

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 231 of 2014

BETWEEN : THE ATTORNEY GENERAL OF FIJI as the legal representative of the
Legislature Department pursuant to section 12 of the State Proceedings Act Cap 24
located at levels 4-8, Suvavou House, Suva.

PLAINTIFF

AND : PACIFIC CONSTRUCTION WORKS & BUILDING DESIGN COMPANY
LIMITED a company duly incorporated having its registered office at 14 Hunts
Place, Namadi Heights, Suva.

DEFENDANT

BEFORE : Master Vishwa Datt Sharma

COUNSEL : Ms. M. Lee with Ms Priya Lata for the Plaintiff
Non appearance for the Defendant

Date of Hearing: 13th August, 2017

Date of Ruling : 26th October, 2017

RULING

*[Notice of Motion seeking orders to strike out Defence and enter Judgment against
the Defendant pursuant to Order 24 Rule 16 of the High Court Rules, 1988
and under the inherent jurisdiction of this Court]*

A. INTRODUCTION

1. The Plaintiff filed this Notice of Motion and sought for the following Orders:
 - (i) That the Defence filed on 26th September, 2014 be struck out;
 - (ii) That Judgment be entered against the Defendant; and
 - (iii) That costs of this application and any other orders the Court deems just and fair.

Upon the grounds contained in the Affidavit of Ajay Singh sworn and filed in support of this Application.

2. This application is made pursuant to *Order 24 Rule 16 (1) (b) of the High Court Rules, 1988 and under the inherent Jurisdiction of this Honourable Court.*
3. The written submission was filed into court by the Plaintiff.

B. THE LAW

4. *Order 24 Rule 16 of the High Court Rules, 1988* deals with Failure to comply with requirement for discovery and provides as follows-

16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),-

(a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

C. BACKGROUND

5. The Plaintiff filed a Writ of Summons and the Statement of Claim against the Defendant on 13th August, 2014 and is alleging Breach of Contract against the Defendant which was entered into on 28th March, 2012 between the Plaintiff and the Defendant for the refurbishment of the Parliamentary Complex by the Defendant.
6. The Plaintiff is now seeking the following orders-
 - Damages in the sum of Three Hundred and Twenty Eight Thousand , one Hundred and Thirty Seven Dollars and Forty Cents (\$328,137.40);

- **Interest at 5% on the principal sum; and**

7. **The Defendant in his Statement of Defence denied the allegations but added that extra construction works were undertaken by the Defendant which were communicated to it by the person responsible for the overall project work.**
8. **Further, the Defendant has not been paid for all those extra work even after the Plaintiff was notified of it.**

C. ANALYSIS and DETERMINATION

5. **The issue for this Court to determine is whether the Defence filed on 26th September, 2014 be struck out and that the Judgment be entered against the Defendant with Costs?**
6. **The Writ of Summons together with the Statement of Claim was filed by the Plaintiff on 13th August, 2014 and served on the Defendant on 26th August, 2014.**
7. **The Acknowledgment of Service was filed by the Defendant on 05th September, 2014 and the Statement of Defence on 26th September, 2014 respectively.**
8. **The matter remained dormant for approximately one and a half years and the High Court Civil Registry on its own motion issued a Notice pursuant to Order 25 Rule 9 of the High Court Rules, 1988 seeking the parties to the proceedings to show cause why the matter should not be struck out for want of prosecution.**
9. **The Plaintiff upon receipt of the Notice, filed a Notice of Intention to Proceed pursuant to Order 3 Rule 5 of the High Court Rules, 1988.**
10. **By consent of parties to this proceeding, this court then converted the Order 25 Rule 9 Notice to the Summons for Directions, hence moving the matter forward.**
11. **By consent, Orders were accordingly granted on the Summons for Directions and the parties were directed to comply with those directions.**
12. **The Plaintiff whilst complying with the court orders, filed its Affidavit Verifying List of Documents (AVLD).**
13. **The Defendant sought further 14 days' time to file and serve its Affidavit Verifying List of Documents and the Court acceded to its request accordingly.**
14. **Hereafter, this matter was listed on three (3) consecutive dates (13th /26th June 2017 and 04th July, 2017), still the Defendant's Affidavit Verifying List of Documents was not filed and served. Further, there was no appearance by the Defence Counsel as well.**
15. **The Plaintiff's Counsel made oral applications pursuant to Order 24 Rule 16 of the High Court Rules, 1988 seeking an order to strike out the Defendant's Defence and order costs against the Defendant.**

16. This Court did not accede to their application and directed that the Plaintiff should file and serve an appropriate formal application.
17. The Plaintiff filed the Notice of Motion currently before court and served the same on Tuifagalele Legal, Solicitors representing the Defendant and an affidavit of Service to this effect filed in court.
18. On the returnable date of the Notice of Motion, the Defence Counsel was present in court and did not make any appearance in this matter on this Notice of Motion. It was noted that he only appeared in another case and left the court premises.
19. The Notice of Motion currently before court was scheduled for hearing on 31st August, 2017.
20. The Plaintiff's Counsel adopted the Affidavit in Support deposed by Ajay Singh and submitted that no Affidavit Verifying List of Documents was filed by the Defendant and the Plaintiff was of the view that the absence of the Defendant and the non-filing of the Affidavit Verifying List of Documents was clear evidence that the Defendant was not disputing the Plaintiff's claim.
21. In Landauer Ltd. -v- Comins & Co. (a Firm) The Times August 7, 1991 the Court of Appeal held that the test for an application to strike out under **Order 24 Rule 16**, since the decision of Mr Justice Millet in Logicrose Ltd. -v- Southend United Football Club (The Times March 5 1988) was whether there had been a real or substantial or serious risk that a fair trial was no longer possible. However if the court were satisfied that a fair trial was possible, but that there had been conduct which was contumacious such as the deliberate suppression of a document, the court could allow the application to strike out.
22. The Affidavit deposed by Ajay Singh and filed in support of the Plaintiff's Motion clearly sets out the breach of the court order by the Defendant for discovery in terms of **Order 24 Rule 16** which provides for 'Failure to comply with requirement for discovery'. However, it does not address the issue of whether failure to comply with the court order has rendered a fair trial impossible. Further, the Plaintiff does not allege that the Defendant is deliberately disobeying court orders or suppressing documents.
23. It is crystal clear from the perusal of the Court Record that to the present the Defendant has failed to comply with the orders made on the Summons for Directions on 09th March, 2017 of which he is well aware of since the Counsel representing the Defendant was present in court. Not only that, the Defence Counsel has failed to make appearance in court to represent the Defendant on three consecutive adjournments and has failed to file and serve any Affidavit Verifying List of Documents (AVLD).
24. This action by the Plaintiff was filed in 2014 and although I am satisfied that a fair trial in this case is still possible, but I find that the Defendant's conduct tent amounted to contumacious when the Defendant failed to comply with the Court Order of 09th March, 2017 in particular failing to file and serve his Affidavit Verifying List of Documents (AVLD).
25. Sir Nicholas Browne Wilkinson VC said in Christy Hunt -v- Davis and Anr. The Times January 24, 1990 in response to an application to strike out defence and counterclaim,

a totally relaxed approach to complying with court orders must not go unmarked by the disapproval of the court.


26. I find that due to the Defendant's laxity and non-compliance of the court order has prompted the Plaintiff to file this application and seek the orders as sought in the application.
27. Accordingly, for the aforesaid rational, I am inclined to **Strike out** the Defendant's **Statement of Defence** and enter **Judgment** against the Defendant for the liquidated amount as prayed for in the **Statement of Claim together with interest**.
28. In terms of **Costs** issue of the current application, there is no doubt that it is the Defendant who has failed in complying with the court order and has delayed the matter from moving forward for final determination accordingly.
29. There, the Defendant must pay costs to the Plaintiff summarily assessed at \$1,000 within 14 days timeframe.
30. In conclusion, I make the following orders accordingly:-

FINAL ORDERS

- (a) The Plaintiff's application succeeds.
- (b) The Defendant's Statement of Defence filed on 26th September, 2014 is Struck Out accordingly.
- (c) That Judgment is hereby entered for the liquidated Claim together with interest against the Defendant.
- (d) Costs is summarily assessed against the Defendant in the sum of \$1,000 to be paid within 14 days timeframe.

Dated at Suva this 26th Day of October 2017




VISHWA DATT SHARMA
Master of High Court, Suva

cc: Attorney Generals Chambers, Suva
Tuifagalele Legal, Suva