IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 11 OF 2008

BETWEEN : **VIJENDRA MANI** of Varadoli, Ba, Driver/Technician.

PLAINTIFF/RESPONDENT

AND : **SUBHAS CHANDRA SHARMA** trading as **SHARMA MUSIC CENTRE** of Nadi Town.

DEFENDANT/APPELLANT

Appearances : Mr M. Naivalu for the defendant/appellant
: Mr V. Chandra for the plaintiff/respondent
Date of Hearing : 29 July 2019
Date of Judgment : 11 September 2019

JUDGMENT

Introduction

[01] This is an appeal, with leave being obtained to appeal, against an interlocutory ruling of the learned Master (*"Master"*) delivered on 5 November 2018, where the Master had converted a notice issued by the court under O 25, R 9 of the High Court Rules 1988, as amended (*'HCR'*) to a summons for directions (*'the ruling'*).

[02] The parties had agreed that the court may deliver its judgment on the written submissions they had filed.

The Background

[03] On 17 January 2008, the plaintiff/respondent (*'the respondent'*) brought an action against the defendant/appellant (*'the appellant'*) claiming compensation for personal injuries sustained by him as a result of a motor vehicle accident which occurred on or about 4 November 2006.

[04] On 26 March 2008, the pleadings had closed. There were some issues with respect to the pre-trial conference ('*PTC*'). On 5 October 2016, the court delivered a ruling and directed the parties to complete the PTC. The parties did not take any action to complete the PTC.

[05] Thereafter, on 11 November 2016, the matter was taken off the cause list as there was no appearance by or for the respondent.

[06] On 8 November 2017, the court on its own motion issued a notice under O 25, R 9 of the HCR ('*the court's motion*') requiring the parties to show cause as to why the matter should not be struck out for want of prosecution or for an abuse of the process of the court.

[07] The respondent filed a show-cause affidavit on 25 January 2018. On 03 April 2018, the defendant filed an affidavit in support of the court's motion. Eventually, the matter was listed for hearing on 5 November 2018. On 5 November 2018, the Master converted the court's motion into a summons for direction and directed the parties to file the PTC within 14 days. The Master's ruling is so brief and can be quoted in full, which is as follows:

> *"I have gone through the history of this matter. The matter was for trial and the defendant filed the amended defence and counter-claim. The matter then was for Pre-Trial conference again. The ruling on the Pre-Trial conference was delayed and the plaintiff didn't take any steps. The defendant too didn't proceed on the counter-claim. The matter should have gone for trial after the ruling of Judge Anare Tuilevuka delivered on 5/10/16. However, it was not. However, the interest of justice requires this matter to go for trial immediately. Therefore, I* ***consider the Notice under Order 25 rule 9 as Summons for Directions.*** *As a result I direct the parties to try the Pre-Trial conference again on the amended Counter Claim. Pre-Trial conference minutes before 20/11/18. Mention on 20/11/18. If not the Pre-Trial Conference to be amended before me. "(Emphasis provided)*

Grounds of Appeal

[08] The appellant appeals the ruling of the Master on the following grounds:

1. *That there was a breach of natural justice as the Learned Master did not hear the application and/or allow the Appellant to support the Court's Motion which the Learned Master was required to do under Order 25 Rule 9 of the High Court Rules, such that it led to the Master to summarily convert its Motion under Order 25 Rule 9 to a Summons for Direction which resulted in a miscarriage of justice;*

2. *The Learned Master erred in law by not providing a reasonable opportunity for the Appellant to present its oral and written submissions in support of the Motion and went on to convert the Motion, in the absence of a hearing, to a Summons for Directions, when he had previously directed the Appellant to file evidence by way of an affidavit in support of the Motion;*

3. *The Learned Master erred in law by failing to provide the Appellant a reasonable opportunity to be fully heard on the Motion contrary to Section 15 of the Constitution of Fiji such that it led to a miscarriage of justice;*

4. *The Learned Master erred in law and in fact when he purportedly held that the delay was a result of the pending ruling of Justice Tuilevuka when:*

    [i] *there was evidence to show that notwithstanding the delayed ruling by Justice Tuilevuka, the Respondent was dilatory in prosecuting the action and caused significant delay prior to, and thereafter;*

    [ii] *there was no reasonable and/or excusable reasons for the delay presented by the Respondent; and*

    [iii] *there was evidence to show specific and implied prejudice against the Appellant as a result of the delays occasioned by the Respondent,*

    and thereby fell into the error of converting its Motion to a Summons for Directions summarily;

5. *The Learned Master's purported reason to convert its Motion to a Summons for Directions due to the pending ruling by Justice Tuilevuka is inadequate and/or contradictory when he had previously directed the Appellant to provide evidence by way of an affidavit in support of its Motion to strike out;*

6. *The Learned Master erred in law and in fact by failing to take into account of the evidence provided by the Appellant by way of his affidavit and accordingly converted its Motion to a Summons for Direction without providing any or any sufficient written reasons for his decision.*

7. *The Learned Master erred in law and in fact by failing to properly consider or consider at all the evidence produced by the Appellant in support of the Court's Motion under Order 25 Rule 9 such that it led to a summary conversion of the Motion to a Summons for Directions; and*

8. *The Learned Master erred in law by failing to consider or consider at all, the principles applicable to a motion under Order 25 Rule 9, including but not limited to,* ***Grovit and others v Doctor and Others*** *(1997) 01 WLR 640, 1997 (2) ALL ER, 417 and* ***New India Assurance Company Ltd, V Rajesh K. Singh and Anor****, Civil Appeal No, ABU 0031/1996, such that it led to a summary conversion of the Motion to a Summons for Directions.*

The Law

[09] The HRC, O 25, R 9, provides:

> *"Strike out for want of prosecution (O 25, R 9)*
>
> *9 (1) If* ***no step*** *has been taken in any cause or matter* ***for 6 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.*** (Emphasis added)".

The issue

[10] The only issue on appeal was whether the Master was correct in summarily converting the court's motion to a summons for direction without a hearing and without giving adequate reasons or no reasons for doing so.

The submissions

Appellant

[11] On behalf of the appellant Mr Narayan submits: the Master's failure to hold a proper hearing clearly amounted to a miscarriage of justice and breach of natural justice. The Master had failed to consider the affidavit evidence filed and the oral argument advanced by the parties to appropriately determine whether or not delay had been satisfactorily explained by the respondent.

Respondent

[12] Mr Chandra of counsel for the respondent on the other hand submits: the appellant has no grounds of appeal that touches on the alleged delay by the respondent giving rise to substantial risk for a fair trial. All the grounds of appeal are primarily based around the conduct of the Master and his actions of summarily converting his own motion into a summons for directions. He further submits: even if this court finds the Master's conversion of the motion into a summons for direction as premature, it would still mean that this matter perhaps would have to be sent before the Master again to be heard properly as the appellant is claiming that the Master has in fact not provided a ruling at all in this matter.

Discussion

[13] The appellant appeals the Master's interlocutory ruling dated 5 November 2018. The ruling was made on a notice issued by the court on its own motion under O 25, R 9 of the HCR, calling for show-cause from the parties why the action should not be struck out for want of prosecution or as an abuse of the process of the court.

[14] The respondent filed an affidavit showing cause why the matter should not be struck out and the appellant filed his affidavit in support of the court's notice. The hearing of the notice came up before the Master on 5 November 2018, when, it appears, both counsel had made oral submissions and the Master made his ruling that: "*I have gone through the history of this matter... Therefore, I consider the*

Notice under Order 25 rule 9 as Summons for Direction. As a result, I direct the parties to try the Pre-Trial Conference again on the amended counter claim …"

[15] The grounds of appeal collectively challenge the validity of the Master's ruling, which summarily converts the court's motion to a summons for direction without proper hearing and without adequate reasons for doing so.

[16] I would concentrate the issue that was raised on this appeal rather than considering the grounds of appeal individually.

[17] In terms of HCR, O 25, R 9, if no step has been taken in any cause or matter for 6 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.

[18] HCR, R 9 (2) explains what the court can do on the application or on its motion, which says: Upon hearing the application the Court may either **dismiss** the cause [or] matter on such terms as may be just or **deal with <u>the application</u> as if it were a summons for directions.**

[19] Undoubtedly, the court has, on the application or on its motion under Rule 9, the discretion either to dismiss the action or to deal with the application as if it were a summons for directions.

[20] The question then arises whether the court could deal with its own motion as if it were as summons for directions. The whole idea of O 25, R 9 is that of case management and cases should not be lying in courts without taking steps for 6 months or more. That is why the rule requires that if no step has been taken in any action for 6 months then any party on application or the court of its own motion may list the action 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.

[21] It is the application, filed by the party under R 9, that can be dealt with as if it were a summons for directions under R 9 (2) not the court's motion. The reason

for that preposition is that R 9 (2) expressly states that the court may ... *'deal with the application as if it were a summons for directions.'* It is worth to note that the word *'its motion'* has been omitted in R 9 (2), and it only says that the court may ... deal with the application and **not its motion** as if it were a summons for directions.

[22] It is the parties that needs to take steps, not the court. Converting the court's motion to a summons for directions would amount to court taking step on behalf of a party, which the court cannot do. If it does, that would be against the case management.

[23] The parties filed their respective affidavits after the court had issued its motion under R 9. The appellant filed his affidavit supporting the court's motion, where he stated that he would be prejudiced if the action were not dismissed. The respondent in his show cause affidavit had attempted to explain the delay for not prosecuting the claim ever since the claim was taken off the cause list for non-appearance of the respondent or his solicitor on 11 November 2016. Since then, the respondent did not take any step to reinstate the claim and proceed with it from the stage at which it was taken off the cause list. On 8 November 2017, the court issued its notice calling for show cause why the matter should not be struck out for want of prosecution. The respondent did not even give to the appellant a notice of intention to proceed after 6 months delay as required by HCR, O 3, R 5.

[24] The Master had summarily converted the court's motion to a summons for directions purportedly acting under R 9 (2) without a proper hearing and without considering the affidavit filed by the parties. Under R 9 (2), the court may deal with the application as if it were a summons for directions upon hearing the application.

[25] The only reason given by the Master for his ruling is that the history of the case. It is not sufficiently adequate reason for his decision. Therefore, his ruling should not be allowed to stand.

Conclusion

[26] For the reasons set out above, I would hold that the Master was incorrect in summarily converting the court's motion to a summons for direction without proper hearing and properly considering the affidavits filed by the parties. I would, therefore, allow the appeal and set aside the Master's ruling dated 5 November 2018. I would remit the matter back to the Master for consideration of the court's motion and for deciding on its merits, after taking the affidavits filed by the parties. In all circumstances, I would make no order as to costs.

The result

1. Appeal allowed.
2. Master's order dated 5 November 2018 set aside.
3. Matter remitted to Master for decision on its merits.
4. No order as to costs.

11/9/19
....
M.H. Mohamed Ajmeer
JUDGE

At Lautoka
11 September 2019

Solicitors:
AK Lawyers, Barristers & Solicitors for the defendant/appellant
Millbrook Hills Law Partners, Barristers & Solicitors for the plaintiff/respondent