IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 144 of 2014

BETWEEN : **PRABHA WATI** as administratix of the Estate of Vijay Singh of 14 Tewkesbury St Chipping Norton, Sydney, Australia 2170, Insurance Broker, Deceased, intestate.

PLAINTIFF

AND : **SATYA WATI** as administratix of the Estate of Shiv Charan of 86 Tavewa Avenue, Lautoka.

1st DEFENDANT

AND : **PETER JOHN RAM NARAYAN** of 86 Tavewa Avenue, Lautoka.

2nd DEFENDANT

AND : **THE DIRECTOR OF LANDS** Government Building, Suva.

3rd DEFENDANT

AND : **THE ATTORNEY GENERAL** Attorney General's Chambers, Lautoka.

4th DEFENDANT

Mr. Anil Jatinder Singh for the Plaintiff
Mr. Roopesh Prakash Singh for the First and Second Defendants
Appearance excused for other Defendants

Date of Hearing : - 17th October 2016
Date of Ruling : - 02nd December 2016

RULING

(1) The matter before me stems from the Inter Parte Summons filed by the Plaintiff, dated 30th May 2016, seeking the grant of the following Orders;

1. *The Order made on the 25th day of April 2016 striking out this Action, be set aside on grounds set-out in the Affidavit of Ateca Tikonatabua.*

2. *The Court fix a fresh time table for compliance of its Orders.*

3. *The time fixed for service of this Summons be shorten.*

4. *Further directions this Court may seem fit on hearing of the whole action and/or reinstatement and costs.*

(2) The Plaintiff's application for re-instatement of the action which was struck off on 25th April 2016 due to breach of a Peremptory Order is supported by an Affidavit of "Ateca Tikonatabua", a **law clerk** in the Chambers of Messers Anil J.Singh Lawyers, the Solicitors for the Plaintiff.

(3) The application is strongly contested by the First and Second Defendants. The Third and Fourth Defendants did not oppose the application.

(4) The First and Second Defendants filed an "Affidavit in Opposition" opposing the application for re-instatement of the Plaintiff's action which was struck off due to breach of a "Peremptory Order."

(5) The Plaintiff and the First and Second Defendants were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the First and Second Defendants filed a careful and comprehensive written submission for which I am most grateful.

(6) What are the circumstances that give rise to the present application?

The following is a unhappy history of the proceedings.

a) On the 14th of April 2016, this Court made a Peremptory Order that the Plaintiff within seven days to seal the Order made on the 28th of August 2015 to amend the Statement of Claim and also to file the Amended Statement of Claim, if not the Plaintiff's claim would be struck out.

b) It is to be noted that the Court made the Peremptory Order as there was a delay in filing of the Amended Writ of Summons and the Order granting leave to amend the Statement of Claim. The Order granting leave to amend the Statement of Claim was made on the 28th August 2015.

c) The Peremptory Order was made as a last resort to agitate compliance of the previous court directions.

d) On the 25th of April 2016, the matter was called before this Court to review compliance of the Peremptory Order. On this day there was no appearance for or on behalf of the Plaintiff and there was a failure to comply with the Order.

e) The Court struck out the Plaintiff's Claim as there was a breach of the Peremptory Order.

(7) At the commencement of the oral hearing before the Court for the application for re-instatement, Counsel for the Defendants raised objections to the Plaintiff's Summons for re-instatement and the supporting Affidavit of the law clerk on the following grounds.

(1) The Court cannot re-visit or amend its Orders. The Court is *functus officio* . The Court had struck out the action hence the matter should be appealed to a Judge of the High Court.

(2) The application for reinstatement of the action is a contested hearing and thus it is not appropriate for a law clerk to depose in support of it.

(8) Let me now move to examine the first ground of objection, that is to say that "*the Court cannot re-visit or amend its Orders. The Court is functus officio . The Court had struck out the action hence the matter should be appealed to a Judge of the High Court.*

(As I will explain later, I entirely dissent from this proposition)

Reference was made by Counsel for the Defendants to the High Court case of **NBF Asset Management Bank v Apisai Tora & Anor (2016) FJ 18 121.**

Counsel for the Plaintiff responds by pointing to the fact that unless Orders are made in the exercise of inherent powers of the Court and solely for the purpose of compelling parties on procedural compliance and not made on merits. In the same breath he asserted that therefore the Court can re-visit and re-instate its own Orders and the Court is not *functus officio.* Counsel relies substantially on the High Court Judgment of Hon. Justice Madam Dilrukshi Wickramasinghe in "**Samat v Qelelai (2012) FJHC 844.** Counsel for the Plaintiff was characteristically frank and brief in support of his Summons. He accepted that his firm had blundered in not sealing the Order on time. He asserted that there was no contumacious conduct or deliberate disobedience of the Peremptory Order. He suggested that the Plaintiff has a good case and that she should not be deprived of the opportunity to present that case at trial merely because of fault of her legal advisors.

During the course of argument, Counsel for the 1st and 2nd Defendants took me through a passage at paragraph 21, 22 and 23 of the High Court decision, **NBF Assets Management Bank v Apisai Tora & Anor** (supra). The passage is this;

> *"**21.** On the above premise, it is crystal clear that the Order 19 of the HCR provides provisions only for setting aside of a judgment entered when there is a default in the pleadings, but it does not provide room for setting aside of a judgment which is entered by a court for non-compliance of an unless order. It deals with only when there are circumstances where there is a default in the service of either the statement of claim on the defendant or where the defendant fails to serve the statement of defence within the period fixed by or under the above rules for service of the defence.*
>
> ***22.** On relying upon the above provision, the plaintiff argues that the statement of defence of the defendant was stuck out due to non compliance of an order [unless order] made by a judge.*
>
> ***23.** The default judgment in the instance was not however made under Order 19, Rule 9 of the HCR, the plaintiff further submits.*
>
> *In **Ramesh Patel & Anor –v- Rajini Kanth** **[2014] Fiji High Court Civil Action No. HBC 16 of 2011**, Corea J at paragraphs 41, 42, 43 and 60, held that:*
>
> > *"[41] Undoubtedly the rule gives the discretionary power to the court to set aside or vary the judgment entered. However it can be done pertaining to judgments entered pursuant to Order 19.*
> >
> > *[42] Order 19 deals with specific provision pertaining to default of pleadings. It is submitted to court that the said order deals with situations where the defendant has failed to serve a defence. It was also submitted that judgment impugned is not a default judgment."*

I closely read the High Court decision NBF Assets Management Bank (supra).

What are the facts and circumstances of High Court decision "NBF Assets Management Bank"? The paragraph 1 to 10 of the Judgment reads;

> *Para 1. The plaintiff in this case originally instituted legal actions against the defendants by way of the writ of summons dated 17th January 2001 in the High Court of Fiji, Lautoka in order to recover a sum of $2,556,747.25 (two million five hundred and fifty six thousand and seven hundred and forty seven dollars twenty five cents) from them.*
>
> *2. The hearing of the substantive matter had been scheduled to be taken up on several occasions including some intervals for consideration of a settlement suggested by the 1st defendant ["the defendant"] before it was finally set for the trial on 28 February 2011.*

3. *The 2nd defendant during the period in-between has died and the plaintiff did not continue its cause of action against her with substitution or other.*

4. *The defendant in the meantime writes a letter to Mr. Shalend Krishna the then solicitor for the defendants and informs by the said letter dated 25th February 2011, that he shall no longer require Mr. Krishna's representation of him in the listed trial on 28 February 2011, or any time thereafter.*

5. *Accordingly, on the 28th February 2011 Mr. Krishna the solicitor/counsel for defendants (automatically, not the solicitor for 2nd defendant) with the leave of the court withdrew from the proceedings as the solicitor/counsel on record for the defendant as per the precise written instructions given by the defendant to do so.*

6. *The court having granted leave for Mr. Krishna to withdraw, then and there made further orders against the defendant with an unless order of costs of $5,000.00 to be paid to the plaintiff on or before 7th March 2011 and more fully explained in that, that failure to pay the costs would result in the statement of defence shall be struck out and the judgment shall be entered in favour of the plaintiff for the whole claim against the defendant.*

7. *The defendant having understood and agreed to the default terms of the unless order, placed his signature in the case record for confirmation of his knowledge with regards to the consequences of a default.*

8. *The defendant was found ducked of the costs order when the matter was taken up on 7th March 2011 and was found guilty of dishonouring the then existing unless order.*

9. *The court forthwith executed the guillotine order by entering the judgment in favour of the plaintiff enabling it to recover the aforesaid sum with the added interest totalling to a sum of $5,903,284.23 (five million nine hundred and three thousand two hundred and eighty four dollars and twenty three cents).*

10. *It is the impugned judgment against which the defendant is now beseeching before this court to set aside and seeking a proper hearing to the pleadings of both the parties before passing the judgment.*

As I understand the judgment, in that case, the issue before the Court was whether the Defendant can file Summons under Order 19, rule (9) to set aside the Default Judgment, which was entered for non-compliance of an unless Order.

But in the case before me, the application is to reinstate the action which was struck off on 25th April 2016 due to a breach of a Peremptory Order.

Therefore, the case before me completely differs from that of NBF Asset Management (supra). There is a world of difference between **an application to re-instate an action** which was struck off due to breach of a Peremptory Order and **an application to set aside a Default Judgment** which was entered for non-compliance of a Peremptory Order.

Thus, I do not attach importance to that passage. In the present case, I have here a fundamentally different situation from that case.

In my view, the case relied upon by counsel for the Defendant is not authority for the proposition that this Court cannot reinstate the action which was struck off due to non compliance of an unless Order.

I do not accept the proposition advanced by Counsel for the First and Second Defendants. The submission is not in line with the authority.

On the other hand, Counsel for the Plaintiff took me through a passage at paragraph 26 – 30 of the High Court decision of **Samat v Qelelai** (supra). The passage is this;

> *[26] It is common ground that the plaintiff filed action for re-instatement and not an appeal against the Master's order. The defendant argues that the Plaintiff should appeal against the Master's order and not an application for re-instatement.*
>
> *[27] It is well established principle of law that a Master, Magistrate of a Judge cannot revisit or amend its own orders unless such orders were made per incuriam. In my mind, there are at least three types of rulings, orders, or judgments in a case made by either a Master, Magistrate or a Judge. i.e. (i)←unless orders → for procedural compliance; (ii) interlocutory or final orders, which are made on merit; and (iii) orders which are made in the exercise of statutory powers where matters are dealt summarily and not on merit.*
>
> *[28] No doubt that both High Court Act section 21 B and the High Court Rules O.59 r.2 clearly provides that a party aggrieved by the ruling of the Master must appeal from such ruling after obtaining leave from the Judge. However, in my mind, these appellate provisions only apply to situations where the Master had considered an application on merit, which in effect deems final in the hands of the Master.*
>
> *[29] ←Unless Orders →that are made in the exercise of inherent powers of the court and solely for the purpose of compelling parties on procedural compliance are not made on merits. Therefore in my mind, an ←unless order → made either by a Master, a Magistrate or a Judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not functus officio. This however would be in contrast to a ruling made by the Master in exercising the statutory powers under O.25 r.9 where matters could be struck out for want of prosecution. A decision made by the Master considering the objections placed before him on a show cause notice under O.29 r.9, is final in nature although not considered on the*

merits of the cause. Therefore, an aggrieved party would be required to appeal against such an order vis a vis an application to re-instate.

[30] For the foregoing reasons, in my judgement a plaintiff aggrieved by an ← unless order → could make an application for re-instatement before the same Judge, Magistrate or the Master to set aside the ←unless order →

I closely read the High Court decision in **Samat v Qelelei** (supra). In that case the application before the Court was for re-instatement of the Plaintiff's action, which was struck off by the Master for non-compliance of an unless order.

The case of "**Samat v Qelelai**", which was cited by Counsel for the Plaintiff certainly appears to carry him good way in his argument.

The passage relied upon by Counsel for the Plaintiff is unmistakeably clear to me. In my view, the case relied upon by Counsel for the Plaintiff is authority for the proposition that this Court has jurisdiction to re-instate an action which was struck off due to breach of a peremptory order.

I have no hesitation whatsoever in relying on the High Court decision in "**Samat v Qelelai**". Applying those principles to the present case and carrying those principles to their logical conclusion, I have no hesitation in concluding that the Plaintiff can make an application for re-instatement of the action and this Court is not *functus.*

I reject the first ground of objection as being wholly lacking in substance.

(9) Let me now move to consider the second ground of objection raised by counsel for the first and second Defendants that is to say that "*the application for reinstatement of the action is a contested hearing and thus it is not appropriate for a law clerk to depose in support of it*".

I acknowledge the force of the submission by Counsel for the first and second Defendants. **The swearing of affidavits by solicitor's clerks in contested proceedings should be a rare exception and the reason why the party is unable to depose ought to be explained.**

It is not disputed that the Plaintiff's application to re-instate the action is a contested proceeding.

I note that there is not a word in the law clerk's supporting affidavit explaining as to why the Plaintiff is unable to depose.

In the case of Dr. Ramon Fermin Angco v Dr. Sachida Mudaliar & Others, Lautoka High Court Civil Action No. 26 of 1997, the Court on page 3 stated;

> *"The Court will disregard the affidavit sworn by Yogesh Narayan. As a practice it is quite improper that law clerks swear affidavits on behalf of clients. Proceedings such as the present are matters in which the latter ought more appropriately to be involved. Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. It trespasses the demarcation between client and solicitor roles."*

I reiterate here the comments of Hon. Mr. Justice Jiten Singh in Deo v Singh [2005] FJHC 23; HBC0423.2004 (10 February 2005):

> *"The swearing of affidavits by solicitor's clerks in contested proceedings with alarming regularity before the courts. Arun Kumar says he was duly authorised by defendants to dispose the contents. There is no authority annexed to the affidavit. Order 41 Rule 1 sub-rule 4 requires affidavit to be expressed in "first person". The affidavit put before the court is more like a statement defence in its wording rather than being expressed in first person.* ***Swearing of affidavit by solicitor's clerk on contested matters should be a rare exception and the reason why the party is unable to depose ought to be explained".***

Master Robinson in Chand v Hussein [2009] FJHC 286; Civil Action 17. 2007 {14 October 2009) warned of the inherent danger in such practice:

> *"I do not wish to delve into the possible implications of solicitor's clerks swearing affidavits on behalf of clients except as to say that personal knowledge of the facts by the deponent is a necessary ingredient".*

In the case of **'Rupeni Silimuana Momoivlau v Telecom Fiji Ltd', Civil Action No. HBC 527 of 1992,** Hon. Justice Gerad Winter held;

> *The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:*

> ***"It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non contentious matters such as service of documents where not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr. Joji Boseiwaqa who appeared on instructions from the plaintiff at the relevant time. The court respectfully endorses the general thrust of dicta by Lyons J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No. HBC 323 of 1077 about the propriety of law clerks deposing affidavits".***

I have no hesitation whatsoever in relying on the above Judicial decisions in the instant matter before me.

Applying those principles to the present case and carrying those principles to their logical conclusion, I have no hesitation in concluding that the affidavit of the law clerk filed in support of the Plaintiff's Summons to re-instate the claim is unacceptable. **Thus, I uphold the second ground of objection**. Therefore, the whole of the affidavit is removed from the court record. The affidavit is worthless and ought not to be received in evidence in any shape whatever. This may leave the court with no option but to dismiss the Summons since there is no material on which the court can exercise its discretion to re-instate the action.

Parenthetically, there is here a point which I think that I should mention.

When dealing with the consequences of non-compliance of a Peremptory Order, the Court is not concerned with why the Peremptory Order made, but rather, why it was not complied with. **[See, Syed Mohammed Abdul Muthaliff v Arjan Bhisham Chotrari, (1999) 1 S.L.R. 361.]**

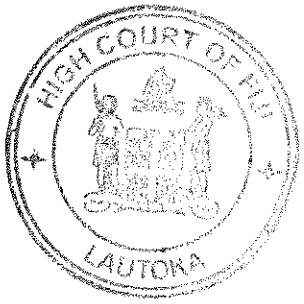
If the Plaintiff can clearly demonstrate by Affidavit evidence that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the Plaintiff to right which she would otherwise have enjoyed. Thus, the critical question is whether the Plaintiff's failure is intentional and contumelious? That is for another day!

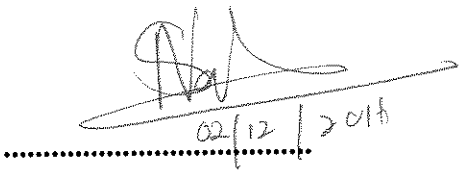
(10) To sum up, in view of the approach I have adopted in relation to the supporting affidavit of the law clerk, I have no alternate but to dismiss the Plaintiff's Summons. Thus, it will be at best a matter of academic interest only or at worst an exercise in futility to express my conclusion on the merits of the Plaintiff's application to re-instate the claim.

ORDERS

(1) The Plaintiff's Summons, dated 30th May 2016 is dismissed.

(2) The Plaintiff to pay costs of $500.00 (summarily assessed) to the first and second Defendants within 14 days hereof.





Jude Nanayakkara
Master

At Lautoka
02nd December 2016