

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

**Civil Action No. HBC 35 of 2016**

BETWEEN

**VIRENDRA SINGH** of Sigatoka in the Republic of Fiji.

**PLAINTIFF**

AND

**CHINA GENHOUBA GROUP (FIJI) LIMITED** a limited liability company

having its registered office at Kings Road, Varoka, Ba.

**DEFENDANT**

**Counsel** : Mr S. Sharma for the Plaintiff  
Mr V. Filipe for the Defendant

**Date of hearing** : 25<sup>th</sup> February, 2019

**Date of Ruling** : 28<sup>th</sup> March, 2019

# **RULING**

*(On the application for leave to appeal out of time)*

- [1] The plaintiff instituted these proceedings against the defendant claiming damages for the injuries caused to him during the course of employment.
- [2] On 26<sup>th</sup> October, 2016 the plaintiff filed a notice of motion seeking leave to amend the writ of summons which was allowed by the court subject to the payment of costs of \$300.00 to the defendant which was not paid by the plaintiff. When the matter came up before the learned master the plaintiff was absent and unrepresented and the court ordered \$500.00 costs to be paid by the plaintiff to the defendant.
- [3] On 18<sup>th</sup> August, 2017 the defendant filed summons pursuant to Order 25 rule 9 of the High Court Rules 1988 seeking to have the matter struck out for want of appearance and/or non-payment of costs. The learned Master struck out the summons for striking out for want of appearance. The defendants filed another summons on 12<sup>th</sup> September, 2017. When the matter was mentioned on 03<sup>rd</sup> October, 2017 Mr Amrish Pal appeared for the plaintiff and the court granted time to file affidavit in response and affidavit in reply. The plaintiff did not file his affidavit in response and the court delivered its ruling on the written submissions of the defendant.
- [4] The court in its ruling made the following orders:
- A. The defendant's summons seeking striking out of the plaintiff's writ of summons and the statement of claim on the ground of want of prosecution fails and is dismissed.
  - B. The SCO Civil High Court Registry, Suva to serve the plaintiff/counsel with a Notice of Adjourned hearing.
  - C. The plaintiff/counsel to show cause why "an unless order" in terms of the total outstanding costs should not be imposed and activated upon non-compliance.
  - D. The matter is adjourned to 17<sup>th</sup> April, 2018 at 9.00am.
- [5] On the day this ruling was delivered the plaintiff was absent and unrepresented. On the 17<sup>th</sup> April, 2018 when the matter was mentioned before the learned Master a

solicitor represented the plaintiff but learned Master struck out the statement of claim of the plaintiff for none payment of costs. Although the court ordered the notice of adjourned hearing be served on the plaintiff there is no affidavit of service filed of record.

[6] The plaintiff applied for leave to appeal out of time on the following grounds of appeal:

1. That the learned Master erred in law and in fact in making an 'unless order' when such 'unless order' was not deliberate disobedience of the court orders and deliberate disobedience of the discovery orders.
2. That the learned Master erred in law and in fact in striking out the Appellants Writs of Summon on 17<sup>th</sup> April 2018 on a 'unless order' when there was no disobedience of discovery orders and in unfairly exercising the discretion under Order 24 Rule 16(1) of the High Court Rules.
3. That the learned Master erred in law and in fact in not making an order for the matter to take its normal course as the appellant's statements of claim were within the ambit of Order 25 Rule 8 which warrants an automatic discovery within the parties.
4. That the learned Master erred in law and in fact in not taking into account that the appellant/plaintiff has expeditiously within the stipulated time period has filed affidavit verifying plaintiff list of documents and completed the discoveries.
5. That the learned Master erred in law and in fact that in making 'unless orders' for non-payment of cost when it does not amount to contumacious conduct delay per se.
6. That the learned Master erred in law and in fact in not considering when the respondent defendant was a liberty to enforce the order of the court against the appellant/plaintiff.
7. That the learned Master erred in law and in fact in making an 'unless order' is striking out the plaintiff's claim for non-appearance of the

appellant or its counsel at the discovery stage when no such appearances are required under the high court rules.

[7] In the case of **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013) the Supreme Court held:

In applications of this kind appellate courts consider five factors to ensure a principled approach to the exercise of a judicial discretion. Those factors are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate court's consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced?

[8] The application for leave to appeal out of time was filed on 20<sup>th</sup> December, 2018, eight months after the order sought to be challenged was made. On 14<sup>th</sup> April, 2018 a lawyer representing the plaintiff was present in court when the order was made by the learned Master. Therefore the plaintiff cannot say that he was not aware of the order. Eight months is a long period and the plaintiff has failed to offer an explanation for such a long delay in making this application.

[9] From the record it appears that the plaintiff has not taken any interest in prosecuting this matter. This case was mentioned before the learned Master on 01<sup>st</sup> June, 2017, 26<sup>th</sup> June, 2017, 18<sup>th</sup> July, 2017, 11<sup>th</sup> September, 2017, 16<sup>th</sup> November, 2017, 22<sup>nd</sup> November, 2017, 31<sup>st</sup> January, 2018 and 29<sup>th</sup> March, 2018. On any of these dates the plaintiff had not been present in court nor had he been represented by a lawyer.

[10] The plaintiff avers in his affidavit in support that when he made enquiries his solicitor Mr Sharma enquired from the court registry and he was informed that the matter was struck out on 17<sup>th</sup> April, 2018. There cannot be any truth in this statement for the reason that on the day the matter was struck out the plaintiff was represented by a lawyer in court.

[11] When the court makes an order the parties to the case are bound to comply with it unless they seek to challenge the decision in a higher forum. In this case when the court ordered the plaintiff to pay costs within the period prescribed by the court he should have complied with it but he has totally disregard the orders of the court.

[13] For the reasons set out the court is of the view that the plaintiff has failed to justify the long delay in making this application and also there are no grounds of appeal that the plaintiff will probably succeed.

### **ORDERS**

1. The application for leave to appeal out of time is refused.
2. The parties will bear their own costs of this application.



28<sup>th</sup> March, 2019

  
Lyone Seneviratne

**JUDGE**