

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 290 of 2018

BETWEEN:

RODERICK TWINBERROW and REENA TWINBERROW
PLAINTIFF

AND:

NRW MACALLAN (FIJI) LTD
1ST DEFENDANT

AND:

GRACE ROAD FOOD COMPANY LTD
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Kohli & Singh Suva Barristers & Solicitors for the Plaintiff
Munro Leys Solicitors for the 1st Defendant
Mitchell Keil Lawyers for the 2nd Defendant

Date of Hearing:

04 December 2023

Date of Ruling:

02 August 2024

RULING

01. The Plaintiff filed the current summons on the 03/06/2022 with the supporting affidavit of Shahista Ayesha Muskan Sen, an associate of the Plaintiff's solicitors and moved the court for the following orders/reliefs,

1. *That the order of the learned Acting Master of the High Court pronounced in Court on the 31/05/2022 be set aside and/or vacated,*
2. *That the Plaintiff's Amended Statement of Claim filed on the 30/10/2020 be reinstated to the cause list.*
3. *That Orders of the learned Acting Master of the High Court pronounced in Court 21/03/2022 be further extended,*
4. *That the Plaintiff's be granted leave to pursue this matter unconditionally,*
5. *That costs of this application be costs in the cause.*
6. *For such further and other orders that this Honorable Court deems just and fair to make in the circumstances.*

02. On the 21/03/2022, the previous Master of the Court, *inter alia* made the following orders,

"Orders of 16/12/2021 extended as follows,

- I. *Discovery by parties (not done) be completed by 4pm 31/03/2022,*
- II. *PTC to be convened and minutes to be filed by 4pm 29/04/22 4.00pm. If a date is not agreed upon, Plaintiffs solicitors to file and serve a notice requesting PTC by 4pm 31/03/2022.*
- III. *If PTC is not convened and minutes filed as above, PTC deemed to be dispensed with.*
- IV. *In any event Plaintiff to file and serve Order 34 Summons, Copy Pleadings and Agreed Bundle of Documents (if any) by 4.00pm on 20/5/2022.*
- V. *Unless Copy Pleadings and Order 34 Summons is filed by 4.00pm on 22/05/22, the matter shall stand struck out.*
- VI. *Mention on 31/05/2022 at 10 am to check on compliance."*

03. When the matter was called before the Court on 31/05/2022, it was evident that the Plaintiff failed to comply with the orders made on 21/03/2022. Master had then inquired into the failure by the Plaintiff to comply with the orders and the counsel for the Plaintiff had submitted to the Court that the discovery was completed and that the Plaintiffs solicitors are awaiting instructions from the Plaintiff for an amendment of the claim.

04. The Master had then inquired on the position of the Defendants in extending the previous orders where counsel for both the Defendants had left it open to the Court to make a suitable order.

05. Having heard all the parties, the Master then made the following order on 31/05/2022.

“Orders stays. Make formal application.”

06. Order of the Court made on 31/05/2022 have been sealed on 03/06/2022. Sealed orders of the Court read as follows,

“ORDER

**BEFORE THE ACTING MASTER LAL IN THE HIGH COURT ON
TUESDAY THE 31ST OF MAY 2022**

UPON HEARING Ms. Singh. A of counsel for the Plaintiff, Mr. Naidu. D of counsel for the 1st Defendant and Ms. Kumar. S of counsel for the 2nd Defendant.

IT IS HEREBY ORDERED:

- 1. That the Plaintiff’s action is struck out due to non-compliance of orders made on 21st March 2022.*
- 2. That the Plaintiff can make formal application.”*

07. Plaintiff then filed its current summons for re-instatement on 03/06/2022 with a Supporting Affidavit from Shahista Ayesha Muskan Sen, who is apparently an employee of the Plaintiff’s solicitors.

08. Although she claims to have personal knowledge of the contents in the affidavit, it is unclear and highly doubtful as to what personal knowledge she would possess of the contents of the Affidavit as this person is neither the Plaintiff nor the solicitor who had appeared for the Plaintiff on the day the ‘unless orders’ were made or on the day the matter was struck out for non-compliance.

09. She has averred facts in her Affidavit of what had transpired in Court on 31/05/2022 and what submissions the counsels made in Court on that day. She further goes on to aver facts, allegedly submitted by the counsel for the Plaintiff to the Court on 31/05/2022 which are obviously false and misleading. At paragraph 7 of the said Affidavit it is stated,

“7. That counsel for the 1st and 2nd Defendants relied on the courts discretion when our Solicitor informed the court that orders of the court were not complied with because discovery stage had taken a bit of time as there were various volumes and/or pages of documents to be perused before parties could actually attempt pre-trial conference.”

10. She has further averred that although the records at Plaintiffs solicitors showed that there were unless orders made by the Court, an email from the 1st Defendants solicitors stating otherwise and advising that ‘unless orders’ are yet to be made, have led them to *‘utilize time in perusing the bundle of documents with our clients in detail before attempting the pre-trial conference’*.
11. Both Defendants have opposed the Plaintiffs application for re-instatement. 1st Defendant has objected on a point of law and thus filed only a written submission in opposition. 2nd Defendant has filed an Affidavit in Opposition on 23/08/2022.
12. As per the Affidavit in Opposition filed on behalf of the 2nd Defendant, it is submitted that the discovery stage only took 3 to 4 days and the Plaintiff had time from 04/04/2022 to 31/05/2022 to progress the matter. It is also submitted that the draft PTC minutes had been circulated by the Plaintiff on 15/11/2019 and the solicitors for the 2nd Defendant had already submitted their comments on the draft PTC minutes by 13/02/2020.
13. The 2nd Defendant has also submitted through its Affidavit that since this is a matter initiated in 2018, the 2nd Defendant is being prejudiced as a result of the passage of time and availability of witnesses.
14. Plaintiff, in reply, filed an Affidavit sworn by himself on 08/09/2022. He too has averred that his counsel on the 31/05/2022 *“informed Court that discovery had taken up some time in this matter as parties had massive bundle of documents to read and go through”*.
15. Plaintiff has confirmed in his Affidavit in Reply that 1st Defendant’s bundle of documents had been received on 01/04/2022 and the 2nd Defendants bundle on 4/04/2022. He further claims that there were extensive number of documents, and he went through all these documents till 31/05/2022 with his solicitors.
16. Plaintiff has also claimed that he is 79 years old and that he got severely ill on 19/04/2022 and had annexed a medical report to support the same. However, as per the medical report dated 15/06/2022 by one Dr. Lorina Chandra, it is stated that the Plaintiff had presented himself on 19/04/2022 with a brief chest discomfort and after examination it was revealed that he had suffered from a heart attack a week prior.

17. I find this medical report to be rather amusing. The Plaintiff himself claims that he ‘fell severely ill on the 19/04/2022’ and as per the doctor the Plaintiff had presented himself to the clinic on the 19/04/2022 ‘with a complaint of brief chest comfort’. Yet, the medical report goes on to further state that the Plaintiff had suffered from a heart attack a week ago. However, a week ago as per the facts averred by the Plaintiff himself, he was busy going through the documents received in discovery with his solicitors.
18. Be that as it may, it is more surprising to note that the counsel for the Plaintiff who appeared in Court for the Plaintiff on 31/05/2022 or the solicitor who had sworn the Affidavit in Support on behalf of the Plaintiff had considered it important or noteworthy to inform the Court that the Plaintiff had suffered from a heart attack and thus the reason for the non-compliance and/or delay in compliance of the Court’s orders.
19. The 1st Defendant’s objection on this application for reinstatement is that it is a legally misconceived and/or erroneous application as that this Court, in the circumstances of this case, has no jurisdiction to entertain an application for re-instatement and the proper course for the Plaintiff was to appeal the previous Master’s decision and/or orders made on 31/05/2022.
20. Counsel for the 1st Defendant in his written submissions and in oral submissions made during the Hearing, correctly pointed out to the Court that this application had been made only under the inherent jurisdiction of this Court and that there’s no rule in the High Court Rules or any other provision of law that enables a party to make an application for re-instatement in the circumstances of this case.
21. It was further submitted on behalf of the 1st Defendant that, the nature of this application is such that the previous Master on 31/05/2022 had considered, *inter partes*, the question of whether to extend the ‘unless order’ or not, which was made on the previous day, and thereupon, decided not to extend the ‘unless order’, which effectively struck out the Plaintiff’s cause.
22. It is clear from the record, as per the minutes of the previous Master made on 31/05/2022, that the Plaintiff and as well as the Defendants had been heard through their respective counsels in Court prior to the Master making the decision not to extend the ‘unless order’.
23. Counsel for the 1st Defendant therefore submits that this application will have the effect of this Court revisiting its own decisions/orders (made after hearing all the parties on 31/05/2022) and sitting in a revisionary or appellate capacity, if this application is to be entertained. The counsel for the 1st Defendant respectfully submitted that this is not a situation that could be covered under the inherent jurisdiction of the Court.

24. Counsel for the 1st Defendant has submitted to the Court that the circumstance of this case needs to be differentiated from the facts of a number of cases in which the High Court has held in favour of 're-instatement' of a case that was struck out following an unless order.
25. Counsel for the 1st Defendant quite eloquently pointed out to the Court, by going into the facts in most of such cases, that in such cases, where the High Court had favored a 're-instatement', the order for striking out the claim following the unless order had been made *ex parte* in the absence of the Plaintiff and/or its counsel in Court, on the day the order for striking out the claim was made. The counsel has therefore rightfully appealed to this Court to distinguish such case authorities, as the order striking out the current case was made *inter partes* by the previous Master, upon hearing the Plaintiff and as well as the Defendants on the issue of non-compliance.
26. The 2nd Defendant on the other hand has submitted that the Plaintiff have been guilty of continuous non-compliance of Court orders and that the conduct of the Plaintiff has caused a lengthy delay in these proceedings, which in turn is highly prejudicial to the Defendants in their right to duly defend the Plaintiffs claim.
27. The Writ of Summons and the Statement of Claim in this case had been filed on 27/09/2018. 2nd Defendant had filed its Statement of Defence on 24/10/2018 and the 1st Defendant on 29/10/2018. Reply to the Statement of Defence have been filed on 09/11/2018. Summons for Directions was filed on 15/11/2018. 1st Defendant then filed a Notice under Order 16 Rule 18 for indemnity against the 2nd Defendant on 10/12/2018. The 2nd Defendant had defended the claim by the 1st Defendant against them and the relevant pleadings have been duly filed by both the 1st and 2nd Defendants.
28. Orders of the Court on the Plaintiffs Summons for Directions were initially made on 21/01/2019. Plaintiff filed its AVLD on 31/01/2019 and the 1st Defendant on 11/02/2019. Orders on the summons for directions were extended on 13/03/2019.
29. Plaintiff on 04/06/2019 filed a Notice of Motion for leave to serve interrogatories to the 2nd Defendant. The Court made orders on the same on 11/06/2019.
30. The 1st Defendant filed an Affidavit verifying supplementary list of documents on 11/06/2019 and the 2nd Defendant then filed its AVLD on 04/11/2019.
31. The orders made on Summons for Directions were extended time to time by the Court and on 04/12/2019, the Court made orders for PTC and filing of Order 34 Summons and Copy Pleadings in 14 days thereon.

32. These orders were then extended on 10/02/2020 with an unless order to strike out the pleadings in failure to comply. But again, on the 12/03/2020 the orders were extended as the Plaintiff had failed to comply with the same.
33. However, instead of complying with the orders, the Plaintiff proceeded to file a Supplementary AVLD on 14/09/2020 and then a Summons to Amend the Statement of Claim on 14/09/2020. The Court then made orders in turn on 22/10/2020 by consent.
34. Plaintiff then filed its Amended Statement of Claim on 30/10/2020 and the 1st Defendant filed the Amended Statement of Defence on 05/02/2021 and the 2nd Defendant on 26/02/2021.
35. As the Plaintiff had failed to file its Reply, the Court extended the time to file Reply on 12/04/2021 and thus the Plaintiff filed its Reply on 15/04/2021.
36. From 15/04/2021 till 10/12/2021 there was no progress in the matter and the Plaintiff thereupon filed a Supplementary AVLD on 10/12/2021 after 07 months of inaction.
37. On 16/12/2021 the Master again made orders for discovery, PTC and filing of Order 34 Summons and Copy Pleadings. However, the Plaintiff failed to comply with these orders and the orders were again extended by Court on 21/03/2022 with another unless order being made by the Court.
38. The Plaintiff by the next date had failed to comply with the orders of the Court and on 31/05/2022, submitted in Court that the discovery was completed and that the Plaintiffs solicitors are awaiting instructions from the Plaintiff to file for an Amendment of the Statement of Claim. It was this day that the Master having heard the Plaintiff and the counsels for the Defendant, struck out the claim of the Plaintiff pursuant to the unless order.
39. Counsel for the 2nd Defendant had highlighted the long delay in these proceedings and that such delay is bound to cause prejudice to the Defendants due to the movement of the witnesses and effects of passage of time on the memory of the witnesses. The counsel has further highlighted that the Defendant's constitutional rights guaranteed under sec. 15 of the Bill of Rights Chapter in the Constitution of Fiji is being infringed due to the conduct of the Plaintiff in this case.
40. Plaintiff on the other hand relies on the ground of having to go through a hefty bundle of documents and suffering a heart attack during the same time as an excuse for the delay and effectively submits that as the matter was not heard on merits the Plaintiff has a right to have the matter reinstated and be heard on merits.

41. Counsel for the Plaintiff has also submitted that the court is not functus at this stage as the orders were not made after the matter was heard on merits. In support of the Plaintiffs stance, the counsel for the plaintiff has relied on the decisions in the following case authorities, namely *Thomas (Fiji) Ltd v. Bank of Hawaii* [2006] FJCA 77; *ABU0052.2006* (24 November 2006), *Whytcross v Achari* [2015] FJHC 197; *HBC51.2013* (18 March 2015) and *Samat v Oelai* [2012] FJHC 844; *HBC201.2002L* (30 January 2012) and the celebrated English authority of *Brikett v James* (1987) AC 297.
42. Counsel for the 1st Defendant has mainly relied upon the Fiji Court of Appeal case of *Trade Air Engineering (West) Ltd and 3 Others v Laisa Taga and 2 Others* [2007] FLR 88, *Thomas (Fiji) Ltd v. Bank of Hawaii* [2006] FJCA 77, *Suresh Prasad v Housing Authority* [2014] FJCA 41, *WM Angus (Fiji) Ltd v Ram Karan* [2008] FJHC 165, *Avinesh Ashwin Prasad v Fiji Development Bank* [2013] FJHC 152, *Dhirendra Singh v Atendra Singh* [2016] FJHC 1060.

43. It is clear that in the High Court decisions in Fiji, there are two lines of authorities on the proper course to be taken once a matter is struck out for non-compliance of an ‘unless order’. There are conflicting decisions to suggest that there must be an appeal against the order for striking out, whilst the others hold, an application for reinstatement must be made before the same court which struck out the matter.
44. Inoke J, having referred to several High Court cases on this point came to a conclusion in **Peters v Seashell @Momi Ltd** [2012] FJHC 868; HBM09.2011L (15 February 2012) and held that:

*“There appears to be much confusion as to whether the striking out or dismissal of an action pursuant to an “unless” order where no hearing on the merits took place should be appealed or whether it should be the subject of an application to re-instate before the Master or Judge that made the order. Recently, several decisions of this Court were delivered on the question: **Westmall Ltd v CUL (Fiji) Ltd** [2010] FJHC 448; HBC175.2001L (6 October 2010); **Nakesu v Lakoiniusiladi** [2012] FJHC 828; HBC113.2009 (27 January 2012); **Samat v Oeelai** [2012] FJHC 844; HBC201.2002L (30 January 2012); **Gulf Seafood (Fiji) Ltd v Native Land Trust Board** [2012] FJHC 853; HBA28.2011 (2 February 2012); **NBF Asset Management Bank v Krishna** [2012] FJHC 835; HBC129.1999L (2 February 2012). The consensus is that the proper procedure is an application to re-instate rather than an appeal.”*

45. In the case of **WESTERN LAND DEVELOPMENT AND INVESTMENT COMPANY LIMITED v ANIL KUMAR & OTHERS** Civil Action No. 214 of 2015 (Ruling on 23/09/2022), Master Mohamed Azhar (as he then was) stated thus.

“The court, which has power to extend the time for compliance of its order, must have the power to reverse the sanction it imposed when proper cause is shown and it is proved that, there is no real risk that the particular non-compliance would render fair trial impossible, because the purpose of imposing a sanction is to control the proceedings and not to summarily oust a party from the case without hearing his or her grievance in merits. The court imposes a conditional order exercising its inherent power to regulate its procedure and to protect its proceedings from being abused. Similarly, the same court has the inherent power to extend such order or to reverse and/or cancel it when proper cause is shown. As a result, the court which imposed a conditional order is not functus officio and application for reinstatement, with proper justification for default, can be made before the same court to review its order. Accordingly, when a claim or defence is struck out due to an ‘unless order’, the proper procedure to be followed by the party at default is to make an application for reinstatement and also to move the court for extension of time for compliance of the order of the court.”

46. I have extensively considered the case authorities relied upon by the parties in support of their respective arguments. I have no reservation on the fact that the High Court shall have inherent jurisdiction and/or inherent powers to regulate its own process. However, I have no hesitation, whatsoever, in holding that such inherent jurisdiction and/or inherent powers shall not extend to a limit that a Court itself may exercise such power to revisit its own orders and to revise such orders at a later stage, unless in very exceptional and recognized instances in law. The High Court, in my view, clearly has no such power to revisit its own orders, which could be included in its arsenal of inherent jurisdiction or powers, unless statutorily recognized in Fiji.
47. As the counsel for the 1st Defendant has correctly pointed out, the only exception to the above principle is where the Court had made *ex parte* orders in the absence of a party. In such a scenario, the Court is duly empowered as per Order 32 Rule 6 of the High Court Rules to set aside such *ex parte* orders.
48. Having carefully considered the case authorities for and against the re-instatement of a cause which is struck out on an unless order, I hold that the correct position in law is duly set down in *Trade Air Engineering (West) Ltd and 3 Others v Laisa Taga and 2 Others* where it was held,
- “[13] Although the judge rejected the Appellants’ submissions, he did give leave to them to apply for the action to be reinstated. Mr. Haniff was unable to refer us to any provision in the rules granting the court power to reinstate an action struck out in these circumstances. Generally, a party’s only remedy following the striking out of its action is appeal.”*
49. This is more so in the circumstances where the Court has heard all parties before making its orders to strike out and thus making the order not an *ex parte* order and thus giving no room for the Court to revisit its own order at a later stage.
50. In considering the effects of the orders sought in the Plaintiffs application, it is clear to the Court, that this Court is expected to revisit the previous Master’s orders made on 31/05/2022 and to revise the same on the grounds submitted on behalf of the Plaintiff. This, in fact, is a request for the Court to exercise a revisionary or an appellate power over its own decision and/or orders and to have them set aside. The Court’s considered view is that this is *ultra vires* to any recognized power of the Court.

51. Notwithstanding the above finding, I shall further proceed to consider the merits of this application and find, firstly that the Affidavit in Support of Shahista Ayesha Muskan Sen, cannot be accepted as proper on the basis that she is not a person who has personal knowledge of the contents therein. As pointed out at paragraph 9. of this Ruling, she has clearly deposed false and/or misleading facts in her Affidavit. I do not find her to have any personal knowledge of the matter and the contents she had sworn in the said Affidavit.
52. In the case of **RANJIT SINGH v LAUTOKA GENERAL TRANSPORT COMPANY LIMITED & OTHERS**; HBC260.2006L (05 June 2020), Master Azhar (as he then was) held,

“08. *Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit (Vodafone Fiji Ltd v Pacificconnex Investment Ltd [2010] FJHC 419; HBE097.2008). Despite the courts, on numerous occasions, had dealt with several objections and issues in relation to the affidavits filed in civil suits, some issues are still being raised on admissibility and regularity of affidavits. Kalabo Investments Ltd v New India Assurance Co Ltd [2019] FJCA 210; ABU0010.2019, decided on 4 October 2019 is the latest case in which the Fiji Court of Appeal dealt with such an issue. Thus, it has become necessary to deal these issues along with the objection taken up against the impugned affidavits in this case. The Order 41 of the High Court Rules deals with the matters connected with the affidavits that are filed in civil suits. Though the rules do not directly state who can depose an affidavit, rule 5 provides for the contents of an affidavit which can give a clear idea as to who can depose it. The rule 5 reads:*

Contents of Affidavit (O.41, r.5)

5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. (Emphasis added).

53. In **Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and Others** [1984] 1 WLR 271, [1984] 1 All ER 296, Peter Gibson J explained the nature, operation and effect of paragraph 2 of rule 5 of Order 41 and held at page 305 that,

It is obvious from r 5(2) itself that it operates as an exception from the primary rule of evidence stated expressly in Ord 41, r 5(1) that a person may only give evidence as to 'facts', which he 'is able of his own knowledge to prove'. Rule 5(2), by including statements of information or belief, plainly allows the abduction of hearsay. It also allows a statement of belief, that is to say an opinion but in its context that belief must be that of the deponent, and such statements will have no probative value unless the sources and grounds of the information and belief are revealed. To my mind the purpose of r 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief. What r 5(2) allows the deponent to state that he has obtained from another must, in my judgment, be limited to what is admissible as evidence.

54. Having duly considered the above legal provisions and the authorities cited, I find that the Supporting Affidavit of Shahista Ayesha Muskan Sen cannot be accepted and that it should be struck out for irregularity.
55. Moreover, I do not find the reasons given on behalf of the Plaintiff to explain the delay and/or the non-compliance of the orders of the Court to be convincing at all and are rather surprising and contrary to what was submitted to Court by the counsel for the Plaintiff on 31/05/2022. I have no hesitation in rejecting these reasons and find that the reasons are in fact an attempt to cover up the lethargic and sporadic conduct of the Plaintiff in these proceedings.
56. The conduct of the Plaintiff in these proceedings and the delay caused thereby is in Court's considered view a breach of the constitutional guarantee provided in Sec. 15 (3) of the Constitution of Fiji.
57. At the same time, having regard to the chronology of the case as discussed in the foregoing paragraphs, this Court finds that the delay in these proceedings, as caused by the Plaintiff, is inexcusable and contumelious. Thus, even in the above context the Plaintiff's current application is bound to fail.
58. The Court therefore concludes that this summons for re-instatement of the claim shall necessarily fail based on the discussions and findings of the Court in the foregoing paragraphs.

59. Court shall accordingly strike out the Plaintiff's summons filed on 03/06/2022 subject to the following orders.
60. In consequence, the Court makes the following orders.
1. The Plaintiffs summons dated 03rd June 2022 for reinstatement of the cause is refused and accordingly struck out and dismissed.
 2. The Plaintiff shall pay a cost of \$ 2500.00 to each of the Defendants in this matter within 28 days of this Ruling.
 3. Proceedings in the case is accordingly terminated.



A handwritten signature in blue ink, appearing to read "L. K. Wickramasekara", is written over a faint, circular stamp.

L. K. Wickramasekara,
Acting Master of the High Court.

At Suva,
02/08/2024.