

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

Civil Action No. HBC 49 of 2014

**BETWEEN:** **BAL KRISHNA** of Lot 1 Nadawa, Nasinu, Business as the Administer of the ESTATE OF SANTA WATI aka **SANTA WATI KRISHNA** of Lot 1 Nadawa Road, Nadawa, Nasinu, Self-employed, Deceased.

**PLAINTIFF**

**AND:** **SUVA PRIVATE HOSPITAL** having its registered head office at 120 Amy Street, Toorak, Suva.

**1<sup>st</sup> DEFENDANT**

**AND:** **DR LITIANA BROWN** place of abode unknown, Doctor, Suva Private Hospital.

**2<sup>nd</sup> DEFENDANT**

**BEFORE:** Master Vishwa Datt Sharma

**COUNSEL:** Mr. Vakaloloma on instructions from Mr. M. Raza - for the Plaintiff  
Mr. Filipe - for the 1<sup>st</sup> Defendant  
Ms. Jackson L - for the 2<sup>nd</sup> Defendant

**Date of Hearing:** 01<sup>st</sup> December, 2015

**Date of Ruling :** 02<sup>nd</sup> March, 2016

**RULING**

*(Application pursuant to Order 25 Rule 9 And Order 3 Rules 5  
of the High Court Rules 1988)*

**(A) INTRODUCTION**

1. This court on 16<sup>th</sup> April, 2015 issued a Notice of its own motion pursuant to *Order 25 R 9 of the High Court Rules 1988*.

2. The Notice required the Plaintiff to show cause as to why the within action ought not to be struck out for want of prosecution or an abuse of process of this court since no steps have been taken by the Plaintiff in this cause for more than six (6) months.
3. The Plaintiff filed an affidavit deposed by Hemant Kumar, who works in his capacity as a Chief Legal Executive for Mehboob Raza & Associates Solicitors.
4. Subsequently, the Second Defendant, Litiana Browne filed an affidavit in Opposition.
5. Oral submissions were made to court by the Plaintiff and the First Defendant. The Second Defendant furnished court with both oral and written submissions.

(B) **BACKGROUND**

6. The Plaintiff, as the Administrator of the Estate of Santa Wati a.k.a Santa Wati Krishna, instituted this proceedings against the following two Defendants:
  - (a) 1<sup>st</sup> Defendant, is a Company duly incorporated in Fiji which had the care, control and management of the private hospital having its registered head office at 120 Amy Street, Toorak, Suva; and
  - (b) 2<sup>nd</sup> Defendant is employed in her capacity as a Medical Practitioner within the Suva Private Hospital Limited.
7. The Plaintiff alleged that on or about the 30<sup>th</sup> April, 2012, the First Defendant entered into a contract with the Plaintiff to provide medical treatment to the deceased by a qualified and competent medical practitioner at a fee to be paid by the Plaintiff. In breach of the said contract, the First Defendant failed to adequately treat the deceased which resulted in her death. The Plaintiff claims damage under the Law Reform (Miscellaneous Provisions)(Death and Interest) Cap 27, special damages, damage under compensation to Relatives Act Cap 29, Funeral expenses, Interest and Loss of expectation of life and costs.
8. The 2<sup>nd</sup> Defendant categorically denied the reliefs sought under paragraphs 34 of the Claim puts the Plaintiff to strict proof thereof.
9. The Plaintiff instituted this action by way of a Writ of Summons on 20<sup>th</sup> February, 2014.

10. The Writ was served on the two (2) Defendants and an affidavit of service was accordingly filed.
11. The acknowledgements of service as well as the Defences of the two (2) Defendants were filed.
12. It was noted by the Court Registry that the matter was laid in abeyance since 14<sup>th</sup> August, 2014, and no further steps or cause of action was taken by the Plaintiff to pursue this case further until the final hearing and the determination of the case that prompted the Court Registry to issue a Notice on 16<sup>th</sup> April, 2015, pursuant to *Order 25 Rule 9 of the High Court Rules 1988*.

(C) THE LAW

13. This application is made pursuant to *Order 25 Rule 9 of the High Court Rules 1988*, which *inter-alia* states as follows:

*"9. (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.'*

14. Abovementioned rule was introduced on 13<sup>th</sup> September 2005. After the introduction of this rule the Court of Appeal has had the opportunity to review the law on want of prosecution in Fiji both before and after the coming in to effect of the same.
15. Prior to the introduction of Rule 9, the Court of Appeal in **Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000s** (30<sup>th</sup> May 2003) in readopting the principles expounded in *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801 and explained that:

*"The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of*

*the court; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would 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 each other or between them and a third party."*

(Emphasis added)

16. Basically the Court of Appeal affirmed the principle enunciated in *Brikett v. James* (1978) AC 297 (1977) 2 ALL ER where the House of Lords held as follows:-

*"The power should be exercised only where the court is satisfied either:-*

- (i) *That the default has been intentional and contumelious e.g.; disobedience to pre-emptory order of the court or conduct amounting to an abuse of the process of the court; or*
- (ii) *(a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers (in the present case Defendant's lawyers); (b) that such delay would give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between then and a third party."*

17. After the introduction of Order 25 rule 9, *Birkett v. James* was revisited by the court of Appeal. This largely arose due to the case management system introduced by the Court to agitate those cases which were lying idle in the registry for many years some ranging over 20 years. This High Court had tended to strike-out the actions based on delay alone.

18. The first case which went on appeal and decided by the Court was *Bhawis Pratap v Christian Mission Fellowship Civil Appeal No. ABU 0093 of 2005* (14 July 2006). His Lordship Mr. Justice Coventry struck out the action on a number of grounds one of which was delay of 7 years since the action was filed. On appeal, after reviewing the law on want of prosecution the Court of Appeal affirmed that the applicable law in this country is still as was pronounced in *Brikett v. James*. At para. 23 of judgment the Court unreservedly stated:-

*"[23] The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions. Most recently, in Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU*

0024 of 2000 - FCA B/V 03/382 the court, in readopting the principles expounded in *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801"

(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."

(Emphasis added)

19. Again the Court of Appeal was invited to consider the position of Order 25 rule 9 in the *Trade Air Engineering (West) Ltd v. Taga Civil Appeal No. ABU 0062 of 2006* (9 March 2007) (per Gordon P, Barker and Scott JJA). In considering the appeal the Court categorically formulated the following question:-

"[4] The central question raised by this appeal is whether the Court's powers under O 25 r 9 should be exercised in substantial conformity with the powers it already possessed prior to the making of the new rule or whether an additional jurisdiction, exercisable on fresh principles, has been conferred on the Court."

(Emphasis added)

20. In observing the new feature of Order 25 rule 9 their Lordships stated:-

"[15] A notable feature of the new Order 25 rule 9 is that it confers on the court the power to act on its own motion. Within our present High Court Rules such a power is only rarely conferred. One example is O 34 r 2 (6), another is O 52 r 4. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji."

(Emphasis added)

21. Their Lordships then conclusively and unanimously held that:-

"[16] In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority."

(Emphasis added)

22. The issue then is whether delay alone is sufficient for the Court to **strike-out an action for want of prosecution**. The Court of Appeal in *New India Assurance Company Limited v. Rajesh Kumar Singh Civil Appeal Number ABU 0031/1996* emphasized that while inordinate and inexcusable delay might be established, these factors were not, *on their own, sufficient to warrant the striking out of the action*.
23. The Court of Appeal in *Bhawis Pratap v Christian Mission Fellowship (supra)* discussed and distinguished the new rules which applied in England after the introduction of the new Civil Procedure Rules after 2000 inter-alia as follows:-

*"[28] Securum Finance Limited v. Ashton (supra is especially instructive since it explains why, following the introduction of the new Rules, the courts in England and Wales have been more ready to strike out actions on the ground of delay alone. At paragraphs 30 and 31 Chadwick L.J wrote that:*

*"30 The power to strike out a statement of claim is contained in CPR r3.4. On particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process. ...In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".*

*"31 In the Arbuthnot Latham case this court pointed out in a passage which I have already set out that:-*

*"In Birkett v. James the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration which was in issue. From now on it is going to be a consideration of increasing significance."*

*[29] In Fiji there is as yet no equivalent of the English CPR r 1.1 or 3.4 and therefore the approach exemplified in Securum has not yet become part of our civil procedure.*

24. Thus the developments which have been taken in England after the introduction of the new rules do not apply in this instant to Fiji without the introduction of new rules. As such the principle in *Birkett v James* applies on all fours. This was also confirmed by the Court of Appeal again in 2008; *Avinash Singh v Rakesh Singh, Nirmala Devi & Sarojini Kumar Civil Appeal No: ABU 44/06 (8 July 2008)*.

(D) ANALYSIS and DETERMINATION

25. I have perused the court file in terms of the documents filed as required by the set down procedures and the High Court Rules 1988 accordingly.
26. I reiterate the abovementioned paragraphs 09- 11 inclusive which inform this court the steps taken and the documents filed by the Plaintiff and the Defendants in this proceeding.
27. This case was commenced on 20<sup>th</sup> February, 2014 and after the two Defendants were served with the Plaintiff's Writ of Summons, they filed their acknowledgment of Service and Defences on 19<sup>th</sup> March and 17<sup>th</sup> April, 2014 respectively. The Counsel for the First Defendant filed a Notice to Second Defendant on 14<sup>th</sup> August, 2014 in terms of *Order 16 Rule 8 of the High Court Rules, 1988*.
28. After 14<sup>th</sup> August, 2014, no action was taken by the Plaintiff nor any of the Defendants in order to pursue this case any further until this court on 16<sup>th</sup> April, 2015 issued the notice in terms of the *Order 25 Rule 9* application asking the Plaintiff to show cause why this matter should not be struck out. This meant that since the last pleading was filed on 14<sup>th</sup> August, 2014, until this court issued the *Order 25 Rule 9* Notice that some 08 months had elapsed. In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to proceedings to complete the pleadings and allow the case to be heard and determined either before the Master or a Judge of the High Court accordingly.
29. The onus is on the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case after the 14<sup>th</sup> August, 2014.
30. This court is therefore required to deliberate on the following issues in terms of the impending **Order 25 Rule 9** application to arrive at a determination whether to dismiss the cause or deal with the application as if it were a summons for directions accordingly:
- (i) *that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or*
  - (ii) *that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, ( In this case the Plaintiff's lawyers); and*

- (iii) *that such delay would 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 each other or between them and a third party."*

#### **Default is contumelious**

31. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.

Upon the perusal of the court file it reveals that there were no orders or directions of the court made that the Plaintiff failed to adhere to or disobeyed. Rather, the Plaintiff failed to pursue and complete the cause of action for a period of eight (8) months to ensure that the file was ready to be remitted to a Judge of the High Court for hearing and determination.

On the other hand, after the service of the *Order 25 Rule 9 application*, the Plaintiff was required to give or file a notice of intention to proceed with his case in terms of *Order 3 Rule 5* of the High Court Rules, 1988, if he intended to proceed with the case, but he failed to do so.

On the returnable date of the *Order 25 Rule 9 application*, the court granted the Plaintiff 14 days' time to file and serve his affidavit and 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 Plaintiff failed in its bid to file and serve any affidavit rather sought for extension of time and adjournment on four (4) consecutive occasions and only succeeded in filing the same after a lapse of four (4) months time frame.

However, though the Plaintiff did not file any Notice to show his intention to proceed with the case, he eventually succeeded in filing an affidavit to show cause by seeking extensions of given time frame on each of the four (4) occasions. This meant that the Plaintiff did not disobey any orders of this court.

For the above rational, the Plaintiff is not caught by the first arm of the test.

#### **Delay**

32. The test for delay is both '*intentional*' and '*inordinate*'.  
**Intentional**



For these two elements to be satisfied, the Defendants must establish that the delay was **intentional** on the part of the Plaintiff. In other words the Plaintiff has filed an action with having **no intention to proceed** with the same.

*The Plaintiff through its Affidavit In Reply filed on 03<sup>rd</sup> August, 2015 stated:*

1. *'That after the pleadings were concluded, we instructed the Plaintiff to provide us with the details of his loss of income and evidence of the same to be included in the list of documents.*
2. *That whilst the Plaintiff was collating the documents, the then Honourable Minister of Health approached our office and asked us to submit to the Minister of Health a proposal to settle this matter.*
3. *Thereafter we conducted research of case authorities of similar nature and by a letter dated the 2<sup>nd</sup> July 2014, we submitted the said proposal to have the matter amicably settled by the Minister of Health marked as annexure "A".*
4. *That thereafter we were advised on numerous occasions that the Honourable Minister is liaising with the parties with the view to settle the matter.*
5. *That unfortunately after the elections in September 2014, another Minister of Health was appointed and the settlement was not pursued any further.*
6. *That by letter sated the 6<sup>th</sup> October 2014 we requested Dr. Sachida Nand Mudaliar for his opinion on the circumstances surrounding the death of Ms Shanta Wati, which report we intended to include in the Plaintiffs List of Documents. (I annex hereto a copy of the said letter dated the 6<sup>th</sup> October 2104 marked as annexure "B").*
7. *That on the 24<sup>th</sup> April 2015 our office was served with an Order 25 Rule 9 Notice by the Court.*
8. *That we advised Dr. Mudaliar of the said notice, He advised us that he is writing the opinion and will forward the same as soon as it is ready.*
9. *That in early May 2015 Mr. Raza got ill and was hospitalized at the CWM Hospital and was advised to take complete bed rest. The Medical Report of Mr. Raza was submitted to the Court on the last appearance.*
10. *That by letter dated the 29<sup>th</sup> May 2015 we requested Dr. Mudaliar to provide us the Report as soon as possible. (I annex hereto a copy of the said letter marked as annexure "C").*
11. *That by letter dated 3<sup>rd</sup> June 2015 Dr. Mudaliar responded by stating **no doubt, you would be aware that the above case is very complex***

*and involves medical negligence by Doctors. In order for me to write an opinion I need to consult text books and also conduct researches to support my conclusions. (I annex hereto a copy of the said letter marked as annexure "D").*

12. *That on the 13<sup>th</sup> July 2015, Dr Mudaliar signed the opinion which was then forwarded to our office. (I annex hereto a copy of the said letter marked as annexure "E").*
13. *That with respect to the delay, if any, was not caused deliberately by the Plaintiff and/or its solicitors and I humbly pray that the matter to remain in the cause list with specific directions on lists of documents and pre-trial conference.*

*The Defendant submitted;*

1. *That before this Honorable Court proceeds to consider the Second Defendant's arguments in support of the Court's Notice dated 16 April 2015, the Second Defendant submits that there are a number of preliminary issues which ought to be dealt with first.*
  2. *In light of the general rule that when a deponent makes a statement of on his information and belief, he must state the source of that information and belief, the Second Defendant submits that the Plaintiff's Affidavit is inadmissible and ought to be considered worthless and not to be received in evidence in any form whatsoever.*
  3. *The Second Defendant further submits that the Plaintiff's Affidavit is Defective in form. Upon receipt of the Court's Notice dated 14 April 2015, the Plaintiff ought to have filed an Affidavit to Show Case. Not an "Affidavit in Reply" The Second Defendant therefore again submits that this Honourable Court ought to expunge the Plaintiff's Affidavit from the record.*
33. The Plaintiff relies on his Statement of claim and the Affidavit In Reply filed and sought that Order 25 Rule 9 application be dismissed and the Plaintiff be allowed to pursue with this case. The arguments raised by counsels for the Plaintiff and the Defendants, I find that there was some delay on the part of the Plaintiff himself when asked by his Legal Counsel to collate and furnish his loss of income. Further, a medical report from Doctor Mudaliar was anticipated rather delayed by him. I find that the delay was not intentiona on the part of the Plaintiff.
34. The other requirement is the 'inordinate' delay.

### Inordinate

This relates to the length of delay. Reference is made to the 2<sup>nd</sup> Defendants written submissions furnished to court which sets out the chronology of the pleadings filed and the same has been cross checked with the court record. No doubt the action was commenced on 20<sup>th</sup> February, 2014. The 2<sup>nd</sup> Defendant filed the acknowledgement of service on 19<sup>th</sup> March, 2014 and her statement of defence on 17<sup>th</sup> April, 2014.

The First Defendant filed his acknowledgment of service and the Defence on 18<sup>th</sup> and 19<sup>th</sup> March, 2014.

In the above circumstances I am of the finding that the Plaintiff has not filed any reply to defence filed by both Defendants and failed to pursue his case thereafter. Hence some 08 months had lapsed and the matter was left unattended by the Plaintiff resulting in the matter remaining impending in court.

The Plaintiff has explained his delay accordingly which is acceptable to this court. The Court of Appeal in *New India Assurance Company Limited v. Rajesh Kumar Singh Civil Appeal Number ABU 0031/1996* emphasized that while inordinate and inexcusable delay might be established, these factors were not, *on their own, sufficient to warrant the striking out of the action.*

### Prejudice

35. It is trite law that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants must establish that both are prejudiced by the delay.
36. The 2<sup>nd</sup> Defendant in his written submissions stated that he has been put to the expense and the anxiety of having to defend a claim, which the Plaintiff is clearly not interested in bringing to any conclusion. Further so much time has lapsed since this matter was initiated that the two nurses who had assisted the 2<sup>nd</sup> Defendant in the surgery and who were to be called as witnesses are no longer in the country. Therefore, the 2<sup>nd</sup> Defendant submitted that a fair trial of the matter is no longer possible due to the Plaintiff's lack of interest in pursuing his claim.

The 1<sup>st</sup> Defendant did not raise any question on prejudice for the reasons best known to him.

The matter is still before this court and the status of the matter in terms of pleadings needs to be brought to its conclusion. The court can give tight timelines for the

parties to comply with the same bearing in mind the nature of the pending substantive issue.

This certainly alleviates any prejudice to both, the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant accordingly.

#### Interest of Justice

37. Even if both Defendants satisfy the requirements in *Birkett v James*, the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in *Chandar Deo v Ramendra Sharma and anor*: Civil Appeal No. ABU 0041 of (23 March 2007) (Unrep) stated as follows:-

*[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v James principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197 refers.*

38. In *Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248*. Eichelbaum CJ reviewed the authorities and concluded:

*'The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'*

39. Even the courts are reluctant to strike- out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners* (1949) 78 CLR 62, at 91 Dixon J said:-

*'26. This principle was restated by the Court of Appeal of Fiji in Pratap v Kristian Mission Fellowship [2006] FJCA 41. Also refer to; New India Assurance Co Ltd v Singh [1999] FJCA 69. The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000)*

201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'

40. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and find as follows:-

- (i) *The delay is neither inordinate nor intentional;*
- (ii) *Explanation has been provided by the Plaintiff for the delay as such the Plaintiff has overcome the factor of inexcusability;*
- (iii) *The default is not contumelious and the Plaintiff has not disobeyed any orders of this court;*
- (iv) *Both Defendants have not suffered any real prejudice; and*
- (v) *In the interest of justice, a fair trial is still possible.*

41. For the aforesaid rational, I make the following orders:-

- (a) Application in terms of Order 25 Rule 9 Notice seeking striking out of the substantive action for want of prosecution is hereby dismissed;
- (b) This case to take its normal cause;
- (c) Further directions in terms of the compliance of consequent pleadings to be made accordingly on 02<sup>nd</sup> March, 2016 at 11.30 am.
- (d) All parties to the proceedings to bear their own costs.

Dated at Suva this 02<sup>nd</sup> Day of March, 2016



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MR VISHWA DATT SHARMA  
Master of High Court, Suva.

cc: Mehboob Raza & Associates, Suva.  
Haniff Tuitoga, Suva.  
Saumatua Bale & Faktaufon Lawyers, Suva.