

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**ORIGINAL JURISDICTION**

**CASE NUMBER:** ERCC 02 of 2012

**BETWEEN:** **CAPTAIN RUFUS D'CRUZ**  
**PLAINTIFF**

**AND:** **CARPENTERS FIJI LIMITED**  
**DEFENDANT**

Appearances: Mr. S. Nandan for Plaintiff.

Mr. E. Narayan for the Defendant.

Date/Place of Judgment: Monday 22 November 2021 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

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**RULING**

*(Application for Reinstatement)*

**A. Catchwords:**

*Employment Law –plaintiff was asked to show cause why the matter should not be struck out for want of prosecution – plaintiff failed to appear and show cause – matter struck out – plaintiff subsequently appears and asks for a reinstatement – when a matter is struck out under Order 25 rule 9 for failing to show cause, the aggrieved party cannot apply for reinstatement- the right lies in an appeal against the said order.*

**B. Cases:**

- 1. Trade Air Engineering (West) Limited & Others v. Laisa Taga & Others, Civil Appeal Number ABU 0062 of 2006 (Court of Appeal Fiji).*

**C. Legislation:**

**1. The High Court Rules 1988 ("HCR"): Order 25 Rule 9**

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1. The plaintiff has filed an application to reinstate the matter which I had struck out on 23 July 2019 as the plaintiff failed to appear in Court and show cause why the matter should not be struck out for want of prosecution.
2. I made the order to show cause on 24 April 2019. After I had made the order to show cause, the plaintiff file the notice of intention to proceed with the matter. The notice was filed on 14 May 2019. However, the plaintiff failed to appear in Court on 23 July 2019 to show cause.
3. The order to show cause why the matter should not be struck out was made on my own motion due to the plaintiff's excessive delay to prosecute this matter.
4. Before I deal with the application for reinstatement, it is essential that I outline the brief history of this matter. I will only outline the essential facts. This is an action that was filed on 24 April, 2012. A reply to defence and defence to counter-claim was filed on 3 May 2013. One may wonder why this was done after a year. For sake of completeness I must say that there was default judgment entered in this matter for the balance unpaid sum on the counter-claim.
5. The default judgment was set aside by consent on 15 April 2013 on the condition that the plaintiff deposits a sum of \$11,017.00 in the High Court within 14 days.
6. Upon the filing of the reply to defence and defence to counter-claim, the plaintiff filed a summons for directions on 15 January 2014. Since the Summons for Directions did not seek any orders for Pre-Trial Conference, Mr. Nandan withdrew his summons to file another one. I then ordered on 21 February for Mr. Nandan to file a fresh summons seeking directions for all the orders including compliance of order 34.
7. Following my orders, a fresh summons for directions was filed and the summons still did not require any orders for Pre-Trial Conference. When the Summons was called in Court on 3 July

2014, both counsel for the parties agreed for order in terms of the same, the effect of which was that both parties did not see a need for any Pre-Trial Conference.

8. If there was a need for Pre-Trial Conference then the Summons for Directions would have sought that order. Be that as it may, when there was no indication that a Pre-Trial Conference was preferred, I gave order in terms of the summons for directions.
9. The effect of my order of 3 July 2014 was that:
  - a. *The plaintiff and defendant were to file and serve affidavit verifying list of documents within 14 days.*
  - b. *Thereafter the parties had to inspect the documents.*
  - c. *The trial was to be fixed within 60 days.*
10. Upon compliance of the orders of 3 July 2014, it was expected that the plaintiff would move to file a summons to enter the action down for trial.
11. I must say that as per my orders of 3 July, discovery and inspection of documents should have been completed by mid-August 2014. The defendant filed its affidavit verifying list of documents on 18 July 2014. That was done on time. The plaintiff did not comply with the order until 08 April 2015.
12. The plaintiff should have filed his affidavit verifying list of documents by 18 July 2014 but he was well out of time. There was delay of almost 9 months to file a simple affidavit verifying list of documents.
13. Following the filing of the affidavit verifying list of documents, the plaintiff was supposed to file a summons to enter the action for trial but there was no action from April 2015 until 14 March 2019.

14. The plaintiff took no action for almost 4 years when suddenly it moved the court with an application filed on 14 March 2019 to dispense with the Pre-Trial Conference in the matter. The plaintiff's application asking for dispensation of the Pre-Trial Conference was struck out on 24 April 2019 as there was no order sought or granted for Pre-Trial Conference despite my directions to require an order. I may repeat that the parties showed no interest to have a Pre-Trial Conference.
15. If the plaintiff wanted to have a Pre-Trial Conference then the application should have been made to compel the defendant to attend a Pre-Trial Conference. The application for dispensation was meaningless when it was clear that Pre-Trial Conference was not intended. Even if it was intended and an order not sought, the application should have been made before expiration of 60 days from the order on summons for directions as the parties were ordered to enter action down for trial within 60 days.
16. After striking out the plaintiff's application to dispense with the Pre-Trial Conference on 24 April 2019, I ordered the plaintiff to show cause why the matter should not be struck out for want of prosecution. The matter was assigned another date for the plaintiff to show cause. The plaintiff did not appear and show any cause when the matter was struck out.
17. I must say that it is now 9 years since the filing of the action and the matter is still lying in the system. I do not think that it should have taken this long to prosecute this matter. Be that as it may, I now come to the application for reinstatement.
18. I made an order to show cause under Order 25 Rule 9 as that that provision gave me the powers to act on my own motion. Order 25 Rule 9 states that:  
  
*“(1) If no steps have been taken in any cause or matter for six months then any party on application or the Court on 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”.*

19. Indeed there were no steps taken in the matter for so many years after discovery and inspection took place. The term “steps” means steps for the progress of the matter and not a mere application to activate the file such as filing a notice of intention to proceed or an application such as was made in this case to dispense with the PTC.

20. I must also say that the registry should have pulled this file out and listed it before me under Order 25 Rule 9 of the HCR. That is the standard practice when the files are in the system for ages and not moving.

21. Now to the application for reinstatement. When an application is struck out under order 25 Rule 9 of the HCR, the proper cause is to appeal the decision and not to ask for reinstatement. The order to show cause was made under Order 25 Rule 9 of the HCR (*see Trade Air Engineering (West) Limited & Others v. Laisa Taga & Others Civil Appeal Number ABU 0062 of 2006 (Court of Appeal Fiji)*).

22. I do not find it proper to make any comments on the grounds raised by the plaintiff for reinstatement as I do not have the jurisdiction to consider the application. I therefore make the following orders:

(a). *The application to reinstate the matter cannot be made in the High Court as the matter was struck out under Order 25 Rule 9. The application is dismissed.*

(b). *The defendant shall have costs of application in the sum \$550.00.*

(c). *The defendant must now show cause why its counter-claim for a sum of \$11,017.00 should not be struck out under Order 25 Rule 9 as the defendant too could have filed an application to strike out the claim and entered its claim down for trial.*

- (d). *I will be consulting the parties about what should happen to the monies paid by the plaintiff in the High Court. There are two sums that were ordered to be paid. One amount of \$11,017.00 represents the amount on the counter-claim which was paid in High Court as a condition for setting aside the default judgment and the second amount of \$5,000 represents security for costs which the plaintiff was ordered to pay in the proceedings.*

*Anjali Wai*

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*Hon. Madam Justice Anjala Wai*

*Judge*

*22. 11. 2021*



**To:**

1. *Reddy and Nandan Lawyers for the Plaintiff.*
2. *Patel Sharma Lawyers for the Defendant.*
3. *File: ERCC 02 of 2012.*