IN THE MAGISTRATE'S COURT OF FIJI AT SUVA
CIVIL DIVISION

Civil Action No. 57 of 2018

BETWEEN: **UATE BALEILAKEBA BALEILEVUKA aka WATE BALEILAKEBA** of Waibola Subdivision, Wailekutu, Lami in the Republic of Fiji, Self Employed.

PLAINTIFF

AND: **PARVIR RATTAN,** of Sterling Place, Lami in the Republic of Fiji..

DEFENDANT

For the Plaintiff: M/S Oceanica IP
For the Defendant: M/S Capital Legal

RULING ON APPLICATION FOR NON-SUIT

1) Plaintiff claim in this cause inter alia:
   a) a sum of $18,000.00 owed under the Agreement by the Defendant,
   b) a sum of 23,800.00 as incurred cost and expenses,
   c) General damages for breach of agreement,
   d) Interest.

2) The matter was taken up before this court for hearing on 07-03-2023. The plaintiff gave evidence and was cross examined by the Counsel for the defendant. That was being the sole witness, the plaintiff closed his case.

3) The Defendant moved to file written submission on an application for "non-suit". Time granted to the defendant to file said submission and the plaintiff to file submission in reply.

4) The defendant filed his submissions 29-08-2023, but the plaintiff did not file any submission.

5) The defendant relied upon the decision in the case of **Chandra v Ali [2008] FJCA 32; ABU0077.2007S (11 July 2008).** In that case the Court of Appeal held that :
   "[25] It would appear from a review of the cases that in England that making a "no case" submission is now something of a rarity. That might well be because the effect of the rule applied in its full rigor is to impose on counsel something of a risk. If counsel is asked to elect and does elect then he cannot then give evidence if his submission fails. Small wonder it is that counsel in those circumstances would have to be fairly confident of his position before making such an election.

[26] In any event, the rule is not of universal application in civil proceedings. For example, in proceedings for contempt of court there is clear authority that such a rule does not apply: Re B [1996] 1 WLR 627.

[27] One other matter should not pass without comment. Section 46 of the Magistrates Act imports the practice for the time being of certain courts including the County Court in England into the Magistrates Courts. These may have been provisions which were highly appropriate in colonial times. Such provisions may be found in the legislation of other former British colonies. It seems more consonant with a modern (and non-colonial) judicial system such as obtains in Fiji that the judicial system should be in control of its own rules rather than leave them to the vagaries of the changes from time to time of the system in relation to county courts in a jurisdiction far away. One specific and obvious point in relation to this is that the rules of practice in civil proceedings in England have now changed radically and the idea that these should be imported without any consideration by the courts of Fiji, the legal profession of Fiji and others who are appropriately interested in the administration of justice is something which many might find a little difficult to understand. It seems to us that urgent attention should be directed towards a modernization of the approach which applies in section 46."

6) In **Chand v Christian Mission Fellowship [2018] FJCA 16; ABU0035.2016 (8 March 2018)** the Court of Appeal held that:

"[7] Since the promulgation of High Court Rules of Fiji in 1988, we have at our disposal a complete code of procedure which nowhere recognizes the concept of non-suit. Fijian judicial precedent too is silent on the issue of non-suit.

[8] The learned High Court Judge, at paragraph 20 of his judgment was of the following opinion: "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 Faiaz Ali v Fiji Bank and Finance Sector Employees Union[2004]FJHC 270; HBC 0088.2004(14 December 2004; 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".

[9] It is observed that the learned High Court Judge has wrongly construed the statement of Winter, J. in Faiaz Ali (supra) in arriving at the above conclusion. Contrary to the Learned High Court Judge's interpretation of the dictum of Winter, J, the natural inference to be drawn from the dicta is that non-suit is a relief which is available, if at all, only to a Plaintiff but certainly not to a Defendant. It thus follows that, had His lordship meant any contrary elucidation the same would have been stated in unequivocal terms."

7) The above stance was followed thereafter in several High Court decisions. In **Pacific Villa Development Ltd v Speedy Hero Development Ltd (trading as The Pearl South Pacific) [2018] FJHC 1061; HBC226.2013 (2 November 2018)** Hamza J. held that:

"[36] Therefore, it is now settled law that there is no provision in the High Court Rules 1988 which provides for a non-suit application to be made in the High Court.

[37] For the aforesaid reasons, I refuse the application made by the Defendant for non-suit."

8) In **Nand v Singh [2018] FJHC 859; HBC145.2014 (17 September 2018),** Nanayakkara J. held that : "I refuse to entertain and rule on the Defendant's application to non-suit the Plaintiff on the ground that the High Court Rules, 1988 made no provision for non-suiting and therefore non-suiting no longer exists."

9) Most recently Wati J. held in **Buresala Transport Ltd v Labour Officer [2023] FJHC 719; ERCA18.2018 (29 September 2023)** that:
"[14] There is no provision in the Magistrates Court Act or the Rules for the defendant to apply for a non-suit. The Magistrate's Court is a creature of statute, and it derives its powers from the statute. If there is a power to apply for non-suit then it should be available in the Magistrates Court Act or the Rules. Mr. Valenitabua relied on s. 46 of the Magistrates Court Act 1944 which reads as follows:
"The jurisdiction vested in Magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Act and ……., or by such rules and orders of Court as may be made pursuant to this Act and ….., and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction."
[15] My reading of s.46 is that the English county court rules can only apply if there is a statutory power given to the courts to enter non-suit. Neither the Act nor the rules provide for such powers. If the power for non-suit was available and there was lack of procedural guidelines then the English county court rules could be followed. "

10) In light of the above superior court decisions, it is now well settled that there are no legal provisions for an application of a non-suit in a civil cause in the Magistrate's Court of Fiji. **Buresala Transport Ltd** (supra) case is quite certain on this point. Therefore, this court cannot entertain the purported application of non-suit made by the Defendant.

Orders of the Court

i) Application for Non-Suit made by the defendant is refused and dismissed,
ii) Defendant is directed to inform the court his selected option on defending the claim,
iii) Cost will be cost of suit,
iv) This matter to take its normal cause.

MAGISTRATE'S COURT SUVA

Lakshitha Jayawardhana
Resident Magistrate

At Suva, on this 09th day of October 2023.