

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 180 OF 2006

**BETWEEN : SUNDAR LAL MANOHAR
PLAINTIFF**

**AND : CHIEF EXECUTIVE OFFICER FOR MINISTRY OF
HEALTH
ATTORNEY GENERAL OF FIJI
DEFENDANTS**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr D Singh [Daniel Singh Lawyers]
DEFENDANT : Ms Ali [Office of the Solicitor-General]
RULING OF : Acting Master Ms Vandhana Lal
DELIVERED ON : 20 September 2018

**INTERLOCUTORY RULING
[Order 25 rule 9 Summon to Strike Out]**

INTRODUCTION

1. A notice pursuant to Order 25 rule 9 and Order 3 rule 5 of the High Court Rules was issued dated 26 February 2018 for the parties to show cause why the matter should not be struck out for want of prosecution or as an abuse of the process of the Court. The said Notice was issued by the Court on its own motion.
2. The Plaintiff was allowed time to file his affidavit to show cause with liberty to the Defendant to reply.
3. The Plaintiff has on 04 June 2018 filed his affidavit to show cause and the Defendant has filed theirs on 27 June 2018.
4. Both parties have also filed their respective submissions.

HISTORY OF THE PROCEEDING

5. The matter was initiated by the Plaintiff when he on 02 May 2006 filed a writ of summon claiming damages for medical negligence. The writ was filed by his then solicitors Neel Shivam Lawyers.

6. The Court record shows that on or about the 28 July 2006 a statement of defence was filed by the Defendants. There was consent of the Plaintiff for late filing
7. On or about the 11 October 2006 Mr Singh filed a notice of change of solicitors.
8. On or about 02 November 2006 a schedule of special damages was filed followed by an application for interim payment which was filed on 13 November 2006 with a supporting affidavit.
9. The application for interim payment was listed in Court and called on 06 December 2006 however the date was vacated on Court's direction. Matter was next called in the Master's Court on 06 February 2007 and listed for hearing on 19 March 2007.

The orders of 06 February 2007 was:

- The defendants to provide all documents relevant for the purpose of the action. This was to be done by 26 February 2007.
 - Defendant was to file and serve its affidavit verifying list of documents by 26 February 2007;
 - Parties were to convene pre-trial conference and file minutes by 06 March 2007.
10. On 19 March 2007, counsel appearing for the defendants informed they have provided some documents and sort time.

The court ordered for the Defendant to provide disclosures or to convene a pre-trial conference with all evidence by 09 April 2007.

11. The next hearing was on 23 April 2007. This was again adjourned for parties to convene pre-trial conference. Mr Singh had informed that discovery was made.
12. The matter was called thereafter on 18 May 2007; 02 July 2007; 06 August 2007; 14 September 2007.
13. On 18 May 2007, the Court ordered for x-ray files to be made available to the plaintiff.
On 02 July 2007 Mr Singh informed that Court that the Plaintiff will go for another x-ray.
14. On 14 September 2007 the matter was taken off the cause list.
15. On or about 29 June 2009, Mr Singh filed a notice of intention to proceed. However the matter was left in abeyance.
16. On or about the first summons under order 25 rule 9 was issued on the Court's own motion. Said motion was dated 12 January 2011 and was listed for hearing on 11 March 2011.
17. On 09 March 2011 the Plaintiff filed its second notice of intention to proceed together with its affidavit verifying list of documents.
18. On 11 March 2011, the Court made orders for the Defendants to file and serve its affidavit verifying list of documents. Parties were directed to convene pre-trial conference in 14 days and 14 days to file copy pleadings and order 34 summon.

Matter was adjourned to 09 June.

19. The Defendants list of documents was filed on 08 June 2011.
20. On 09 June 2011 the Court was informed that pre-trial conference minutes were sent to the Defendants and the Court had made directives for the matter to take its normal course. Thus removing the matter from the list.
21. The matter was left in abeyance again until the Plaintiff on or about the 19 January 2015 filed its third notice of intention to proceed. However it did not take any actions thereafter.
22. As a result this application was issued by the Court on its own motion.

PARTIES SUBMISSION

23. According to the Plaintiff [paragraph 6 of the affidavit to show cause filed on 04 June 2018] there was substantial period of time wasted in trying to extract the medical reports and hospital records.

Sometimes in 2008; later on 30 June 2009 and 05 May 2010 his counsel wrote to the Attorney General's office proposing settlement.

On 07 September 2011, his counsel wrote to the Defendants informing them a pre-trial conference minute was forwarded and was not returned and also made a proposal for settlement.

His counsel again wrote to the Defendants on 07 October 2014 for settlement. A response was received on 23 March 2015 informing them that the Defendants are not in a position to settle and a hearing date be assigned.

Thereafter from 24 September 2015, the Plaintiff's counsel followed up on the minutes.

On 24 November 2015 his Counsel again wrote proposing settlement.

On 16 June 2016 a maxillofacial assessment was sent to the Counsel with instruction that the Defendants will not settle.

The reason for delay is due to the fact the Defendants are not responding to the minutes.

24. The Defendants state that the first proposal for settlement was written some 05 months after the filing of notice of change of solicitors. There is no explanation for the delay.

The pre-trial conference minutes were sent to Ministry of Health and not to the office of Solicitor-General the legal representative of the Defendants.

They further claim they have no record of the Plaintiffs affidavit verifying list of documents.

LAW

25. Order 25 Rule 9 of the High Court Rules reads:

(1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

- (2) *Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions*

26. This rule was introduced for case management purpose with the Court exercising its discretion with caution and would sparingly exercise in exceptional circumstances – deliberate and inexcusable non-compliance with a pre-emptory Court order.

DETERMINATION

27. In the case of **Gaffar Ahmed & Others v. Ligairi & Others** a Suva High Court Civil Action HBC 100 of 2003, Winter J dealt with an application by the 5th and 6th Defendants for an order that the Plaintiff's statement of claim be struck out on the grounds that it is an abuse of process of the court.

He made following comments on paragraph 10:

[10] *While there is a caution to be exercised when the court considers strike out applications and the jurisdiction should be sparingly exercised only in exceptional circumstances there comes a point in time when it should be exercised and in those plain and obvious cases the court should not hesitate to strike out for an abuse of process.*

28. Lord Woolf in **Arbuthnot Latham Bank v Trafalgar Holdings** [1988] 1 WLR 1426 at page 1437, said as follows:

"Whereas hitherto it may have been arguable that for a party on its own initiative to in effect 'warehouse' proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the Claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes."

29. **Birkett v James** [1978] AC 297 remains the leading authority for the approach to be taken on an application to strike out an action for want of prosecution, namely that the power should only be exercised where the court is satisfied.

Lord Diplock at page 308 laid out the principles as follows:

(1) that the default has been intentional and contumelious e.g. disobedience to a pre-emptory order of the court or conduct amounting to an abuse of the court, or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between them and a third party.

30. **In The Hancock Family Memorial Foundation Ltd v Fieldhouse [2005] WASCA 93; (2005) 30 WAR 398** the Court of Appeal identified five factors to be considered which will usually be relevant to the court's decision to exercise the discretion:

- *the length of the delay;*
- *the explanation for the delay;*
- *the hardship to the plaintiff if the action is dismissed and the cause of action left statute barred;*
- *the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay; and*
- *the conduct of the defendant in the litigation [99].*

They further stated:

They are things to which the court should have regard and they will usually be persuasive. But the absence of one or more of them from the credit or debit side of the checklist process will not necessarily determine the result. It will always be necessary for the court to stand back and ask: What does justice, in all the notions or senses of it that are relevant, require in the circumstances of this case?

Should the Action be dismissed for want of prosecution?

31. The first consideration is the delay by the Plaintiff in prosecuting the action.
32. Annexure A in the Plaintiffs affidavit is a letter by Mr Singh addressed to Ministry of Health dated 27 February 2007 seeking report on certain particulars.
- This letter is not addressed to the legal representative of the Defendants Solicitor-General's Office but to the Ministry of health.
33. Annexure B is also a letter dated 05 January 2007 addressed to Ministry of Health rather than the Office of Solicitor General enclosing draft copy of the pre-trial minutes.
34. Annexure C is a letter addressed to the Attorney General's office. On the second paragraph of the letter the counsel mentions that on 14 September 2007 at the plaintiff's behest the matter was taken off the cause list to discuss out of court settlement.

I note this letter was written on 28 May 2008 some 08 months after 14 September 2007.

35. Annexure D is a letter from the Attorney-General's Office dated 11 June 2008 denying liability and not willing to commit to any settlement.
36. Yet again MR Singh wrote letters offering settlement as follows: 30 June 2009; 05 May 2010; 07 September 2011; 16 August 2012; 07 October 2014.
37. In the letter of 07 September 2011 Mr Singh refers to a letter of 06 July 2011 via which a pre-trial conference minute was sent.

However the Plaintiff has not shown to this Court copy letter dated 06 July 2011.

38. Via its letter dated 23 March 2015 [annexure J] the Defendants Counsel again informed the Mr Singh that they are not in a position to settle the matter and request for hearing date.

39. Yet again Mr Singh wrote a letter on 24 September 2015 [annexure K] for settlement and informing the Defendants counsel he had written a letter on 08 June 2011 enclosing a draft pre-trial conference minute.

However the Plaintiff have not disclosed any letter dated 08 June 2011.

40. Another letter was written dated 24 November 2015 [annexure L] offering settlement.
41. The Defendants Counsel wrote on 16 June 2016 [annexure M] informing that considering the recent oral and maxillofacial impairment assessment the Defendant does not wish to settle. Tis assessment was carried out on 06 June 2016.
42. Mr Singh yet again wrote for settlement on 28 November 2016.
43. The Defendants via their counsel again reiterated that settlement was not an option.
44. The Defendants have since 2008 denied liability and not opted for settlement.
45. The Plaintiff blames that there was delay in getting reports. However the Court was informed on 23 April 2007 that discovery was done.
46. The last assessment of the Plaintiff was done on 06 June 2016 and the Defendants Counsel made is clear that they do not wish to settle the matter. Yet again the Plaintiff failed to move the Court for trial.
47. Time and again there was delay by the Plaintiff's Counsel to move the matter forward for trial and this only leads to confirm there was inordinate delay by the Plaintiff.
48. After filing its third notice of intention to proceed on 19 January 2015, the Plaintiff has failed to provide for a reasonable explanation not moving the Court. In failure of providing a satisfactory explanation for the delay this Court can only infer that the delay was deliberate.
49. Since the inception of the matter on 12 May 2006, the Plaintiff took no active step in the proceedings as follows:

- 14 September 2007 when the matter was taken of the list until 29 June 2009 when a notice of intention was filed [gap of 01 year and 09 months];
- From 29 June 2009 until 12 January 2011 when the first order 25 rule 9 summons was issued by the Court [gap of 01 year and 07 months];
- From 09 June 2011 when matter was removed from the list until 19 January 2015 when a notice of intention to proceed was filed [gap of 03 years and 07 months];
- From 19 January 2015 until 26 February 2018 when this application was issued by the Court [gap of 03 years].

50. In failure to provide a reasonable explanation why no steps were taken to move the Court to enter the matter for trial the only inference that can be drawn is that the Plaintiff has not interest in actively pursuing this matter.

And this I find amounts to abuse of process.

51. In his offer letters for settlement Mr Singh claims that the Plaintiff is of age and “is penniless and in financial desperation”.
52. The first summons by the court should have been a warning for the Plaintiff to enter the action for trial. However there was not action taken in the last 03 years in addition to the other 06 years or so gives rise to inference that the loss of action is not a serious detriment to him.
53. Further I note that the Defendants have merely acquiesced in the Plaintiff’s delay.

They have complained about the delay in getting the matter ready for trial but have not shown in their affidavit how they will be prejudiced if the Court allows the action to stand.

Though in their submission [paragraph 20] they submit that the events took place on 19 January 2004 and with the passage of time the recollections of witnesses has naturally waned giving rise to a substantial risk that a fair trial will be impossible.

According to them at this stage the matter is not ready for trial and they also contemplate that the trial may be conducted in late 2019 which means that the Court would be considering evidence by the witnesses recollecting events that occurred in 2004 some 14 years later.

54. It is not known to this Court if the Dental Officer who attended the Plaintiff at Nausori Dental Clinic is still available and whether Dr. Ovini Masi and Dr. Nikasio Koroï whose reports are annexed to the affidavit are still available as witnesses.
55. I find that having regard to all of the matters discussed above, balance of justice favours in dismissing the action. Furthermore it is in public interest that the Court does not permit the matter which the plaintiff have on three occasion left in abeyance to take up the valuable and important time of the Court and delay access to Court for other parties who act promptly in pursuing their claims.

FINAL ORDER

56. The Plaintiff’s action will be dismissed for want for prosecution pursuant to Order 25 rule 9 of the High Court Rules.
57. There is no order for costs made as the Defendant on their part also failed to move the Court at any given time.




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Vandhana Lal [Ms]
Acting Master
At Suva.