

IN THE COURT OF APPEAL FIJI
(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL NO. ABU 0034 of 2013
(High Court Civil Action No. 311 of 2012)

BETWEEN : **MERCHANT FINANCE & INVESTMENT**
COMPANY LIMITED *Applicant*

AND : **RESHMI LATA**
Respondent

Coram : **Calanchini, P**
Almeida Guneratne, JA
C. Prematilaka, JA

Counsel : **Mr. S. Nandan for the Appellant**
Mr. V. Maharaj for the Respondent

Date of Hearing : **9 November, 2016**

Date of Judgment : **29 November, 2016**

JUDGMENT

Calanchini, P

- [1] I have had the advantage of reading in draft the judgment of Guneratne JA and agree that the appeal should be dismissed. The Ruling dated 27 March 2013 so far as it related to the counterclaim should be set aside on account of the default judgment entered on 5 March 2013.

Almeida Guneratne JA:

- [2] This is an appeal against the Ruling of the High Court at Suva pronounced on the 27th March, 2013.
- [3] For a determination of this Appeal, it is important to record the chronology of events that had taken place in the High Court.

Chronology of Events

- [4] By a writ of summons the Plaintiff (Respondent to this Appeal) filed a statement of claim together with a motion dated 14th November 2012 (supported by an Affidavit) seeking an order that the Defendant (Appellant to this Appeal) do release a motor vehicle to the Respondent “as of payment of debt” and to restrain the Defendant from selling the said motor vehicle until the determination of the case. (vide: page 12 of the Court Record).
- [5] On 23rd November 2012 the motion was called on for hearing. (vide: page 131 of the Court Record). The Learned Judge gave leave to the Respondent to withdraw the motion.
- [6] By a Notice of Motion dated 27th November 2012, the Defendant (supported by affidavit), moved to have the Plaintiff’s statement of claim struck out on the ground that it does not disclose a reasonable cause of action against it. vide: page 14 of the Court Record). It is to be noted that, the motion is signed, described wrongly as being by solicitors for the plaintiff.
- [7] On 29th November 2012, the Defendant filed a statement of defence and a counterclaim for judgment in a sum of \$159, 948.77 as an outstanding debt owed to it on the basis of the dealings between them involving a loan agreement and a bill of

sale (the details of which I do not think is necessary to go into. The said statement of defence and counter-claim is at pages 43 to 49 of the Court Record).

- [8] While the matter of the Defendant's said counter-claim was pending, on 7th December 2012, the matter of the Plaintiff's claim referred to at paragraph [4] above had recommenced and had continued till (page 133 of the Court Record gives the date as 27th March, 2012 but must be read as 27th March, 2013 in as much as 27th March, 2012 could not have come after 7th December, 2012).
- [9] I pause here to comment on the impugned (sealed) Ruling dated 27th March 2013 which reads thus:
- "That the statement of claim by Reshmi Lata T/A always Investment
(the Plaintiff) does not have locus standi to continue with the application.
This fault cannot be rectified by way of an amendment....."*
- (the emphasis is mine), while the Ruling following the proceedings dated 27th March, 2012 (which I have noted earlier must be read as 27th March, 2013) states "This fault (cause) be rectified by way of an amendment".
- [10] While noting this clear inconsistency I now move onto another aspect of the case in the context of the chronology of events.
- [11] While all the aforesaid events had been taking place ending up on 27th March, 2013, on the Defendant's counter-claim dated 29th November 2012 referred to at paragraph [7] above, there being no acknowledgement of service of the same by the Plaintiff judgment by default had been entered on 5th March, 2013 against the Plaintiff in the said sum of \$159,948.77 / 2 (vide: page 127 of the Court Record).

- [12] In that background I shall now proceed to consider the Appeal that has been preferred before this Court by the Appellant.

Re: The Notice and Ground of Appeal

- [13] The notice and the grounds of appeal are contained at pages 1 to 2 of the Court Record which urge thus: the material grievance of the Appellant being that,
- “the counter-claim of the Appellant (defendant) be re-instated That, the learned judge erred in law and in fact in striking out the Appellant’s counter-claim on the basis that the plaintiff was a wrong party in the proceedings is so far as the defendant’s counter-claim is concerned”.*

Re: The Impugned Judgment of the High Court

- [14] The High Court held thus:
- (i) That, the statement of claim by Reshmi Lata T/A Allways Investment (the plaintiff) does not have locus standi to continue with the application. This fault cannot be rectified by way of an amendment. Similarly counter-claim cannot sustain against wrong party therefore the statement of claim is struck out.
 - (ii) ...That having ruled to strike out on the fundamental error, no necessity arises to consider the Notice of Motion filed on 29th November, 2012.

Does that judgment bear scrutiny?

- [15] With all due respect, I do not think so. The Plaintiff’s statement of claim was rejected by the Learned High Court Judge apparently for the reason that the motor vehicle in question (referred to earlier in his judgment) stood registered in the name of an incorporated company viz: Allways Investment (Fiji) Limited.

Thus, the Plaintiff could not have sustained her claim against the Defendant. But the Defendant's counter-claim was against Reshmi Lata (trading as Allways Investments), (the parenthesis is mine), Reshmi Lata being a natural person.

[16] Although the motor vehicle was registered in the name of Allways Investment (Fiji) Limited and therefore it is against that entity the Plaintiff had to institute action, the Defendant Company's counter-claim was not against Allways Investment (Fiji) Limited but was against Reshmi Lata.

[17] The Learned Judge misdirected himself when he held that the Plaintiff was a wrong party in so far as the Defendant's counter-claim was concerned.

Conclusion re: the validity of the High Court Judgment

[18] For the aforesaid reasons I would set aside the impugned Judgment of the High Court dated 27th March, 2013. (sealed on 26th April, 2013) in so far as the said counterclaim is concerned.

The Impact of the said Default Judgment

[19] The default judgment had been entered on 5th March, 2013. It has not been executed. At least there is no material in the Court Record to indicate that it has been executed. The Plaintiff has not had it set aside either. In any event, there is no material on the court record to indicate that as well.

[20] Although neither counsel raised this matter before this Court, they both made submissions thereon when Court felt obliged to raise it.

The matters Court was concerned with

- [21] 1. Was the High Court Judge ‘functus’ when he gave the impugned judgment on 27th March, 2013 when on 5th March, 2013 the High Court had entered a ‘default judgment’ in favour of the defendant?
2. If so, could the learned judge have proceeded to make any order/judgment?

The Concept of functus officio

- [22] The High Court was “functus” as at 27th March, 2013 in as much as it had expended its jurisdiction in respect of the same cause between the same parties in regard to the claim of a liquidated sum of \$159, 948, 77.00 in the said default judgment.

- [23] **Jowitt’s Dictionary of English Law** (2nd ed, 1977) defines Functus officio as “having discharged his duty”, as an expression applied to a Judge, Magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. In re: V.G.M Holdings Ltd. [1941] 3A11ER 417 (Ch.D.) it had been said that, “*where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal*”. (per Morton, J. vide: the Head Note)

Effect of this Judgment


- [24] In so far as the defendant (Appellant) is concerned, there being no statement of counter-claim on foot in view of the default judgment entered on 5th March 2013, the only option available to it would be to have the said default judgment executed.

Prematillaka JA:

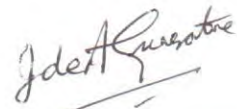
- [25] I agree with the reasoning and conclusions of Almeida Guneratne JA.

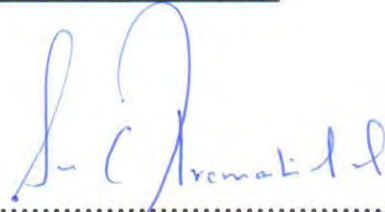
Orders of the Court

1. *The Appeal is dismissed, but the Ruling of the High Court dated 27th March, 2013 is set aside on account of the Default Judgment entered on the counter-claim on the 5th March, 2013.*
2. *In the circumstances there shall be no order as to costs.*


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Hon. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL




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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL


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Hon. Justice C. Prematillaka
JUSTICE OF APPEAL