

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER: HBC 239 OF 2020

BETWEEN: **VINOD KUMAR**

PLAINTIFF

AND: **JONE DIVAVESI**

1ST DEFENDANT

SUPER CONSTRUCTION AND CIVIL WORKS LIMITED

2ND DEFENDANT

Appearances:

Ms. K. Saumaki for the Plaintiff.

No Appearance of 1st Defendant.

Mr. V. Kapadia and Ms. J. Singh for the 2nd Defendant.

Date/Place of Judgment:

Wednesday 16 April 2025 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

RULING

(Application for Leave to Appeal from Decision of Master)

A. Catchwords:

LEAVE TO APPEAL – DECISION OF MASTER- *refusal by Master to re-instate action struck out for non-compliance of orders of Master- plaintiff was earlier allowed an opportunity to proceed with the action when an Order 25 Rule 9 summons to show cause was issued on the Master's motion as the plaintiff had not proceeded with the action for almost two years after service of the claim- on summons to show cause, a chance was granted to the plaintiff to proceed with his claim- orders were granted and strict compliance was required- the plaintiff's inaction again led to the matter being struck out- on the application for reinstatement, plaintiff claimed that his lawyers overlooked , thinking that they had complied with the orders- such lethargic reason is inexcusable in light of earlier inaction on the part of the plaintiff- plaintiff's inaction*

is contumelious and disrespectful- the conduct of the plaintiff shows disregard of the orders of the court and an expectation that since this is a personal injury claim, the court will oblige the plaintiff and continue to grant time over time to comply with the orders- the court has a duty to ensure that each party's constitutional right under s. 15(3) is fulfilled and that one party does not continue to be allowed to cause delay in the proceedings and expense to other parties- the Master had not erred in exercise of her discretion as each party has a duty to proceed with his or case expeditiously- it is not the Master's correct exercise of discretion that has caused the plaintiff prejudice but the choice of the plaintiff in initially not moving his case for almost 2 years after filing the same and when given one chance to proceed, in failing to ensure that all orders are timely complied with- in any event, the plaintiff has not pleaded any significant injuries arising out of motor vehicle accident to claim prejudice, he continued to work after the accident and only brought a claim when he was terminated from work- the conduct of the plaintiff and his injuries establishes lack of genuineness to proceed -the application for leave ought to be declined.

B. Legislation:

1. *Constitution of Fiji: s. 15(3).*
-

Application

1. This is an application by the plaintiff for leave to appeal the decision of the Master of 2 December 2024 in refusing to reinstate the plaintiff's claim which struck out on 10th August 2023 on "unless orders" of 5th July 2023.

Background

2. I will very briefly outline the history of the proceedings. On 14th August 2020, the plaintiff filed a writ and statement of claim against 1st and 2nd defendant's claiming damages for personal injuries arising out of a motor vehicle accident allegedly caused by the negligence of the 1st defendant. The accident occurred on 6 September 2017. A claim was filed after 2 years 11 months.
3. The motor vehicle registration number JC 088 was driven by the 1st defendant when the alleged accident occurred. The plaintiff claims that the 2nd defendant is vicariously liable as the employer of the 2nd defendant and the owner of the motor vehicle.
4. The 2nd defendant denies vicarious liability on the basis that the accident occurred well after working hours and both the plaintiff and the 1st defendant had left the workplace and were on their own individual journeys.

5. The 1st defendant says that the plaintiff continued to work for the 2nd defendant for some years after the accident without any signs of injury but after he was terminated for cause, he filed this action. He says that the plaintiff was cleared by Nausori Hospital to go home straight after the accident.
6. After filing the claim, the plaintiff did not move the action. The Master then, on her own motion, had an Order 25 Rule 9 summons issued on 2 June 2022 for the plaintiff to show cause why the action should not be struck out for failure to proceed.
7. After hearing the parties on the summons to show cause, the Master delivered an ex-tempore ruling on 5 July 2023. An opportunity was granted to the plaintiff to proceed with the action. The Master made the following observations and orders:

[14] *As stated earlier the plaintiff did not proceed further with the matter for one year and eleven months.*

[15] *However I do not find the defendants are prejudiced as they had not entered any appearance and filed their statement of defence.*

[16] *Apart from the delay there are no other prejudice highlighted by either of the defendants.*

[17] *Should the matter be struck out now the plaintiff will not have his claim be determined on merits*

[18] *There is no evidence of any substantial risk for a fair trial likely to cause the defendant any serious prejudice.*

[19] *Though there is a delay of close to 2 years, I do not find the case warrants a dismissal under Order 25 Rule 9 Notice.*

[20] *Following orders are made:*

- (a) *The 1st defendant file and serve notice of intention to defend by 12 noon on 10th July 2023;*
- (b) *The 1st and 2nd defendants to file/serve their respective statement of defence by 12 noon on 14th July 2023;*
- (c) *The plaintiff to file/serve a reply to the statement of defence by 12 noon on 21st July 2023;*

- (d) *The plaintiff thereafter to file/serve a summons for direction by 12 noon on 28th July 2023;*
- (e) *Should the defendants not file/serve statement of defence as above, the plaintiff is at liberty to seal an interlocutory judgment by 12 noon on 21st July 2023;*
- (f) *And should the plaintiff not comply with (d) or (e) required in the circumstances, the matter shall stand struck out for want for prosecution.*

[21] *Matter will be called to check on compliance on 10th August 2023 at 10am”.*

8. The plaintiff did not file the summons for directions by 12 noon on 28 July 2023.
9. When the matter was called in court on 10 August 2023 to check for compliance, the Master ordered that as per the orders, the mater stands struck out and a formal application for reinstatement ought to be filed.
10. On 11 August 2023, the plaintiff filed an application seeking that the action be reinstated to the cause list and the time for compliance granted on 5 July 2023 be extended.
11. The grounds for the application was that it was an oversight on the officer in carriage’s part in confirming the Master’s directions and they were of the view that they had complied with the Master’s orders. The oversight was not intentional.

Master’s Findings on the Reinstatement Application

12. The Master refused to reinstate the matter. She said that the plaintiff failed to adhere “*to the directions of the court despite allowed opportunity to proceed further after the issuance of Order 25 Rule 9 notice. The plaintiff was disrespectful in not complying with the court orders and is an abuse of the process of the court”.*

Law and Analysis

13. I have to determine whether the proposed grounds of appeal show that the Master’s decision in not reinstating the matter was clearly wrong and whether there will be substantial injustice caused to the plaintiff in allowing the decision of the Master to stand.

14. I have summarized the proposed grounds of appeal. It is contended that the Master erred:

1. *when she did not exercise her discretion to reinstate the matter when the plaintiff had shown that there was no intention to ignore or flout her directives as evidenced by partial compliance of her orders.*
2. *given that the automatic discovery under Order 25 Rule 8 of the High Court Rules 1988 applies after close of pleadings but the pleadings had not closed in this case as the 1st defendant had not filed his statement of defence.*
3. *in not exercising her discretion to reinstate the matter and grant an extension of time for compliance as it was in the interest of justice that the plaintiff's case to be determined on merits.*

15. The plaintiff did not file his case for almost 3 years after the accident. He had no interest in bringing a personal injury claim. He continued to work for the 2nd defendant and when he was terminated, he filed the claim. Be that as it may, after having filed his claim, he did not move the action for almost 2 years. Again there was no intention to proceed with the matter.

16. On the summons to show cause, the plaintiff was given a chance to prosecute his claim. Strict orders were issued for compliance. Given the plaintiff's earlier conduct in not showing any seriousness to file the claim and then to proceed with the same, one would expect the plaintiff and his solicitors to be very vigilant and show a genuine intention to proceed with the claim.

17. Additionally, with the "*unless orders*" issued against the plaintiff, he was already on the edge of a knife. The plaintiff and his solicitors were therefore expected to exercise utmost care and caution in ensuring that the orders of the Master were complied with or the action would stand struck out. That warning was already issued to the plaintiff and his counsel. Despite that warning the plaintiff and his counsel chose not to adhere to the directives.

18. What is the reason that the plaintiff's counsel gives for not complying with the orders of the court? The plaintiff's counsel says that the counsel in carriage overlooked that he did not comply with the orders. The plaintiff's counsel further says that it was thought that the orders had been complied with. I cannot comprehend and fathom such a frivolous explanation by the plaintiff's counsel.

19. The plaintiff's counsel always had the file. It would have just taken a minute to check whether the orders have been complied with. How can the counsel think that he has complied with the orders without checking the file? The plaintiff's counsel also says that it took some time to confirm the orders of the Master. If the plaintiff's counsel could comply with the order to file reply to defence, it shows that the counsel knew the full extent of the orders. The counsel also knew that the next step in the process was to file summons for directions as that was the next order to be complied with, within 7 days. The most prudent thing to do was to have a summons for directions prepared with the reply to defence and have it filed as soon as the reply to defence was issued.
20. In the very least, the counsel could have used modern day technology to remind himself of action due in the file to avoid being caught by unless orders.
21. In the grounds of appeal the plaintiff says that the Master erred in her discretion in not reinstating the matter as the plaintiff had not intended to flout her orders since there was partial compliance. In other words the plaintiff is saying that the court should be happy that the plaintiff complied with half the orders. I find this submission preposterous. The plaintiff should be happy that he was given a chance to proceed with the action and was expected to fully comply with the orders for his own benefit. Partial compliance is not sufficient.
22. A summons for directions is a standard document and it takes less than 5 minutes to prepare it. There is no reason why it should take a plaintiff more than 24 hours to file and serve the document.
23. The excuse tendered by the plaintiff's counsel is unreasonable. I agree with the Master that the conduct of the plaintiff and his counsel shows disrespect to the orders of the court and an attitude that since this is a personal injury claim, the court will feel obliged to let the plaintiff proceed with the action under any circumstances. The plaintiff disregards that under the Constitution, a party has the right to have his civil dispute tried within a reasonable time. This is a 2017 accident. It is now 8 years that the claim has not been prosecuted. 4 years has almost passed since the filing of the claim and the plaintiff chooses to continue to delay the matter.
24. There does not appear to be any genuine intention on the part of the plaintiff to proceed with the matter. It an abuse of the process for a party files a case and allow it to age in the system without proceeding with it and continually delaying the progress to trial. The plaintiff has indeed abused the process of the court and caused the defendants expense by filing and delaying the claim.

25. The plaintiff also says in his grounds of appeal that the Master erred in not considering that the time for automatic discovery arises after the pleadings close and since the 1st defendant had not filed his statement of defence, the automatic discovery could not take place. This attitude of the plaintiff yet again shows that it did not have any intention to comply with the order of the Master. The plaintiff fails to acknowledge and recognize that the Master had ordered that a summons for direction be filed. This was because the plaintiff could never be expected to comply with the rules for discovery on his own. The past conduct of the plaintiff was a cause for concern.
26. The Master therefore wanted to set timelines for discovery and other processes and monitor compliance. The rules were overtaken by the Master's orders. There is little point in asserting that the plaintiff would have complied with the rules.
27. The Master had also ordered that if defence was not filed, the plaintiff could proceed to file interlocutory judgment. The plaintiff did not move the court, to exercise this right against the 1st defendant and now complains that the pleadings had not closed.
28. Further, the plaintiff's pleadings was closed for the 2nd defendant as the plaintiff had filed his reply to defence on 21st July 2023. The 2nd defendant had received the reply on 26th July 2023, six days later. Despite this, the plaintiff did not file the summons for directions.
29. Given the plaintiff's earlier delay, the age of the case, and the inexcusable reason for non-compliance with the order, I find that the Master was correct in not reinstating the action. The plaintiff, by his conduct showed disinterest in proceeding with his claim. The court is under no obligation to continue to keep such cases in the system and consume judicial resources.
30. I do not find any injustice cause to the plaintiff by the Master's orders. The plaintiff is simply not interested in prosecuting this matter. He took 3 years to file a claim, two years to move the action and then not complying with the orders without any reasonable excuse. The claim was not filed until the plaintiff was terminated from work. The claim also does not show any severe injuries. I cannot find any prejudice caused to the plaintiff and if there is any it does not arise from the Masters orders but the plaintiff and his counsel's inaction to proceed.
31. I find that the 2nd defendant will suffer prejudice if this action were allowed to proceed. The 2nd defendant says that it has lost witnesses and may not be able to defend the trial fairly to his great prejudice and costs. The 2nd defendant's relevant witnesses since have left the employment. The 2nd

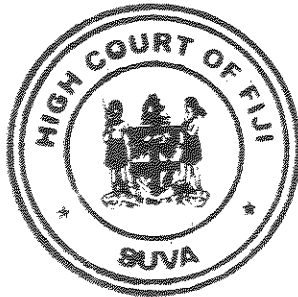
defendant has a constitutional right under section 15, to have his action dealt with without delay. That right cannot be continued to be defeated by the plaintiff.

32. I do not find the Master's orders wrong in law. Modern day case management principles require that each judicial officer in carriage of file issues orders for compliance and monitors it strictly to prevent cases being delayed. The Master had used unless orders to ensure compliance. She has the discretion to do so and she was correct in applying the constitutional principle that a case must be tried within a reasonable time. There is no basis to grant leave to appeal her decision as there is no error in the exercise of her discretion.

Orders

33. I dismiss the application for leave to appeal the decision of the Master.

34. The plaintiff shall pay the 2nd defendant costs of the proceedings in the sum of \$3,500. The sum shall be paid within 21 days.



.....
Hon. Madam Justice Anjala Wati

Judge

16.04.2025

To:

1. *Shelvin Singh Lawyers for the Plaintiff.*
2. *Kapadia Lawyers for the 2nd Defendant.*
3. *File: Suva HBC 239 of 2020.*