



Lisa Development Sdn Bhd Plaintiff

AND

Orchid Garden Hotel Sdn Bhd Defendant

**(High Court of Brunei Darussalam)
(Civil Suit No. 124 of 2008)**

Steven Chong, J.

21 July 2014

Civil law and procedure – Failure to prepare List of Documents and Affidavit
Verifying the List – Failure to attend PTC – Exercise of judicial discretion –
Striking out of re-amended defence and counterclaim and entering
judgment – Appeal procedurally flawed.

Ms Veronica K Rajakanu (M/S Zuls Partners Law Office) for the Plaintiff.
Hj Mohamad Rozaiman Bin Dato Hj Abdul Rahman (M/S Rozaiman Abdul
Rahman Advocates and Solicitor) standing in for Sheikh Noordin bin Sheikh
Mohammad (M/S Sheikh Noordin Mohammad & Associates) for the
Defendant.

Case cited:

“Vishva Apurva” [1992] 1 SLR(R) 912.

Steven Chong, J.:

This is an appeal by the defendant against the decision of Senior Registrar Ramzidah Binti PDKD Hj Abdul Rahman striking out the defendant's Re-Amended Defence and Counterclaim and entering judgment for the plaintiff in the sum of \$2,571,701.53 with interest.

At the outset Ms Rajakanu who appears for the plaintiff raised the preliminary objection that the Notice of Appeal was not served on the plaintiff's solicitors.



Mr. Rozaiman who appears for the defendant on the instruction of Sheikh Noordin was unable to provide any explanation for this omission.

On this ground alone, counsel for the defendant not being able to give any reason for failing to serve Notice of Appeal on the plaintiff, I would dismiss the appeal.

Even if Notice of Appeal had been served on the plaintiff this appeal is devoid of merit. Firstly, it is procedurally flawed. The decision of the Senior Registrar was made in the exercise of the court's discretion pursuant to RSC O.34A r.2(3) and r.6(1). So far as it is material RSC O.34A r.2 provides:

- “(1) Without prejudice to rule 1, at any time before any action or proceedings are tried, the Court may direct parties to attend a pre-trial conference relating to the matters arising in the action or proceedings.*
- (2) At the pre-trial conference, the Court may consider any matter including the possibility of settlement of any or all of the issues in the action or proceedings and require the parties to furnish the Court with any such information as it thinks fit, and may also give all such directions as appear to be necessary or desirable for securing the just, expeditious and economical disposal of the action or proceedings.*
- (3) The Court, having made directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.*
- (4) Any judgment or order made under rule 2(3) may be set aside by the Court, on the application of the party, on such terms, if any, as it thinks just.”*

RSC O.34A r.6 provides:

- “(1) If, at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the Court may dismiss the action or proceedings or strike out the defence or counterclaim or enter judgment or make such other order as the court thinks fit.*
- (2) An order made by the Court in the absence of a party concerned or affected by the order may be set aside by the Court, on the application of that party, on such terms as it thinks just.*
- (3) Without prejudice to the proceeding paragraphs of this rule, where one or more of the parties to the action or proceedings fails to attend the pre-trial conference, the Court may, if it thinks fit, adjourn the conference.”*

Inexplicably, counsel for the defendant chose to appeal against the decision of the Senior Registrar when it is plain that he ought simply to have applied to set aside the striking out order and judgment under RSC O.34A r.2(4) and r.6(2).

Secondly, the Senior Registrar’s decision was made in the exercise of judicial discretion. As such, this court, on appeal, should only intervene if the Senior Registrar misdirected herself with regard to the principles in which the discretion was to be exercised or, if in the exercise of the discretion she took into account matters which she ought not to have done or failed to take into account matters which she ought to have done, or if her decision is plainly wrong: The *“Vishva Apurva”* [1992] 1 SLR(R) 912.

Sheikh Noordin in an Affidavit in Support filed late in the day on 17 July 2014 says that his failure to attend the PTC was *“not intentional but was inadvertently overlooked by myself as at the time I was heavily involved in a capital drugs trial”* and *“prior to myself having conduct of this matter for the defendant this matter was fully handled by my associate at the time namely Mr. Christopher Sawan Jiram”* who was unable to renew his practicing certificate.

Further, Sheikh Noordin says that the defendant has a good and arguable defence and counterclaim and it would be unfair for the judgment to stand *“merely on account of the failure of the defendant’s counsel to observe procedure rules of court especially given the excusable circumstances....”*



Whether defence counsel's failure to attend the PTC was not intentional, and whether the defendant has a good and arguable defence, are issues which are certainly relevant for the court to consider in an application to set aside an order made in the absence of the defendant but they are irrelevant to this appeal.

It is axiomatic that rules of court must be obeyed. Otherwise, the purpose of making them will be defeated and the administration of justice will become ineffective.

I think the Senior Registrar was entitled to exercise the discretion of the court to decide in the manner that she did having regard to the following undisputed facts: (1) counsel for the defendant had failed to prepare the defendant's List of Documents and the Affidavit Verifying the List despite being ordered to do so; and (2) counsel for the defendant had failed, for the third time, to attend a PTC, and this was after the Court had ordered that *"Should defence counsel not attend the plaintiff is at liberty to apply for the striking out of the defence and counterclaim and/or judgment be entered against them."*

For the reasons I have given the appeal is dismissed with costs to the plaintiff to be taxed unless agreed.

DATO PADUKA STEVEN CHONG
Judge, High Court