

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

CIVIL ACTION NO: HBC 128 OF 2014

BETWEEN: **SHEETAL PRITIKA CHAND** of Voi-Voi, Legalega, Nadi, Fiji,
Domestic Duties in her own personal capacity and as the Administratrix of
the Estate of **RAJ DEO SINGH** of Voi-Voi, Legalega, Nadi, Driver,
deceased.

PLAINTIFF

AND: **VISION TRADING LIMITED** trading as **DHOBY'S** a limited liability
company having its registered office at Courts (Fiji) Limited, 123 Ratu
Mara Road, Samabula, Suva, Fiji.

DEFENDANT

Counsel : Mr. Turuva A for the Plaintiff
 Mr. Gordon & W.S.Pillay for the Defendant

Ruling On : 29th March, 2018

Ruling by : Hon. Mr. Justice Mohamed Mackie

RULING

A. Introduction:

1. This ruling concerns an oral application made by the learned Counsel for the Plaintiff (plaintiff's Counsel) for an adjournment, when the matter came up for trial on 8th March, 2018, being the 2nd and final date of trial.
2. The applications being objected by the learned Counsel for the Defendant (Defendant's Counsel), rulings on same was reserved for today and in between both the parties have filed their respective written submissions as per my directions.
3. This is a writ action filed by M/s Siddiq Koya Lawyers on behalf of the plaintiff, claiming, among other reliefs, special damage and general damages, on account of her Husband's death, admittedly, by drowning in a Soak Pit, while the deceased

was, allegedly, engaged in his duty as a Boiler Operator in Defendant's premises, on or about 30th July, 2012. The Plaintiff alleges negligence on the part of the Defendant,

4. The issue before the Court, for the time being, is whether the adjournment moved by the Counsel for the Plaintiff on 8th March, 2017, being the second and last date of trial, should have been allowed or not .

B. Chronology of Events:

5. (a) Writ of summons and the Statement of claim were filed on 11th August, 2014.
- (b) Statement of Defence was filed on 21st November, 2014
- (c) After the pre-trial formalities, the matter was fixed for 3 day trial to be held on 22nd, 23rd and 24th of June, 2017 before my predecessor judge.
- (d) The above trial dates had to be vacated due to the departure of the judge from the service in Fiji and thereafter same, being re- allocated, was mentioned before me on 10th August, 2017 to re-fix for trial and same was fixed for 7th and 8th of March, 2018.
- (e) When the trial was around the corner, on 23rd February, 2018, the Defendant's Solicitors filed summons to strike out the Plaintiff's writ of summons and statement of claim and this being supported before me on 2nd March, 2018, same was dismissed instantly, and the trial dates fixed stood unchanged. (Vide – written ruling dated 7th March, 2018)

C. The Trial

6. The trial was taken up on 7th March, 2018, being the first date of trial and Ms. U. Baleilevuka, the learned Counsel for the Plaintiff, after leading the short and uncontested evidence of the Plaintiff (deceased's wife), when looked for the plaintiff's 2nd witness, Namely, Mr. Nilesh Chand, who was, admittedly, present in the Court premises in the very morning prior to the commencement of the proceedings, had left the Court premises before taking his evidence.
7. After an unsuccessful attempt to trace him, Counsel for the Plaintiff, with no other witnesses in hand, moved to adjourn the trial for the next day i.e. 8th March, 2018. Though, the learned Counsel for the Defendant objected and moved for cost, the

matter was adjourned for the next day as the trial was for two days and the order on cost was reserved.

8. When the matter was called on 8th March, 2018 for the 2nd date of trial, with the appearance of Mr. Turuva as the new Counsel for the Plaintiff, the Plaintiff's intended 2nd witness, Mr. Nilesh Chand still being absent, an adjournment was moved by the counsel for the plaintiff, though, he initially indicated that he had another witness present to continue with the trial.
9. The above move once again was objected by the Counsel for the Defendant and the Court after hearing the oral submissions of both the Counsel reserved the ruling directing the parties to file written submissions, if they wished to, and accordingly they have filed respective written submissions.

D. Law on Adjournment:-

10. Order 35 Rule 3 of the High Court Rules, which gives a judge the discretion to adjourn a trial in the interest of justice, reads as follows;

"The judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit."

11. The principles enunciated in ***Goldenwest Enterprises Ltd vs Timoci Pautogo, Civil Appeal Number ABU 0038 of 2005*** guides me on the subject in issue. The test for adjournment of trial is based on the following questions.
 - 1) Will refusal to grant an adjournment amount to the denial of a fair hearing and hence denial of natural justice or procedural fairness? Or
 - 2) Where a refusal to adjourn would cause definite and irreparable harm to the party seeking it; and
 - 3) Is there any 'fault' on the part of the party seeking the adjournment?

E. Submissions:

12. The Counsel for the Plaintiff submitted that though necessary subpoenas had been issued, it was not served on Mr. Nilesh Chand as he had met the Plaintiff's Solicitors in their Office and volunteered to give evidence, being a person who was with the deceased at the time of the accident. It is also submitted that he had in fact come to the Court on the 1st date of trial, met the Plaintiff's Counsel Ms. U. Baleilevuka for briefing, but left the Court without giving his evidence. Counsel argues it was not a fault on the part of the Plaintiff's for Mr. Nilesh Chand to leave

the Court premises without giving his evidence and the Plaintiff cannot be held responsible or punished for his departure in this manner.

13. The Counsel for the Defendant in his submission states that though the Plaintiff's Counsel on the 1st date of trial had indicated that there were 6 witnesses, including Mr. Nilesh Chand, none of them had been served with subpoenas. Counsel questions, if the plaintiff claims to have met the witness Mr. Nilesh Chand prior to the trial, then why did their Counsel for the day (Ms. U. Baleilevuka) had to brief him at the Court on 7th March, 2018?

The Defence Counsel argues that even Mr. Nilesh Chand had given evidence, the plaintiff still would have asked for an adjournment since the other witnesses were absent. It was also alleged that the Plaintiff was ill prepared or unprepared and always intended to ask for an adjournment. In short, Counsel submits that the plaintiff's failure to call witnesses should not become detrimental to the Defendant and the plaintiff, who failed to prepare was prepared to fail, thus must accept her fate created by her own actions/ omissions.

F. Discussion:

14. The power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. This discretion is to be exercised judicially and in the interest of justice.
15. Admittedly, none of the witnesses for the Plaintiff were served with subpoenas, though same had been filed in the Registry on 22nd February, 2018, except for the subpoena on Mr. Nilesh Chand, which was filed only on 6th March, 2018 just one day prior to the trial.
16. The reason for the above failure on the part of Plaintiff's Solicitors remains unexplained and for the reason/s best known to them had not acted in the best interest of the plaintiff to have all the witnesses in Court for the much awaited trial on 7th and/or 8th of March, 2018, despite the Court had indicated its determination to proceed with the trial without delay, when dismissing the summons filed by the Defendant to strike out the plaintiff's writ of summons and the statement of claim.
17. However, the facts that the witness Mr. Nilesh Chand was actually present in Court on 7th March, 2017 prior to the commencement of the Court proceedings, his meeting with the Plaintiff's Counsel on the day for briefing and he was an eye witness to the incident are not disputed.

18. The Counsel for the Defendant in his written submissions appears to be trying to pin the entire blame on the plaintiff, when there was not any obvious fault on her part or an allegation against her by her lawyers that she failed and/or neglected in giving instructions or making preparation for the trial.
19. The new Counsel, who appeared for the Plaintiff on the 2nd ill-fated date of trial, informed the Court that the witness Mr. Nilesh Chand had in fact visited Plaintiff's Solicitor's firm prior to trial dates and volunteered to give evidence on behalf of the plaintiff. It was further stated that in keeping with the undertaking Mr. Nilesh Chand had in fact come to Court premises, but gone back without fulfilling the task undertaken by him.
20. The Defence counsel, despite of my query from him about their witnesses, did not indicate to the Court whether Mr. Nilesh Chand was to be a witness for them, However, he was candid enough to concede that he met him in the Court premises in the morning on the day in question and spoke to him after ascertaining from him that he had not been served with subpoena to be a witness for the Plaintiff.
21. Had this witness Mr. Nilesh Chand in fact come to Court to give evidence on behalf of the Plaintiff as per his, purported, undertaking, he need not have disappeared from the Court premises in this manner, after meeting the Plaintiff's Counsel for briefing and having had conversation with the Counsel for the Defendant, which is not disputed by the Defence Counsel. I see that this witness, by leaving the Court premises in this manner, has left behind a mystery for unwarranted speculations by the Plaintiff's Counsel. The best person to shed some light on this would be none other than Mr. Nilesh Chand himself.
22. The originally fixed trial dates for 22nd to 24th June, 2017 before my predecessor Judge was vacated due to the changes occurred on the Bench and none of the parties or Solicitors can be found fault with for same. It is on the 2nd occasion fixed for trial the plaintiff had to face this unfortunate event due to no fault on her part. I am of the view that the Plaintiff should not be penalized for the omissions or commissions on the part of her Solicitors or her intended witness Mr. Nilesh Chand.
23. Under the above circumstances, if the adjournment is refused, it will undoubtedly, bring home for her denial of a fair hearing, denial of natural justice or procedural fairness; and would, probably, cause definite and irreparable harm to her.
24. The Counsel for the Defendant was heard to make submissions that the Court should treat the Plaintiff's Counsel's application for the adjournment in the same way the Defendant's application for striking out was treated, by dismissing it, pawing no room for any possible adjournment of the trial. With due respect, I must

say that decisions in each and every application before the Court is taken on the relevant merits and surrounding circumstances of such applications and the decision in one application need not necessarily bind or influence another.

G. Cost

25. On perusal of the Defendant's written submissions, I find nowhere in it, the Counsel for the Defendant has vehemently stressed that the application for adjournment should be refused. Instead, what he emphasizes is the cost, which amounts to a substantial sum of \$15,500.00 calculated on the indemnity basis.
26. Granting of the adjournment and ordering a cost on the Plaintiff to this volume or anything closer to it, while the plaintiff cannot be blamed for any of the consequences, is similar to giving something by the right hand and taking it back by the left hand. This, undoubtedly, would cause immense hardship, prejudice and amounts to be an indirect denial of justice for the Plaintiff.
27. Principles governing the award of indemnity costs are set out in a number of authorities.

General principles in this regard, among others, include:

"It has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order" **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')** (1991) 2 Lloyds Rep 155, at 176, per Kirby, P.

"Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate": **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. Per Power, J.

"Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court": **Willis v. Red bridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ

“A court has ‘absolute and unfettered’ discretion vis-à-vis the award of costs but discretion ‘must be exercised judicially’”: Trade Practices Commission v. Nicholas Enterprises (1979) 28 ALR 201, at 207

“A party against whom indemnity costs are sought ‘is entitled to notice of the order sought’: Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd (1995) NSWLR 242

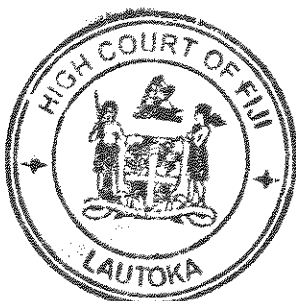
28. In the light of the above authorities and on consideration of the surrounding circumstances, I am of the view that Defendant’s application for indemnity cost does not warrant favorable consideration.

H. Conclusion

29. In view of the surrounding circumstances and the reasons adumbrated above, it is my considered view that the refusal of the application for an adjournment could probably have caused denial of a fair hearing, natural justice or procedural fairness; and result definite and irreparable harm to the plaintiff, while she had not been at fault.
30. This adjournment need not necessarily have adversely affected or prejudiced the Defendant and a summarily assessed cost \$500.00 (five hundred Dollars) would do justice to the Defendant.

I. Final Orders

1. Application by the Plaintiff’s Counsel for an adjournment allowed.
2. Defendant’s application for cost on indemnity basis rejected.
3. Summarily assessed cost of \$500.00 to be paid to the Defendant within 14 days.



At Lautoka
29th March, 2018

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A.M.Mohammed Mackie

Judge