

IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Civil Action No.: HBC 51 of 2018

BETWEEN : **TOYOTA TSUSHO (SOUTH SEA) LIMITED** a limited liability company duly incorporated in Fiji and having its registered office at Ratu Mara, Nabua, Suva, Fiji and trading under the name and style of **AVIS RENT A CAR.**

APPELLANT

AND : **GOUNDAR SHIPPING LIMITED** a limited liability company incorporated in Fiji having its registered office at Vunibua Beach Street, Levuka, Ovalau.

RESPONDENT

Counsel : **Appellant: Mr. Nandan.S**

Respondent: Mrs. Devon .S

Date of Hearing : **15.10.2020**

Date of Judgment : **26.10.2020**

JUDGMENT

INTRODUCTION

1. This is summons filed by Defendant seeking leave to appeal pursuant to grant of extension of time 21.11.2019. Master had struck off statement of defence due to the conduct of the Defendant in not attending to pretrial conference. The issue to be determined in the appeal is whether a party can be shut out from action on the reason that such party had not attended Pretrial Conference (PTC) which was attached with 'unless order'. The scope of unless order and whether Defendant can be heard as to the reason for non-compliance is another issue. When a party had not complied with unless order can they also give reasons for default before Master is another issue.

FACTS

2. Facts are summarized by decision delivered on 21.11.2019, regarding extension of time for appeal in following manner.

‘Chronology of relevant Orders made by the Master

- (i) On 12th April, 2019 the plaintiff and defendant were represented. The Master made an unless Order that unless the Defendant files its Affidavit verifying its List of Documents, (AVLD) by 18th April, 2019, the court will deem that they have no documents to file and rely upon.
 - (ii) On 24th April, 2019 the defendant was not present nor represented. The parties were directed to convene a PTC and file minutes before 8th May, 2019.
 - (iii) On 9th May, 2019 the defendant was not present nor represented. The plaintiff’s solicitor informed the Master that draft PTC minutes were sent on 6th May, 2019 and have yet to receive a reply from defendant’s counsel. A final adjournment was given for parties to convene PTC and file minutes on or before 17th May, 2019.
 - (iv) On 27 May, 2019 the defendant was not present nor represented and a final adjournment was given for the PTC minutes to be filed on or before 31st May, 2019. The Master made Order that: “Unless Counsel for the Defendant appears for PTC before (her) on 31st May, 2019 @10.30 am, the Defence shall be struck out with costs.
 - (v) On 31st May, 2019 The Master noted that counsel for the Defendant failed to appear and the PTC minutes were not filed. She made Order that the unless order of 27/05/19 is effective immediately and struck out the statement of defence.’
3. After making order no appeal was preferred within stipulated time hence an application was made for extension and it was granted on 21.11.2019. Present application is filed, seeking leave to appeal said order to strike out.
 4. The notice and proposed grounds of appeal seek that the following orders made by the Master of the High Court, on 27th May, 2019, 31 May, 2019, 17 July, 2019, and 23 July 2019, be set aside:

‘Unless the Defendant appeared before the Honourable Master on the 31 day of May 2019, the Statement of Defence shall be struck out (Unless Orders)

The Statement of Defence is struck out on the 31 day of May 2019 (Striking Out Orders)

Refused to give audience to the counsel of the Defendant on the 17 July 2019 and on the 23 July 2019.’

5. On the following grounds are found in the proposed grounds of appeal

‘The Honourable Master erred in law and fact and/or misdirected herself in law and fact in dismissing and/or misdirected herself in law and in fact in making the Unless Order in absence of the Defendant and/or the Defendant’s Counsel;

The Honourable Master erred in law and in fact and/or misdirected herself in making the Striking Out Order without first sending a Notice of Adjourned Hearing to the Defendant or its counsel and without enquiring whether the Defendant was aware of the Unless Orders.

The Honourable Master erred in law and in fact and/or misdirected herself in refusing to grant audience to the Defendant’s counsel on the 17 July 2019 and the 23 July 2019.’

6. Master had struck off statement of defence due to non-compliance of an unless order to attend PTC. Defendant’s contention is that they were unaware of the unless order as they were not present in the court when unless order was made.
7. Defendant had further raised an issue whether they should be heard by Master subsequent to striking out in terms of unless order.
8. It is rare to interfere with interlocutory decision and this will be more so when it relates to a decision regarding case management. Defendant should primarily establish in the appeal that the orders made by Master were manifestly erroneous and they are prejudiced by the orders.
9. There is no qualm that orders made by Master had prevented Defendant’s pleading being considered at hearing. This had prejudiced them from presenting their defence. So if the grounds of appeal show merits leave is granted.
10. Defendant’s grounds of appeal taken as a whole question the jurisdiction of Master to make an unless order in the absence of one party and subsequently striking out pleading in terms of that preemptory order.

11. In Fiji High Court decision, *Peters v Seashell@Momi Ltd* [2012] FJHC 868; HBM09.2011L (15 February 2012) it was held,

“RE-INSTATE OR APPEAL?

[14] There appears to be much confusion as to whether the striking out or dismissal of an action pursuant to an "unless" order where no hearing on the merits took place should be appealed or whether it should be the subject of an application to re-instate before the Master or Judge that made the order. Recently, several decisions of this Court were delivered on the question: *Westmall Ltd v CUL (Fiji) Ltd* [2010] FJHC 448; HBC175.2001L (6 October 2010); *Nakesu v Lakoiniusiladi* [2012] FJHC 828; HBC113.2009 (27 January 2012); *Samat v Qelesai* [2012] FJHC 844; HBC201.2002L (30 January 2012); *Gulf Seafood (Fiji) Ltd v Native Land Trust Board* [2012] FJHC 853; HBA28.2011 (2 February 2012); *NBF Asset Management Bank v Krishna* [2012] FJHC 835; HBC129.1999L (2 February 2012). The consensus is that the proper procedure is an application to reinstate rather than any appeal.

[15] That being the case, the applicant's current application to enlarge time to appeal is misconceived. But, having regard to the fact that his counsel had filed and later withdrew an application to re-instate, on a misapprehension of the proper procedure, I would deal with his current application as if it were an application to re-instate rather than an application to enlarge time to appeal.”

12. In Fiji High Court decision of, *Samat v Qelesai* [2012] FJHC 844; HBC201.2002L (30 January 2012) this issue was raised and it was held,

“16] The courts must be able to freely apply the useful armory of unless orders in their day to day case management. Currently in Fiji, the Master of the court handles most of the pre-trial steps and the cases are adjourned before a judge for hearing. Therefore, the Master must have the flexibility to exercise this discretionary powers of making unless orders. I will reason out the jurisdiction of the Master to make unless orders later on in my judgment. When exercising such powers the Master must ensure that the unless orders are fair and reasonable and the consequences are proportionate to the breach. In appropriate situations the Master could vary or set aside the unless order. However, care should also be taken that unless orders are not construed as an idle threat, not intended to be carried out.”

13. So there are issues as to the manner in which alleged refusal of party to make representation before Master after application of unless order.

14. Master had made a preemptory order to compel a party to participate in PTC. In my mind there are meritorious grounds as to the manner in which unless order is made and what had transpired after that before Master.
15. So the manner in which unless order was made and how it was implemented and also conduct after that where Defendant was compelled to file this appeal are issues that have merits and needs to be determined in appeal.
16. Apart from that when the Defendant was struck off in terms of 'preemptory 'order whether they have a right to heard as to the reason for non compliance is another issue that has merits.
17. In the circumstances Defendant is granted leave to appeal in terms of summons filed on 7.7.2020 against 'interlocutory decision of Master delivered on 31.5.2019.
18. The prejudice to Plaintiff in granting this leave to appeal is less. Plaintiff's claim needs to be proved in the assessment of damages. So granting leave to appeal is necessary to determine the validity of the said Master's order in striking out statement of defense.

CONCLUSION

19. Defendant had shown merits in this appeal, against Master's decision to strike out the statement of defence. There is no prejudice to Plaintiff has it needs to prove assessment of damages even if judgment is entered against Defendant as to the liability.

FINAL ORDER

- a. Leave is granted against interlocutory decision delivered by Master 31.5.2019.
- b. No costs.

Dated at Suva this 26th day of October, 2020.




Justice Deepthi Amaratunga
High Court, Suva