

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 103 of 2014

BETWEEN : MUNI CHAND & SONS LIMITED a limited liability company having its registered office in Suva.

PLAINTIFF

AND : ANZ BANKING GROUP LIMITED a limited liability company having its registered office in Suva.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Amrish Pal with Ms. Naidu - for the Plaintiff
Mr. Ronald Singh - for the Defendant

DATE OF RULING: 29th May, 2018

RULING

[Court's own motion for the Plaintiff to show cause why the Statement of Claim should not be struck out for want of prosecution and abuse of the process of the Court pursuant to Order 25 Rule 9 of the High Court Rules, 1988]

(A) INTRODUCTION

1. The Court issued Notice of its own motion pursuant to *Order 25 Rule 9 of the High Court Rules, 1988* for the Plaintiff to show cause as to why the action ought not to be struck out for *want of prosecution or an abuse of the process of the Court*.
2. The Plaintiff filed the Affidavit opposing the striking out.
3. The Defendant filed his Affidavit supporting the strike out of the Plaintiff's action.
4. Hereinafter, the Plaintiff filed his Reply to the Defendant's Affidavit.
5. Written submissions were filed by the Plaintiff and the Defendant.
6. This Court has noted that the Order of the Honourable Judge made on 30th May, 2014 that the sum of \$26,710-35 being the total sum held by the Defendant in account no. 1010019 to the credit of the Plaintiff, be deposited into Court until further orders of this court. Further parties to attend to pre-trial matters in respect of the substantive matter..."

(B) THE LAW AND PRACTICE

7. *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.'

(C) ANALYSIS and DETERMINATION

8. The Plaintiff is required to show cause herein and the Court to determine as to why the Plaintiff's action ought not to be struck out for *want of prosecution or an abuse of the process of the Court*.
9. The principles to be applied the basis upon which the discretion to **strike out proceedings** for **want of prosecution** should be exercised is well established in the decision of the House of Lords in the case of *Birkett v James [1978] AC 297* and in particular the statement by Lord Diplock at 318:

"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."

10. In the present case before this Court, the Plaintiff has submitted that whilst there has been some **delay** in prosecuting this case, the **delay** has not been **intentional** and **contumelious**. He added that the **delay** was such that it was not to an extent that it can be termed **Contumelious**.
11. Further, the Plaintiff submitted that any delay is not of a nature or extent which may substantially **risk** giving the **Defendant** a **fair trial**.
12. However, the **Defendant** submitted that the Plaintiff's default is **intentional** and **contumelious** and there has been **inordinate** and **inexcusable** delay on the Plaintiff's part and the **delays** have caused ANZ to be **prejudiced** in conducting its **Defence**. He further submitted that the circumstances clearly show that the Plaintiff has **no intention** to bring this Action to a conclusion.
13. Therefore, in the present case the court is concerned with the application of **both principles (1) and (2) (a) and (b) respectively** within the *Birkett v James [1978] AC 297*.
14. '**Inordinate**' and '**inexcusable**' within *Birkett v James* have their ordinary meaning. Whether delay can be described as **inordinate** or **inexcusable** is a matter of fact to be determined in the circumstances of each individual case. *The New India Assurance Company Limited -v- Rajesh K. Singh and Anr. Civil Appeal no: ABU 0031 of 1996S (26 November 1999) C.A.*
15. Where **principle (2)** is relied on, both grounds of **inordinate** and **inexcusable** delay needs to be established before an action is struck out. There must be both **delay** of the kind described and a risk of an **unfair trial** or **serious prejudice** to the defendant.
16. Reference is therefore made to the case *Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897*.

The House of Lords did not accept a submission that the decision in *Birkett* should be reviewed by holding that where there had been **inordinate** and **inexcusable** delay, the action should be **struck out**, even if there can still be a **fair trial** of the issues and even if the defendant has suffered **no prejudice** as a result of the **delay**.

Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ **delay** will either make a **fair trial** impossible or **prejudice** the defendant. He went on to affirm the **principle** that the **burden** is on the **defendant** to **establish** that **serious prejudice** would be caused to it by the **delay**.

17. I have perused the court file in terms of the documents filed as required by the set down procedures the *High Court Rules 1988* and set out hereunder the *Chronology of Events* that has taken place in this case accordingly.

CHRONOLOGY OF EVENTS

<u>08th April, 2014</u>	-	<i>Writ of Summons filed</i>
<u>06th May 2014</u>	-	<i>Acknowledgment of Service filed</i>
<u>28th May 2014</u>	-	<i>Statement of Defence filed.</i>
<u>23rd June 2014</u>	-	<i>Reply to Statement of Defence filed.</i>
<u>23rd June 2014</u>	-	<i>Summons for Directions filed.</i>
<u>22nd July 2014</u>	-	<i>Orders made on SFD.</i>
<u>11th May 2015</u>	-	<i>Notice of Intention to Proceed filed [1st time].</i>
<u>23rd July 2015</u>	-	<i>Plaintiff's AVL D filed.</i>
<u>30th July 2015</u>	-	<i>Defendant's AVL D filed.</i>
<u>04th March 2016</u>	-	<i>Notice of Intention to Proceed filed [2nd time].</i>
<u>16th December 2016</u>	-	<i>Notice pursuant to Order 25 Rule 9 and Order 3 Rule 5 issued by court</i>
		<i>Returnable on 13th February, 2017.</i>
<u>23rd December 2016</u>	-	<i>Notice of Intention to Proceed filed [3rd time].</i>
<u>22 February, 2017</u>	-	<i>Notice requesting Pre-Trial Conference filed.</i>
<u>20th March 2017</u>	-	<i>Notice requesting Pre-Trial Conference filed.</i>
<u>29th March 2017</u>	-	<i>Summons Order 34 Rule 2(3) filed.</i>
<u>20th April 2017</u>	-	<i>Plaintiffs Affidavit to Order 25 Rule 9 filed.</i>
<u>25th May 2017</u>	-	<i>Defendant's Affidavit filed to Order 25 Rule 9.</i>

A particular note should be taken by parties to this proceeding that the Plaintiff filed the Notice of Intention to Proceed on four (4) occasions.

Delay

18. In considering whether **delay** of the kind required in terms of *Birkett v James* case has been established, the court is concerned only with **delay** on the part of the Plaintiff or their lawyer. It is that delay which must be shown to be **inordinate** and **inexcusable**.
19. It can be clearly ascertained from the chronology of events as set out in paragraph 16 hereinabove, as to what documents and/or pleadings were filed and what proactive steps were taken by the parties to this proceedings to ensure that the pleadings were expeditiously completed and the file was ready to be allocated to a Hon. Judge for hearing and determination accordingly.
20. In the present case before this Court, the **Plaintiff** submitted in his written submissions that whilst there has been some delay in prosecuting the action, the delay has not been **intentional** and **contumelious**. He explained that there were three (3) cases *HBC 40 of 2012*, *HBC 36 of 2013* and Nasinu *Criminal Case No. 202 of 2016* impending in Court that has a nexus with this case. The outcome of these 3 proceedings will have a material bearing on the current proceedings and as such the Plaintiff has been waiting on the determination of these 3 cases. He further submitted that the outcome may not only assist the Plaintiff but could assist the Defendant in bringing a third party action against Urmila Verma-those proceedings is just as important to the defendant.
21. The Plaintiff commenced the proceedings with the **Writ of Summons** against the Defendant on 08th April 2014 and the Defendant subsequently filed the **Statement of Defence** on 14th May, 2014.

The Plaintiff filed his **Reply to the Statement of Defence** on 23rd June 2014. Subsequently, the summons for directions was filed on 23rd June 2014 and the orders were made on 22nd July 2014.

It will be noted herein that no proactive actions were taken by the Plaintiff to move the matter forward for about a **period of 10 months** until 11th May 2015 when he just filed the **Notice of Intention to Proceed** showing an intention to proceed but was not a cause of action in itself.

The Plaintiff then filed his **Affidavit Verifying List of Documents** on 23rd July 2015 about **2 months** later when he knew very well that he was required to proceed with this action after the expiration of the notice period of **30 days** in terms of his **Notice of Intention to Proceed**. In terms of the orders on the **Summons for directions**, the Plaintiff was required to file and serve his Affidavit Verifying List of Documents within 28 days of the order, on or before 23rd July, 2014 but it is noted that it was filed almost **one (1) year** later. However, the **Defendant** filed his **Affidavit Verifying List of Documents** on 30th July 2015.

Again, the Plaintiff **delayed** in moving the matter further for a period of **10 months** when for the **second time** the Plaintiff filed his **Notice of Intention to Proceed** filed on 04th March 2016.

At this point in time, **nine (9) months** hereafter, the High Court Civil Registry issued the **Order 25 Rule 9 Notice** on 16th December, 2015 and served the parties to the proceedings. The Plaintiff filed his Notice of Intention to proceed on 23rd December, 2016.

This court noted that it was for the **third consecutive time** now that the Plaintiff had filed his **Notice of Intention to Proceed** [Order 3 Rule], and on each occasion had failed to take any proactive steps and/or measures to pursue with the matter and conclude the proceedings so that the action is entered for trial.

My attention was drawn to the number of the orders made on the Summons for Directions dated 25th June 2014. It is ascertained and is now evident from those direction made by this Court on 22nd July 2014. that none of the directions were complied with. It was only the Affidavit Verifying List of Documents were filed by both parties very late and not within the timeframe of 28 days of the Court order. Further, directions made from item 2-7 were never adhered to and/or complied with.

Needless to say that if the High Court Civil Registry had not picked up on this **delay** in terms of the issuance of the **Order 25 Rule 9 Notice**, then to date no further action would have been taken by the parties rather the matter would have remained impending in the system.

22. The Plaintiff has enumerated the reasons and endeavoured to explain the **delay** at paragraphs 5-22 of the Affidavit deposed by Ashok Chand on 19th April, 2017.

In summary, he stated as follows- "*That the Plaintiff wanted to ensure that all related matters pending in the court were sorted out and in order- Case References: HPP 40 of 2012, HBC 36 of 2013 and Criminal Action 202 of 2016. Since the Plaintiff intended to keep the proceedings active, the Plaintiff filed its Notice of Intention to Proceed. The Plaintiff has a good cause of action, however, there are a number of pertinent related*

issues which have a bearing on this proceedings and this has resulted in the Plaintiff waiting at the PTC stage for these matters to be clarified. Since it has not been resolved, the Plaintiff is willing to move diligently to complete this action and proceed to trial."

23. Further, the **Plaintiff** in his written submissions at paragraph 7.1 and 8.5 submitted that "whilst there has been some delay in prosecuting the action, the delay has not been intentional and contumelious. The delay does not substantially risk taking away a fair trial from the Defendant."
24. The **Defendant** submitted to court that "the Plaintiff's contention that the determination of the other related proceedings currently ongoing would have a direct bearing on the ownership and directorship of the Plaintiff Company, then these proceedings has been issued by Director who lacks clear mandate and made reference to paragraph 18 of Plaintiff's (Ashok Chand's) affidavit." He further submitted that "the affidavit fails to explain how that could possible relate to or affect the outcome of these proceedings to determine the allegations made in the claim, nor does it justify the inordinate delay it intentionally caused for nearly 2 years after the pleadings closed.
25. Therefore, the **Defendant** submitted that the Default is intentional and contumelious and that there has been inordinate and inexcusable Delay on the Plaintiff and /or his Solicitors part.
26. The fact cannot be denied by the **Plaintiff** and that he has **admitted Delay** on his part both in his Written Submissions as well as in the Affidavit deposed by Ashok Chand. He was waiting for the determination and outcome of the three cases as mentioned hereinabove. He further admits that that was the very reason as to why he had filed the Notice of Intention to Proceed with the matter on two (2) occasions. The Notice of Intention to Proceed on both occasions will show that the Plaintiff gave 30 days' time to proceed with the case and on both occasions he had failed to do so. Instead, after filing the Notice of Intention to Proceed, the Plaintiff continued to delay the proceedings for longer period of time.

I find that he filed the **Notice of Intention to Proceed** with an **intention to delay** and have the matter active within the Court system until such time that the three (3) pending cases for which he was waiting for its determination and result were done away by the Courts. He cannot deny this fact since the Plaintiff himself explained to court that this was the very reason why he had filed his Notice of Intention to Proceed.

26. This Court is aware of the law and authority that **Delay** alone cannot be the ground for dismissal for want of prosecution. However, in considering whether **delay** of the kind required in terms of *Birkett v James* case it has been established, the court is concerned only with **delay** on the part of the Plaintiff or their lawyer. It is that **delay** which must be shown to be **inordinate** and **inexcusable**.
27. The **Delay** by the **Plaintiff** in this proceedings has been to the extreme since he only filed the **Notice of Intention to Proceed** in order to keep the action active in the system until such time the courts have determined the abovementioned three (3) matters. The Notice of Intention to Proceed whether filed in this proceedings before or afterwards buys no immunity and/or affects the Court's determination of its Notice to strike out for want of prosecution under Order 25 Rule 9.

References are made to the Following Cases- (a) Deo v Ascot Motors Proprietary Ltd [2011] FJHC 453- the High Court said-

"Even if a notice under Order 3 Rule 5 had been filed and served it would have made no difference to the issue of delay unless the Plaintiff had taken a further step in the action."

(b) Singh v Singh [2008] FJCA 27 at paragraph 29 held-

"For the avoidance of doubt, the fact that there was a Notice of Intention to Proceed under Order 3 Rule 5 of the Rules of the High Court does not prevent an application to dismiss a case for want of prosecution. It buys no immunity from the exercise of the court's prerogative of an action..."

The Plaintiff instead should have **maintained the proceedings** by completing the directions on the Summons for Directions and move with the matter with some urgency and completed the cause of action in order to proceed with the Substantive trial in terms of the provisions of the *High Court Rules, 1988*. He failed in his bid to do so as was required of him.

28. Whether Delay is **inordinate** must be related to the particular circumstances of the case. It is obvious to me that when viewed by reference to the particular circumstances of this case as discussed hereinabove, that it was incumbent on the Plaintiff [no matter whether he was waiting for determination of other pending cases] to move forward with the matter with substantially more expedition and caution than was seen in the current case. The Plaintiff seemed to have gone off to sleep and only awoke when served with the Court's *Order 25 Rule 9 Notice seeking to strike out the matter for want of prosecution*.
29. Therefore, I find that it is this **Delay** on the part of the Plaintiff to move with the matter any further in terms of the directions made on the Summons for Direction that has been **inordinate** and **inexcusable** for reasons mentioned hereinabove. Only after the issuance of the *Order 25 Rule 9 Notice*, the Plaintiff appeared and pretended to advance the proceedings by endeavouring to initiate the **Pre-Trial Conference**. However, these attempts were not in **conformity** with the *High Court Rules* and/or the directions made on the Summons for Directions.
30. For every case which takes up time [*a good example is the current case*], another case is potentially **delayed**, bearing in mind that a number of cases are impending for hearing and determination by the court. If the case which takes up time [As in the current case] and **delays** another case is, on any view, an utter **waste of time** and **resources** and **stands in the way** of other more deserving being heard at an earlier time, then that is a **factor** which the courts cannot ignore.
31. However, the overriding objective of the procedural rule and the requirement in '*Birkett v James*' is to enable the court "*to deal with cases justly*". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
32. I find for the aforesaid rationale that the Plaintiff's explanation for the period of **Delay** as mentioned hereinabove is **unacceptable**. I reiterate that the period of inactivity by the Plaintiff is **inexcusable**.

33. Therefore, **Inexcusable** and **inordinate Delay** has been established against the **Plaintiff** by the **Defendant** accordingly.

Prejudice

Prejudice can be of two kinds. It can be either specific that is arising from particular events that may or may not have occurred during the relevant period, or general, that is prejudice that is implied from the extent of the delay.

34. It should be borne in mind that *presumption of prejudice* is *not a presumption of law*. It is a *presumption of fact* in the sense that, in most cases, it will only be the **Defendant** who is in a position to offer evidence as to the existence of *specific prejudice*. The *presumption* is *rebuttable*.
35. In order to establish **prejudice**, the **Defendant** is required to show that the **Delay** has **prejudiced him** in the conduct of his Defence. This will involve him in having to demonstrate, for example, that he has lost contact with his witnesses, his witnesses are untraceable, death of his witnesses, the witnesses recollections has been adversely affected, the destruction of documentary evidence without fault on the part of the Defendant.
36. The **Defendant** submitted that "ANZ submits that default is intentional and contumelious, and that there has been inordinate and inexcusable delay on the Plaintiff or his solicitor's part, and the delays have caused ANZ to be prejudiced in conducting its defence against the Plaintiff's claim."
37. The **Plaintiff** has not mentioned anything in particular reference to the terms of **Prejudice** but stated that "oral evidence of parties and particularly that of the Defendant will play little role. For this reason the Plaintiff submitted that the delay does not substantially risk taking away a fair trial from the Defendant."
38. I hold the Defence submissions and find that the ^{Defendant} has made out a case for **prejudice** against the **Defendant** accordingly.

Interest of Justice and Fair Trial

39. The demonstration of **inordinate Delay**, **inexcusable Delay** and **Serious Prejudice** does not lead necessarily to a dismissal of the action. Further, even if the **Defendant** 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.

40. 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.'

41. 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.'

42. The Plaintiff and the Defendant have both addressed this court on the possibility of having a fair trial. The Plaintiff submitted that "the delay is not of a nature or extent which may substantially risk giving the Defendant a fair trial." Whereas, the Defendant submitted that "in all the circumstances of the, it is apparent that the delay resulting from the Plaintiff's conduct of this Action is so long that proper justice may not be able to be done between the parties."
43. Taking into consideration both parties oral and written submissions, there is no indication as such that in the interest of justice a fair trial is still very much possible in this matter to allow the matter to proceed to trial with the completion of the cause accordingly. If I may reiterate as a reminder to the Plaintiff that he informed court that "he kept the action alive by filing the Notice of Intention to Proceed anticipating that the related three (3) impending court matters HBC 40 of 2012, HBC 36 of 2013 and Nasinu Criminal Case No. 202 of 2016 having a bearing on the current proceedings, would be determined and finalised and allow him to pursue this action accordingly. Reference made to paragraphs 7.1-7.5 within the Plaintiff's written submissions. Further, this matter remains pending in court since its commencement on 08th April, 2014.

44. I find in the given circumstances that the **Plaintiff** was not ready even to commence with the current proceedings in court since there were three (3) other matters impending courts determination which he reiterates has the **bearing** on this case. Now that he had commenced this proceedings that he is faced with the difficulty of **maintaining** the proceedings and bringing it to its **conclusion** for the matter to proceed to **trial** and determination accordingly. The evidence before this court clearly shows that the **Plaintiff** has not taken an active approach in pursuing his case. The Defendant has been dragged into this court with the allegation that the "**Defendant being a Bank had permitted one Urmila Verma who purported to be a director of the Plaintiff to present cheques and withdraw cash from the Plaintiff's account held with the Defendant.**"

The **Plaintiff** failed in its bid to take any pro-active steps expeditiously with the substantive action to conclude the pleadings and enter the action for trial. Therefore, in the interest of justice I find that a fair trial is not possible.

Abuse of Court Process

45. **Inordinate** and **inexcusable delay alone**, however great, does not amount to an abuse of the Court process. Reference is made to *Abbuthnot Latham Bank Ltd v Trafalgar Holdings [1998] 1 WLR 1426 (per Lord Woolf)*.
46. For this purpose, **Delay alone**, even delay of 11 years does not amount to an abuse of process. Reference made to *Barclays Bank Plc v Mailing (Unreported) 23 April 1997; CA (Civil Division) cited in Abbuthnot (supra)* at pg 1432, para G-H.
47. However, **Delay** which involves complete, total or wholesale disregard of the Rules of the Court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground. Case Reference *Choraria v Sethia [1998] CLC 625 9 per Nourse LJ [1998] EWCA Civ 24*.
48. In the current case, I find from the pleadings and Affidavits filed so far, although the pleadings remains to be completed by the **Plaintiff** that the **Plaintiff** had no **intention** to pursue this matter forward. If he had any intention whatsoever, then he would have proceeded with the matter expeditiously bearing in mind that the Court has already made an order for the sum of **\$26,710.35** held by the Defendant in account no. 1010019 to the credit of the Plaintiff be deposited into court.
- In that, he would have made an effort to move on with the matter to ensure the same is maintained until such time that the matter is heard and eventually brought to its conclusion. It is obvious and clear from the evidence on the Court Record that the **Plaintiff** had commenced this action without having any intention whatsoever of bringing it to its conclusion.
50. There is no valid explanation justifying the Delay on the part of the Plaintiff and for the aforesaid rational, the conduct of this matter on the part of the Plaintiff is evident of an abuse of the court process and accordingly needs to be struck out for want of prosecution under Order 25 Rule 9 of the High Court Rules, 1988.

51. It is also appropriate to briefly allude to the issue of **Costs**. The **conduct** of the substantive matter in the proceedings has been such that the actions of the **Plaintiff** failed to maintain the proceedings until such time the matter is heard and determined by court.

I find that there has been **failure** in the **conduct** of the **Plaintiff** to maintain his proceedings as was required of him. I accordingly order the **Plaintiff** to pay the **Defendant** a sum of **\$500** summarily assessed costs and paid within 14 days' time frame.

49. 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 my final orders are as follows:

FINAL ORDERS

- (i) The delay in terms of inordinate and intentional has been established against the Plaintiff;
- (ii) Explanation provided by the Plaintiff for the period of delay does not justify the Delay and as such the Plaintiff has not overcome the factor of inexcusable;
- (iii) The Defendant has suffered prejudice; and
- (iv) In the interest of justice, a fair trial is still not possible to the current.
- (v) There is an abuse of the Court process by the Plaintiff;
- (vi) The Order 25 Rule 9 Notice hereby succeeds accordingly; and
- (vii) The substantive matter is Struck Out for want of prosecution in terms of Order 25 Rule 9 of the High Court Rules, 1988.
- (viii) The Plaintiff is ordered to pay a summarily assessed cost of \$500 to the Defendant within a period of 14 days' timeframe.

Dated at Suva this 29th Day of May, 2018



cc: Messrs A P Legal, Suva
Munro Leys Solicitors, Suva

Master
VISHWA DATT SHARMA