attend to some funeral rites for Lata’s late father³.
6. Patel & Sharma filed an affidavit in opposition on 07 September 2023 and also filed written submissions opposing reinstatement on 28 November 2023.
7. The application for reinstatement was heard on 30 November 2023. Both counsel confirmed that the Appellant has settled the \$1,000 costs ordered on 12 June 2023.

PRELIMINARY ISSUE - IS REINSTATEMENT THE CORRECT PROCEDURE?

8. At the hearing, the preliminary issue was raised as to whether the appellants were correct to have approached the Court by way of an application for reinstatement.
9. Mr. Kalim submits for and on behalf of NPL that none of the Orders which the appellants rely on are applicable to the scenario before this Court. He argues that since the appeal was dismissed on the date of trial, Order 35 Rule 2 is relevant. The application therefore ought to have been brought under Order 35 Rule 2.
10. Ms. Devi argues that the High Court Rules contain no specific provisions to deal with the reinstatement of an appeal. However, the Court has an inherent jurisdiction to allow such an application. Litigants commonly rely on Orders 32 and 35 to restore processes which are struck out, and even where the striking out was ordered on the hearing date on account of non-appearance.
11. Ms. Devi adds that, given that the appeal was also struck out on account of the appellants failure to file and serve written submissions as directed, Order 2 Rule 1 applies. Accordingly, the failure to comply with the court direction in this case should not nullify the appeal. She submits that a reinstatement will not prejudice the respondents as they have already been compensated in costs of \$1,000.
12. Mr. Kalim replies that Order 32 Rule 5 only deals with hearings in Chambers.

² As per paragraph 6 of their joint-affidavit.

³ As per paragraph 7 of their joint affidavit.

13. I did allow parties to file further submissions on the preliminary point raised and then proceeded with the hearing of the appeal.
14. In **Singh v Singh** [2016] FJHC 1060; HBC43.2011 (22 November 2016), Mr. Justice V. D Sharma observed as follows in paragraphs 18 and 19:
18. After a careful perusal of the Court record and the Plaintiff's Affidavit in Support together with the Written Submissions filed herein, I find that the Plaintiff's Substantive Action was 'Struck Out' on the Court's Notice issued in pursuance to Order 25 Rule 9 application for 'Want of Prosecution'.
19. It is a Fundamental Law that after a matter is struck out for either non-compliance of peremptory order or for want of prosecution the appropriate remedy for the party whose action has been struck out is to **Appeal the Decision and not apply for reinstatement**. I now make references to the following relevant Case Authorities to support this-
- (i) *Avinesh Ashwain Prasad –v- Fiji Development Bank, Civil Action No. 198 of 2010*.
15. In contrast, Mr. Justice S. Inoke in **NBF Asset Management Bank v Krishna** [2012] FJHC 835; HBC129.1999L (2 February 2012) cited the Fiji Court of Appeal's decision in **Trade Air Engineering (West) Ltd v Taga** [2007] FJCA 9; ABU0062J.2006 (9 March 2007) as fortifying the following position:
- [9] when an application is made to re-instate after such a "striking out", and I note that the rule uses the word "dismiss", the Master or Judge that struck the matter out should hear the application. It is not a proper case for an appeal. This is consistent with the general principle that an appeal can only be lodged against a judicial determination, and, with its corollary, that once a judicial determination is made, the proper process is by way of appeal rather than re-hearing by the judicial officer that made the determination, as was the case in **Trade Air Engineering** (supra).
16. In **ABBCO Builders Ltd v Challenge Engineering Ltd** [2016] FJHC 20; HBC76.2015 (15 January 2016), Mr. Justice Nanyakarra refused to reinstate the defendant's *Summons to Strike Out* the Plaintiff's claim which itself was struck out on account of the defendant/applicant's non-appearance on the returnable date of the Summons. Nanyakarra J opined that before the Summons can be reinstated, the Order which struck it out must first be set aside. Combining the authorities discussed above, I hold that where a case has been struck out on account of non-compliance with a peremptory order or an unless order, the proper course to challenge such a decision is by way of appeal, consistent with the approach adopted by Sharma J in **Singh** (supra). However, the present matter does not involve non-compliance with a peremptory order. I consider that the appropriate approach is that set out by Inoke J in **NBF** (supra), which I apply in this case.

PRINCIPLES

17. In any reinstatement application, the court looks at four things:
- (i) length of delay
 - (ii) reasons for delay
 - (iii) merits of appeal
 - (iv) balance of prejudice

Length & Reasons for Delay

18. I accept that the application was filed promptly once the appellants learnt that the appeal had been dismissed for their failures. I have also considered the reasons given for their absence in Court. While I do not doubt that the appellants were both away in New Zealand on 12 June 2023 attending to family matters, the explanation for their solicitor's absence leaves much to be desired. That said, I am inclined to determine this application on the question of whether the appeal itself has merit.

DOES THE APPEAL HAVE MERITS?

19. I have carefully examined the Copy Records, including the pleadings filed in the court below at pages 86 to 100; the Pre-Trial Conference Minutes executed on 08 February 2022 at pages 101 to 103; the record of the trial proceedings at pages 11 to 71; and the Learned Magistrate's Ruling at pages 72 to 81. I have also considered the Electronic Pin System Retailer Agreement ("**Retailer Agreement**") together with the **Kiosk Agreement** at pages 109 to 115, as well as the Personal Guarantee at pages 116 to 117.
20. NPL filed proceedings in the Magistrates Court to recover \$15,478.16 allegedly owed by the first defendant, Dharmendra Singh ("**Singh**") for services rendered between 25 October 2018 to 26 June 2019.
21. The services in question were provided through NPL's digital payment platform. The platform facilitates electronic payment transactions. NPL sells access to this platform. Its customer base includes retailers and kiosk operators. They access the platform through a web-based portal or a point-of-sale (POS) terminal on terms provided under an agreement.
22. Access to the platform enables retailers and kiosk operators to *inter -alia* sell mobile recharge and bus card top-ups electronically to end users (thus, eliminating the need for the "old" scratch-cards).

23. NPL also maintains a standard *agency-like* arrangement with selected retailers and kiosk operators.
24. Under this *agency-like* arrangement, NPL purchases prepaid recharge and bus top-up credit, in advance, and in bulk, from Vodafone. It then supplies the credit to the selected retailers and kiosk operators, as required.
25. These retailers and operators act as intermediaries. Their function, in actual fact, is to act as NPL's point of sale (POS) outlets. They do so by selling NPL's prepaid credit to customers who seek mobile recharges or bus card top-ups.
26. At regular intervals, the retailer must reimburse NPL for the value of credit supplied during a defined period. Once that is settled, NPL then reloads the retailer's account with a fresh batch of bulk credit, and the cycle continues.
27. To enter into such an arrangement, a prospective retailer must first open an account with NPL. The account is linked to the POS terminal which NPL supplies to the retailer (as I gather by reading between the lines of the evidence on record).
28. Hence, through that account, NPL is able to interact with the retailer in terms of the supply and settlement of prepaid credit – and to monitor transactions and obligations. The account also gives the retailer access to NPL's platform and provides a record of prepaid credit usage.
29. Before a prospective retailer can open an account, he or she must provide a suitable guarantor, who must execute a form supplied by NPL. The form serves as a Deed of Guarantee.
30. Needless to say, this requirement protects NPL against the risks inherent in the arrangement, the most obvious being the risk that a retailer may fail to pay for credit supplied.

NPL'S & SINGH'S ARRANGEMENT

31. NPL had two agreements with Singh. These were the Retailer Agreement and the Kiosk Agreement. Singh's account with NPL was guaranteed by his wife, the second defendant.
32. Their arrangement followed the model described above, with Singh retailing NPL recharge credits and bus-top ups through his kiosk in Lautoka.

33. From the evidence given at trial, it is common ground that NPL and Singh had the following working system:
- (i) **Order** - Singh periodically places an order for recharge credits and bus top-ups with NPL representatives in Suva whenever required.
 - (ii) **Loading** – NPL staff then load Singh’s POS machines with the requested recharge credits and bus top-ups.
 - (iii) **Delivery Note** – after loading, NPL issues a Delivery Note (or an *M-Paisa* transaction advice) to Singh to sign in acknowledgement of delivery. The Note will record the details of the loading such as the amount, value, date, time etc.
 - (iv) **Invoice** – after Singh signs the Delivery Note, NPL will then issue an Invoice to him for the value of the electronic credit loaded.
 - (v) **Payment** – Singh pays the invoiced amount into NPL’s nominated bank account and provides NPL with the Deposit Slip.
 - (vi) **Reload Condition** – except in special circumstances, NPL will not reload Singh’s POS machines unless the previous account has been cleared in full.

ISSUES

34. The parties Pre-Trial Conference Minutes before the court below admitted only that NPL and Singh did enter into the Retailer Agreement and the Kiosk Agreement.
35. They raised a total of eleven (11) issues altogether⁴. These ranged from whether NPL did, at all, render the services in question for which the payment is claimed, to

⁴ The eleven (11) issues were:

1. The Plaintiff is and was at all material times a limited liability company having its registered office at 8 & 9 Freeston Road, Walu Bay, Suva, Fiji.
2. That the Plaintiff was carrying out distribution business whereby it facilitates and provides the refills for prepaid mobile platform for recharge cards, m-paisa services and other services which requires to be carried out via electronic distribution through electronic machine or near field communication.
3. That the First Defendant had engaged into a retailer agreement with the Plaintiff and the First Defendant became a registered customer of the Plaintiff.
4. Whether the Plaintiff has provided services to the Defendant as alleged in Paragraph 5 of the Statement of Claim?
5. Whether the First Defendant owes a sum of \$15,478.16 to the Plaintiff?
6. Whether the Plaintiff will suffer loss and damages in its operations if the Defendants do not pay the sum which is due and owing?

whether the guarantor (Singh's wife) did provide a personal guarantee at all on 13 February 2017, to whether the personal guarantee was ever explained to her.

36. There was no issue of construction between the parties.

THE LEARNED MAGISTRATE'S FINDINGS

37. The Magistrate was satisfied that NPL had produced sufficient oral and documentary evidence to establish that it did render the services in question. For those services, NPL remains unpaid. He found that NPL did supply Singh all the electronic credit in question between 25 October 2018 to 26 June 2019. The records show that this was conceded to by Ms. Shayal Prasad ("**Prasad**"). She was employed by Singh at all material times and had handled most, if not all, of Singh's transactions with NPL. This was further fortified through (i) delivery notes by NPL and which were acknowledged by one of Singh's employee and (ii) the invoices raised thereafter. The onus therefore, was on Singh to establish that he had discharged his obligation to pay NPL. The learned Magistrate noted at paragraph 26 of his ruling that Prasad did attempt to tender certain bank deposit slips in order to establish that Singh had settled the invoices relating to the sum claimed. The following points are noteworthy:

- (i) the bank slip which Prasad had sought to tender was a poor photocopy containing material alterations. This was observed by the learned Magistrate, with the specifics noted in the ruling.
- (ii) although not noted in the Ruling, I gather from the record of the proceedings (see page 55 of Copy Records) that NPL's counsel had objected to the tendering of the bank slips as they had not been shown to NPL's witness during cross-examination and thus offending the rule in **Browne v Dunn**).
- (iii) Singh had maintained all along in his evidence that NPL in fact had not rendered the services in question.

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7. Whether the First Defendant has provided the name of the Second Defendant as the personal guarantor or not?
 8. Whether the Second Defendant has executed a personal guarantee on 13th February, 2017?
 9. Whether the Second Defendant had signed a personal guarantee stating that she would be liable for the payments due by the First Defendant?
 10. Whether the contents of the personal guarantee were explained to the Second Defendant prior to the execution? If so by whom?
 11. Whether the Second Defendant has understood the terms and conditions of the personal guarantee?

38. The Learned Magistrate also noted the inconsistencies in Singh's case theory and evidence:

- (i) as noted above, Singh had denied all along that NPL had not rendered the services in question, yet Prasad did admit that the issue was really about whether or not payment for the services was ever settled by Singh.
- (ii) Singh appeared to state briefly in his evidence that he did obtain the loadings in question from NPL on a pre-pay basis, which he sometimes did. However, given that NPL had raised an invoice, which is typically issued in a credit arrangement where goods or services are supplied first and payment is expected later, it is difficult to accept Singh's claim on this point.
- (iii) in her evidence, Prasad asserted that she had paid the invoices in question. However, she relied on receipts which, as her cross-examination revealed, were not linked to those invoices.
- (iv) Singh had maintained that he was unaware of the claim until the action was filed in Court. However, he admitted that he had sent a letter in response to NPL's Demand Notice wherein he had refuted the allegations therein.
- (v) Singh raised an issue as to whether his wife did in fact sign the personal guarantee. However, he himself volunteered in evidence that he was the one who actually completed the guarantee form and then handed it to his wife to sign.
- (vi) Singh stated that he was simply handed the Retailer Agreement and the Kiosk Agreement and told to sign them, with the assurance that any questions could be raised later. The learned Magistrate, however, clearly preferred the evidence of NPL's witness on this issue.
- (vii) Singh contended in his testimony that NPL had bypassed the arbitration clause in the Retailer Agreement. However, this was not raised in the Pre-Trial Conference Agreement. The learned Magistrate relied on **Digicel (Fiji) Ltd v FRU** [2014] FJHC 95 (see also section 5 Arbitration Act). On this point, it is notable that Singh himself did not invoke the arbitration clause as it was open to him to insist upon it.

39. Further to paragraph 38 (v) and (vi) above, I wish to state the following.

40. Singh's testimony is internally inconsistent. On the one hand, he casts doubt on whether his wife did sign the guarantee. On the other, he admits that he personally completed the form and handed it to her for signature. This inconsistency goes directly to his *bona fides* and credibility as a witness. Prasad's evidence fares no better.

41. Singh's attempt to portray himself as a victim who was not explained the Agreement, rings rather hollow. The defence of *non-est factum* only arises where the party signing an agreement had no understanding whatsoever of the nature of the document that he was committing himself to.
42. In this case, Singh had prior industry experience. He admitted in evidence that he was a former employee of Vodafone and had dealt with NPL whilst working there. He understood the mode of operation required, as demonstrated by his having operated the kiosk, managing the sale of recharges, and depositing funds in the bank. His difficulty was not in any lack of understanding. Rather, it lay in his failure to settle the invoices in question. The issue was one of accountability, not of comprehension. The defence of *non-est factum* is simply unavailable to him.

CONCLUSION

43. The Learned Magistrate decided the case on the following platforms:
 - (i) the acknowledged delivery notes and invoices strongly indicated that the credit in question was indeed loaded by NPL into Singh's account;
 - (ii) the loading was ultimately acknowledged by Prasad in cross-examination;
 - (iii) in light of that evidence, the onus then shifted to Singh to demonstrate that he had settled the invoices;
 - (iv) rather than adduce such evidence, Singh appeared to persist with the theory that NPL had not loaded any credit during the relevant period;
 - (v) Prasad subsequently attempted to rely on certain bank slips to show that Singh had paid the sums raised in the invoices;
 - (vi) however, when confronted with the relevant delivery notes and invoices, she conceded in cross-examination that the bank slips were unrelated to the invoices in question;
 - (vii) the inconsistencies in the defendants' evidence, their shifting positions, and their inability to construct a coherent case theory, all worked to undermine their credibility.
44. The intended appeal has no merit. To reinstate it would merely prolong NPL's deprivation of the fruits of its litigation. On the balance of prejudice, and in the interests of justice, the appeal must remain dismissed.

ORDER

45. The Summons to Reinstate is declined. The Appellants are to pay the Respondents costs which I summarily assess at \$1,000-00 (one thousand dollars only).



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Anare Tuilevuka
JUDGE

20 March 2026