

THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 370 of 2013

BETWEEN : AVIEL BAT TZION also known as UNISE RANADI of Suva, Domestic Duties.

PLAINTIFF

AND : GRAPHIC EQUIPMENT LIMITED a limited liability company having its registered office in Suva .

FIRST DEFENDANT

AND : MINGS LIMITED a limited liability company having its registered office in Suva

SECOND DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Ms. Ulamila Fa - for the Plaintiff  
Mr. Nilesh Lajendra - for the Defendant

Date of Ruling: 14<sup>th</sup> February, 2018 @ 9 am

RULING

*(Notice of Motion to reinstate the action struck out by the Court)*

**INTRODUCTION**

1. This is the Plaintiff's Notice of Motion filed together with a supporting Affidavit seeking an order to "Reinstate the struck out action".
2. The matter was struck out on 21<sup>st</sup> April, 2016 upon five (5) non appearances of the Plaintiff's Counsel and Non-compliance of the Court orders made on 22<sup>nd</sup> September, 2015.
3. The Motion does not indicate under what provisions of the Law the current application has been made seeking reinstatement.
4. Hence, in exercise of my discretion, I will now deliberate and deliver my Ruling accordingly.

**LAW and PRACTICE**

5. Case of *Trade Air Engineering (West) Ltd vs. Tago* [2007] ABU0062 of 2006 (Unreported).
6. Case of *Pollard vs. Incorporated Nominal Defendant* [1972] Vic Rp 110; [1972] VR 955.

**BACKGROUND**

7. On 22<sup>nd</sup> September, 2015, the Plaintiff's Counsel informed Court that the Pre Trial Conference minutes have been formalised and accordingly filed. Hence this Court made further orders for the Plaintiff to file its Agreed Bundle of documents, Copy Pleadings and Order 34 Summons within a months' time frame.
8. On the next adjourned date of 09<sup>th</sup> November, 2015, there was no appearance by the Plaintiff/Counsel. The Orders made by the Court on 22<sup>nd</sup> September, 2015 was not complied with. Defence Counsel was asked to communicate in writing to the Plaintiff and inform her of the next adjournment date which the Defence did.
9. On 07<sup>th</sup> December, 2015, the Plaintiff Counsel appeared and the Court still noted that even though a reminder was sent in writing, the Plaintiff Counsel has not complied with the initial Court order of 22<sup>nd</sup> September, 2015 and subsequently adjourned dates.
10. On 11<sup>th</sup> February, 2016 once again there was no appearance by the Plaintiff/Counsel. Defence was informed that Ms. Ulamila Fa was engaged in a hearing at the Nasinu Magistrates Court and to seek further time to allow the Plaintiff to comply with the order.
11. On 16<sup>th</sup> March, 2016, there was again no appearance by the Plaintiff. This Court at this adjournment noted that time and again the Plaintiff had failed to comply with the orders of the Court to the current.
12. On 31<sup>st</sup> March, 2016, again no appearance from the Plaintiff was noted and had failed to file the Agreed Bundle of Documents, Copy Pleadings and Order 34 Summons. This was a complete defiance of the Court's previous directives and orders and that there was a continued default and non-compliance of the Court orders on the part of the Plaintiff/Counsel.

13. It was on this failure of the Plaintiff/Counsel for the fourth time that prompted the Defence Counsel to seek for an 'Unless Orders'.
14. Accordingly, this Court acceded to the Defence Counsel's application for the imposition of the "Unless Order" and thus granted the orders as follows:
  - Invoke unless order that would be activated if the Plaintiff within next 14 days do not pursue this case by filing Bundle of Documents, and Order 34 Summons;
  - For mention on unless order if non-compliance of Copy pleadings, Bundle of Documents and Order 34 Summons;
  - Adjourned to 21<sup>st</sup> April, 2016.
15. Again, on 21<sup>st</sup> April, 2016, there was no appearance by the Plaintiff/Counsel. It was also noted from the Court records that the Plaintiff had failed to comply with the "unless order" made on 31<sup>st</sup> March, 2016.
16. The Defence Counsel herein on this Occasion did not hesitate to request Court that the matter be struck out due to the Plaintiff's non-compliance and default of the unless order in place.
17. This Court acceded to the request and accordingly made the following orders-
  - Refer to minutes of 31<sup>st</sup> March, 2016;
  - Unless orders in place to be activated if Plaintiff doesn't comply with Copy Pleadings, Bundled of Documents and Order 34 Summons.
  - Perused Court File non-compliance by Ms. Fa/Plaintiff on Copy Pleadings and Order 34 Summons;
  - Therefore matter on Plaintiffs Writ of Summons and Statement of Claim is hereby struck out accordingly.
  - On Defendants Counter-Claim, for formal proof to be assigned on 05<sup>th</sup> May, 2016.
18. It was on 05<sup>th</sup> May, 2016 that the Defence Counsel appeared to proceed with his Counter-Claim when he was informed by the Court that a Reinstatement application has been filed by Ms. Fa returnable on 17<sup>th</sup> May, 2016.
19. Thus Reinstatement application was scheduled for hearing on 11<sup>th</sup> July, 2016.

#### ANALYSIS AND DETERMINATION

20. The issue to determine here is "Whether the Plaintiff's Writ of Summons and the Statement of Claim struck out by this Court can be reinstated"?
21. Both Counsels herein would have noted that the Plaintiff's Substantive action in terms of the Writ of Summons coupled with the Statement of Claim was struck out by this court on the non-compliance of the subsequent Court orders, eventually resulting in the activation of the "Unless Order" accordingly. However, this action was not struck out for want of prosecution and/or abuse of the Court process.
22. The Plaintiff's main contention in seeking to reinstate the Writ of Summons and the Statement of Claim, is that the non-appearance and default in not complying with the Court directions of 22<sup>nd</sup>

September, 2015 where the Plaintiff was required to file the **Agreed Bundle of Documents, Copy Pleadings and the Order 34** was unintentional and an oversight on the part of the Plaintiff's Solicitors and her staff.

23. I have also thoroughly perused and examined how the case was pursued, if it had, in terms of the Orders and Directions made on 22<sup>nd</sup> September, 2015. Reference is made to paragraphs 7- 19 hereinabove inclusive.
24. Reference is to the case of *Birkett v James*, (1977) 2 All ER 801 and I also note the same has been addressed in both Counsels written submissions.
25. Lord Diplock in *Birkett v James* expounded the principles to be applied in a striking out application at page 805 as follows:

*"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process 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 each other or between them and a third party."*

26. The principles expounded by Lord Diplock has been restated by the Court of Appeal of Fiji in *Pratap v Christian Mission Fellowship*, (2006) FJCA 41 and *Abdul Kadeer Kuddus Hussein v Pacific Forum Line Limited*, (Civil Appeal No. ABU 0024 PF 2000S).
27. In the present case, the Plaintiff/Counsel has defaulted in not complying with the Court Order and Directions of 22<sup>nd</sup> September, 2015, failing in its bid to file the Agreed Bundle of Documents, Copy Pleadings and the Order 34 Summons which filed would have allowed the Matter to be pursued further and thus entered for trial.
28. This failure on the Plaintiff's part is and I reiterate is indicative of the fact of a deliberate act of default and "*disobedience to a peremptory order of the court*". The first of Lord Diplock's conditions in *Birkett v James*, (*supra*) applies.
29. The *Supreme Court Practice 1988*, Vol 1, pg 439 "*White Book*" provides-

*"Contumelious default - By this is meant deliberate default in compliance with a peremptory order of the Court or, perhaps, conduct amounting to an abuse of the process of the Court...A peremptory order is one which makes clear to the other party, either from its terms or from the circumstances in which it was made, that exact compliance with no further argument, is required by the Court within a stated time and indicating expressly or by implication, that default will incur serious consequences"*.

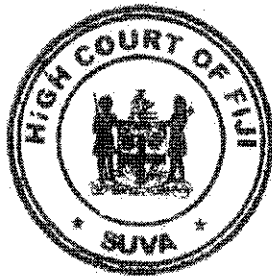
30. I also make reference to the case of *Hytac Information Systems Ltd v Coventry City Council*, (1997)1 WLR 1666 it was held that where there has been non-compliance with a peremptory order, "*a sufficient exoneration will almost inevitably require that (a defaulting party) satisfies the court that something beyond his control has caused his failure to comply with the order,*" per Ward LJ (with whom Auld LJ and Lord Woolf MR agreed), at pages 1674 to 1675.

31. The reasons and or explanation given by the Plaintiff/Counsel in the current matter is enumerated in the Affidavit in Support deposed by Sala Kunatuba at paragraphs 4-10 inclusive.
32. In essence, the Plaintiff's Counsel "admits that the Plaintiff and the Defendant were to file the Bundle of Documents, and the Plaintiff to file the Order 34 Summons. Both parties agreed to sort another adjournment as the documents were not ready for filing. On 31<sup>st</sup> March, 2016, the Plaintiff's Bundle of Documents and Order 34 summons were ready for filing and Ms Fa who had the carriage of this matter was still travelling and not in Suva. There were no court minutes on file of 31<sup>st</sup> March, 2016 to state that there were directions to be filed and documents remained on the file..
33. I find that the Plaintiff's /Counsels conduct and explanation in not complying with the Order of 22<sup>nd</sup> September, 2015 is rather unsatisfactory and unacceptable. The Reason being that this Court noted that from the date of the Order of 22<sup>nd</sup> September, 2015 and until the 04<sup>th</sup> May, 2016 when the Plaintiff filed the current Reinstatement application, no proactive steps were taken by the Plaintiff/Counsel to ensure that the Orders were complied with expeditiously.
- As Roskill J stated in *Samuels v Linzi Dresses Ltd*, (1981) QB 115 at pg 126 "orders are made to be complied with and not ignored".
34. Further, considering the background of this case as set out in paragraphs 7-19 that I find the Plaintiff was given adequate opportunities to comply with the Court Orders initially without the activation of the unless order. The non- compliance as noted herein tantamount to contumelious Delay on the part of the Plaintiff. The matter was accordingly struck out.
35. The orders made by me striking out the Plaintiff's Writ of Summons and the Statement of Claim on non-compliance of the court order resulting in the activation of the unless order is the "Final Order" of this Court.
36. As far as this Court is concerned, the Plaintiff's only remedy following striking out of its action is an appeal.
37. I make reference to the case citing "Trade Air Engineering v. Taga Civil Appeal No. ABU 00062 of 2006. FJCA 9 ABU 0062 J. 2006 (9<sup>th</sup> March 2007). It was stated at paragraph 13:
- (13).....Generally a party's only remedy following striking out of its action as an appeal. Exception to this General rule such as Or13 r10, O14 r11, Or24 r17, O32 r6 has no application to order 25.
38. I reiterate that the orders made by this Court striking out the Plaintiff's Writ of Summons and the Statement of Claim was a "Final Order" and the only remedy for the Plaintiff was to seek an appeal and not Reinstatement of its struck out action.
39. Taking into consideration the conduct of the Plaintiff in this proceedings to bring the litigation to its finality expeditiously by honouring the Court orders and applying the correct procedures in seeking an appeal rather than to reinstate its struck out case to the list, this Court is inclined to order costs. The Plaintiff is ordered to pay summarily assessed costs of \$1,000 to the Defendant within the next 14 days' time frame.

40. Following are the Final orders of this Court-

- (i) *Plaintiff's Application for reinstatement is hereby dismissed;*
- (ii) *Defendant's counter-claim to be proceeded with upon further directions of the court.*
- (iii) *Plaintiff is ordered to pay summarily assessed cost of \$1,000 to the Defendant within 14 days' time frame.*
- (iv) *Orders accordingly.*

Dated at Suva this 14<sup>th</sup> Day of February, 2018



VISHWA DATT SHARMA  
Master of High Court, Suva

cc: Law Solutions, Suva.  
Lajendra Law, Suva.