

Introduction

- [1] On 24th January 2008, a Writ of Summons and Statement of Claim filed by the Plaintiffs were issued by this Court. These were duly served on the Defendant (“**Masiyaka**”). The first Plaintiff (“**Ponce**”) is a businesswoman and citizen of the United States of America. The second Plaintiff (“**Hicks**”) is a Church Pastor and citizen of Fiji. According to paragraph 2 of the Statement of Claim, Hicks is the “*lawful attorney*” for and on behalf of the 1st Plaintiff. A copy of the Power of Attorney was tendered in Court. Notably, there is no evidence that it is registered with the Registrar of Titles. Masiyaka did not bother to file an Acknowledgment of Service let alone a defence. On 30th April 2008, a Judgement By Default was entered by the Plaintiffs against Masiyaka. The Notice of Assessment of Damages was filed on 17th September 2008 and served on Masiyaka on 19th September 2008. Again, Masiyaka has not bothered to appear on any date fixed for hearing on assessment of damages.

Background

- [2] Masiyaka was practising as a Barrister and Solicitor in Fiji trading under the name and style of Masiyaka Law from Colonial Plaza, Namaka, Nadi.
- [3] According to the Statement of Claim, Ponce and Masiyaka entered into a Partnership Business Venture (“**venture**”) pursuant to a Deed of Agreement in 2006. No copy of that 2006 Deed of Settlement was tendered in Court. But according to the Statement of Claim, Hicks acted as Overseas Consultant while Masiyaka stood as Ponce’s Fiji counterpart.
- [4] The purpose of the venture was for Masiyaka to acquire registered lease titles at Momi Bay, Nadroga, Otoculu and Cuvu Beach on Naviti Island, Yasawa and Matanuku Island, Kadavu. Once the titles were acquired, they were then to be sold to buyers. A percentage of the sale proceeds would then be paid to Ponce. Hicks was to be the contact person for and on behalf of Ponce.

[5] As pleaded, upon Masiyaka's request on the 05th day of June 2006 (e-mail to Hicks tendered (**exhibit 4**), Ponce and Hicks wired to Masiyaka's company business account the sum of FJD\$40,000 (Fourty Thousand Dollars – the "**investment funds**") for the acquisition of the registered titles. On the 13th day of June 2006, Ponce sent the investment funds from the US into her Colonial Bank Account in Fiji with instructions that the same said funds be subsequently transferred to Masiyaka's bank account. The Bank did comply with those instructions and did transfer the funds to Masiyaka's bank account on the 14th day of June 2006.

[6] However, after receiving the funds in his account, Masiyaka did nothing at all about acquiring the lots pursuant to the Deed of Agreement. This was of concern to Ponce and Hicks who on numerous occasions thereafter, pressed Masiyaka for an account of that investment funds. Masiyaka did not comply. Various e-mails confirming the same were tendered in evidence by Hicks (see various e-mails dated 6th September 2007 from Ponce to Masiyaka (**exhibit 7**); 30th September 2007 from Masiyaka to Ponce (**exhibit 8**); 1st October 2007 from Ponce to Hicks and from Ponce to Masiyaka (**exhibit 9**) 19th November 2007 from Ponce to Hicks (**exhibit 10**);

[7] It was then that Ponce appointed Hicks on 30th day of April 2007 to be her lawful attorney and accordingly instructed Hicks to pursue recovery from Masiyaka. I note that Hicks has not tendered any specific documentation to prove this point. I do record here though that the e-mail which is **exhibit 7** from Ponce to Masiyaka records as follows:

"I want to inform you that I have given full authority to Basil Hicks under my power of attorney with regards to my interests in Fiji"

[8] Hicks made numerous demands from Masiyaka for a full refund but to no avail.

[9] On or about the 30th day of September 2007, Masiyaka advised Ponce that he was willing to fully refund the investment funds upon receipt of monies from one of his client at Vatulele Island, Fiji.

[10] However, Masiyaka did not keep that promise. And so on the 20th of November 2007, Ponce and Hicks through their lawyers Solicitor served a notice on Masiyaka demanding a full refund of the investment funds.

[11] Masiyaka, in response signed a cheque (which was later post dated to 29th November 2007) for the sum of \$20,000.00. However, when Hicks tried to cash that cheque on 29th November 2007 at ANZ Bank, Lautoka, the Bank refused to honour it.

[12] Following that, on the 30th day of November 2007, Ponce's and Hicks' lawyers again wrote to Masiyaka and proposed settlement as follows:

- (i) \$5,000 to be paid on 03rd December 2007*
- (ii) \$5,000 to be paid on 21st December 2007*
- (iii) \$30,000 to be paid on or before 31st January 2008*
- (iv) should Masiyaka default in payment of any instalment, the full sum then outstanding and owing was to become due and payable at once.*

[13] Masiyaka agreed to the proposal. And a Deed of Settlement (**exhibit no. 2**) was accordingly drawn up on 03rd December 2007 and signed by Hicks for and on behalf of Ponce and Masiyaka. Masiyaka paid the first instalment of \$5,000 on the same day as agreed. And the Settlement was stamped on 05th December 2007.

[14] Masiyaka however defaulted in paying the second instalment of \$5,000 which was due on 21st December 2007. As a result, the full sum then outstanding became due and payable at once.

- [15] Masiyaka was accordingly served a notice demanding payment of the whole sum outstanding and owing being \$35,000 as per the Agreed Terms of Settlement. However, he has never settled the same.
- [16] As a result, Ponce and Hicks have instituted these proceedings against Masiyaka claiming special damages.
- [17] The particulars of breach alleged against Masiyaka are as follows:
- (a) The Defendant breached the Deed of Agreement in failing to identify the subject lands and obtaining the necessary consents and signatures of the relevant native land owning units in Fiji.
 - (b) The Defendant breached the Deed of Agreement in failing to attend to all matters regarding all the necessary work required to acquire all the land titles on a 99 year Tourism Lease over the subject properties.
 - (c) The Defendant breached the Deed of Agreement in failing to acquire the subject lands together with required consents from the landowners whereby requisite premiums payable to the NLTB will be waived.

Damages Sought

- [18] Ponce and Hicks allege that Masiyaka breached the Deed of Agreement in failing to :-
- (i) identify the subject lands and obtaining the necessary consents and signatures of the relevant native land owning units in Fiji.
 - (ii) attend to all matters regarding all the necessary work required to acquire all the land titles on 99-year tourism lease over the subject properties
 - (iii) acquire the subject lands together with required consents from the landowners whereby requisite premiums payable to the NLTB will be waived

[19] It is also alleged in paragraph 13 of the Statement of Claim that Masiyaka had failed to account for the investment funds.

Judgement By Default

[20] The court file will reveal that on the 18th day of February 2008, the Writ of Summons and the Statement of Claim were both served on Masiyaka at 56 Colonial Plaza, Namaka but he refused to sign an acknowledgement.

[21] On 30th April 2008, Default Judgement was entered against Masiyaka. Notice of Assessment of Damages was issued on 03rd June 2008 and served on Masiyaka on 17th June 2008 with the returnable date of 7th July 2008. However when the case was called before Master Udit on 7th July 2008, Masiyaka still did not appear. A second Notice of Assessment of Damages was filed on 17th September 2008 with the returnable date of 15th October 2008. This was served personally on Masiyaka on 19th September 2008 who refused to acknowledge it. Masiyaka again did not appear when the case was called on 15th October 2008 before Master Udit. The records show that Masiyaka simply has not bothered to defend this case as attested to by his complete disregard of any process that has been served on him.

Damages Claimed

[22] Ponce and Hicks claim the following:

- (i) Judgement in the sum of \$35,000-00
- (ii) Special Damages in the sum of \$3,500-00
- (iii) General Damages
- (iv) Interests on Judgement Sum with effect from 13th June 2006 to date of judgement
- (v) Costs on an indemnity basis
- (vi) Any further order that this Honourable Court deems just

[23] They also claim special damages for the following: -

- (i) Return airfares from USA to Fiji - \$1,500-00
- (ii) Mobile Calls to the Defendant - \$ 500-00
Telephone calls to and from USA
- (iv) Transport costs to and from - \$ 500-00
Defendant's office
- (v) Legal costs - \$1,000-00

Special Damages

[24] Special Damages is that component of a claim which is capable of precise quantification before or at the date of trial. ***PAFF -v- SPEED [1961] 105 CLR 549*** at 558-559. As a rule special damages are only awarded if it is specifically pleaded and strictly proven; ***TACIRUA TRANSPORT COMPANY LIMITED -v- VIREND CHAND Civil Appeal No. ABU 0039/94*** at page 3.

[25] The plaintiff has complied with the rule only in part as follows. Subsequently, the full particulars were filed in court captioned “***Schedule of Special damages***” as follows:-

Special Damages Claimed	Sum Claimed	Documentation tendered
• Return Airfares from USA to Fiji	\$1,500	Extracts from Hicks Passport
• Mobile Calls	\$ 500	Nil
• Transport Costs to and from Defendant's Office etc	\$ 500	Nil
• Legal Costs	\$1,000-00	Statutory Declaration by the Plaintiff's former Solicitors.

[26] The claim for mobile calls and transport costs have not been proven. I will make an award on each anyway since they are not contested.

Judgement in the Sum of \$35,000

- [27] At the hearing on 15th October 2009, only Hicks appeared. He seeks judgement in the sum of \$35,000 against the Defendant in favour of the 1st Plaintiff. Hicks has produced in Court a copy of a Credit Bank Cheque Account dated 19th June 2006 showing the Purchaser to be Cynthia Ponce (Account No. 5474500) in favour of ANZ – Jekope Masiyaka – 7748437. He also produced a copy of Colonial Bank Cheque dated 19/06/06 which shows the Payee to be ANZ – Jekope Masiyaka – 7748437 in the sum of Fourty thousand Dollars. Also produced is a copy of some ANZ Bank records which seems to confirm a Cheque deposit in the sum of \$40,000 to Mr. Jekope Masiyaka t/a Masiyaka Law – Account No. 7748437. That deposit was made at 14.53 p.m. on 19th June 2006.
- [28] Hicks has produced in Court the original Deed of Settlement dated 03rd day of December 2007 (**exhibit 2**) signed by Hicks and Masiyaka which confirms the arrangement referred to above in paragraph 12.
- [29] Hicks has also produced various emails between Ponce and Masiyaka and also Hicks which confirm that the three were in fact involved in a business venture together of the nature pleaded in the Statement of Claim. An e-mail dated Sunday September 30 from Masiyaka to Ponce (**exhibit No. 8**) confirms that Masiyaka was “*willing to refund your monies once my clients at Vatulele Island receive the balance of \$1.85 million dollars which is expected to be around November/December*”.
- [30] In my view, there is more than enough evidence to confirm the monies owing by Masiyaka to the Plaintiffs which were due and payable.
- [31] The onus is on the plaintiff to prove his damages. *Lord Goddard in **Bonham Carter –v- Hyde Park Hotel (1984) 64 TLR 178** at 179 aptly said:-*

*“Plaintiffs must understand that if t hey bring an action for damages it is for them to prove their damage, it is not enough to write down the particulars, and **so to speak, throw them at the head of the Court***

saying: “this is what I have lost, I ask you to give me these damages.” They have to prove it.”

(emphasis added)

[32] I find that the Plaintiffs have proven the following to my satisfaction:

Special Damages Claimed	Award
• Return Airfares from USA to Fiji	\$1,500
• Mobile Calls	\$ 500
• Transport Costs to and from Defendant’s Office etc	\$ 500
• Legal Costs	\$1,000-00
• Judgement	\$35,000

[33] Further, the plaintiff is entitled to costs, which I summarily assess at \$800 - 00. Accordingly, so ordered.

[34] The award of interest is discretionary. The Plaintiffs also claim interest on Judgement Sum with effect from 13th June 2006 to date of Judgement. In **Attorney General of Fiji v Wati [2008] FJCA 29; ABU0128.2006S (10 July 2008)** the Fiji Court of Appeal said as follows:

An award of interest is designed to compensate a litigant for being without the use of their money in the period when the right to that money accrues and the ordering of payment by the Court. In some jurisdictions the amount of interest for any given period is specified by the Court Rules and goes up and down as general interest rates go up and down. In the Fiji Islands the courts have a discretion to assess the rate of interest but in fixing the rate regard should be had to prevailing bank interest rates.

[35] I award 5% interest on the judgment sum from 13th June 2006 to date of judgment.

A. Tuilevuka

Master

03rd November 2009.