

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 39 of 2009

BETWEEN : **FARISH FAIZAL KHAN**
PLAINTIFF

AND : **THE COMMISSIONER OF POLICE**
1ST DEFENDANT

AND : **MINISTER FOR HOME AFFAIRS**
2ND DEFENDANT

AND : **SUPREME FUEL LIMITED**
3RD DEFENDANT

AND : **THE ATTORNEY GENERAL**
4TH DEFENDANT

BEFORE : The Hon. Mr Justice David Alfred

Counsel : Ms P Preetika for the Plaintiff
Ms S Ali for the 1st, 2nd and 4th Defendants
Mr R Singh for the 3rd Defendant

Date of Hearing : 26 May 2016
Date of Decision : 18 July 2016

DECISION

1. This is a Notice of Motion filed by the Plaintiff for the reinstatement of his claim which was struck out on 31 March 2016 because of the absence of his Counsel and himself at the continued hearing.

2. The Application is made pursuant to Order 32 rule 5(4) and Order 35 rules 1 and 2 of the Rules of the High Court and the inherent jurisdiction of the High Court.
3. Order 32 rule 5(4) provides that where an application made by summons has been dismissed without a hearing because the party who took out the summons failed to attend the hearing the Court may, if it is just, allow the summons to be restored.
4. Order 35 rule 2(1) provides that a judgment obtained where one party does not appear at the trial, may be set aside.
5. The Motion is supported by the Plaintiff's affidavit in support, wherein he gives the history of what had transpired leading up to the claim being struck out. In essence, he states that his previous solicitors, Messrs M A Khan, and not himself, caused the matter to be struck out. There would be no prejudice to the Defendants, so he asked for the matter to be reinstated.
6. The Motion accordingly came up for hearing on 13 May 2016 when the hearing could not proceed at all, as both Counsel for the several Defendants objected because no Memorandum of Change of Solicitors had been served on them.
7. The hearing therefore actually commenced on 26 May 2016, when I heard oral submissions from all Counsel on both sides.
8. Counsel for the Plaintiff submitted it was the negligence of Messrs M A Khan that caused the matter to be struck out and therefore the Plaintiff should not be punished for this. If the matter was not reinstated the Plaintiff would have no legal redress. There would be no prejudice caused to the Defendants and no risk of them not obtaining a fair trial. Counsel therefore asked for reinstatement and a stay of the costs order pending the continued hearing and cited some authorities.

9. Counsel for the 1st, 2nd and 4th Defendants then submitted. She said there was here a wastage of both time and Government resources. The Plaintiff was not interested in pursuing his claim and she questioned why the Government should be prejudiced, by what Counsel described as “shenanigans” on the Plaintiff’s part, as some of their witnesses had moved abroad.
10. Counsel for the 3rd Defendant now submitted. He said Ms Preetika had 4 months to prepare for the hearing of which she had had ample notice. He therefore asked for the motion to be dismissed.
11. Counsel for the Plaintiff in her reply confirmed that in her e-mail of 30 March 2016, she had stated she was not willing to act for the Plaintiff.
12. At the conclusion of the hearing, I informed I would take time to consider my decision.
13. This is a sorry tale of a fall in the standard of professionalism, that is revealed by the evidence before me. This fall must be arrested. It is not an edifying exercise to repeat that evidence in this Decision. Suffice it to say, that at the end of the day, the Plaintiff has succeeded in showing that it was due to the acts of omission of the various Counsel acting for him that led to his claim being struck out.
14. I also find that in no circumstances are the Defendants to be blamed for the situation coming to such a pass. On the contrary, they are to be compensated by costs which are to be theirs in any event.
15. I am aware that the Plaintiff has remedies against his solicitors, for any adverse consequences of their acts of commission and omission, that he may have suffered. Nevertheless, like every other litigant, he must have his day in court.
16. I also note that the Plaintiff’s Counsel made no objection to either the fact of costs being ordered against her client nor to their amounts, which have been

summarily assessed by me. She only wanted these to be paid after the conclusion of the hearing.

17. I have therefore concluded that the interests of justice will be met if the claim is reinstated and the Defendants receive some solace from the costs coming to them.
18. I do not need to stress that the case has to be fixed for continued hearing expeditiously, after the Plaintiff's compliance with the orders that I am now making.
19. In fine, I make the following orders:
 - (1) I hereby set aside only that part of the Order dated 31 March 2016 striking out this action and hereby reinstate the Plaintiff's claim.
 - (2) The Plaintiff is to pay the costs of this Motion which are summarily assessed at \$500.00 to the 1st, 2nd and 4th Defendants and at \$300.00 to the 3rd Defendant by or before 1 August 2016.
 - (3) I decline to stay the execution of the order for costs made on 31 March 2016. The Plaintiff is to pay by or before 1 August 2016, the costs of \$1,500.00 to the 1st, 2nd and 4th Defendants and the costs of \$1,000.00 to the 3rd Defendant, which were summarily assessed on 31 March 2016.
 - (4) The action is fixed for mention at 9am on 4 August 2016 to set a date for the continued hearing only if the costs in (2) and (3) have been paid by the Plaintiff.

Delivered at Suva this 18th day of July 2016



DAVID ALFRED
JUDGE of the High Court of Fiji