SHAMIR SAMAT v ELENI QELELAI and SUSHIL CHAND (HBC0201 of 2002L)

HIGH COURT — CIVIL JURISDICTION

WICKRAMASINGHE J

8 November 2004, 18 September 2007, 30 January 2012

Practice and procedure — applications — reinstatement of action — struck out for non-compliance — unless order made by Master — whether unless order just and reasonable — jurisdiction to strike out case on call over dates — appeal against ruling — High Court Act ss 21, 21(A), 21(B)(2) — High Court Rules 1988 O 25 r 9, O 29 r 9, O 32 r 9, O 59 rr 1, 2, O 67 r 6.

The plaintiff applied for reinstatement of his action, which was struck out for non-compliance with an 'unless order'. The matter had been adjourned to 11 November 2008. It was unclear what transpired in court on 11 November 2008, but on 14 November 2008 the Court made the following order: 'Unless plaintiff proceeds with the action (illegible) by 15/12 it is Struck Out due to non compliance of direction. Adjourned to 19/01.' Neither party was in court, nor were they legally represented. There is no minute sheet in the case record for 19 January 2009, and the next minute sheet dated 9 February 2009 states that the action was struck out on the basis that there was 'no progress'.

Held –

(1) It was critical that the plaintiff was made aware of the "unless order", and permitted adequate time for the plaintiff to satisfy the order before it was struck out on a subsequent date. The Court is not satisfied that the "unless order" was known to the plaintiff, or that the Master exercised his discretionary power to make the "unless order" with considerable caution considering the circumstances upon which he made the order. Hence, the "unless order" was unjust and was made in unreasonable circumstances.

(2) A Master is empowered to make "unless orders" when exercising his statutory powers on matters listed in O32 r9 and O59 r2 of the High Court Rules.

(3) A plaintiff aggrieved by an "unless order" could make an application for reinstatement before the same Judge, Magistrate or Master to set aside the "unless order".

Cases referred to

Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463; 2007 3 All ER 365; *Trade Air Engineering (West) Ltd v Taga* [2007] FJCA 9; ABU0062J.2006 (9 March 2007), cited.

Westmall Ltd v Cul (Fiji) Ltd HBC 175 of 2001L, applied.

Master's order vacated. Application for re-instatement allowed.

D. Gordon instructed by *Messrs Gordon & Co* for the Plaintiff

S. Maharaj instructed by *Messrs Suresh Maharaj &* Associates for the Defendants

Wickramasinghe J.

INTRODUCTION

[1] This is an application for re-instatement of the plaintiff's action, which was struck out by the Master on 25 March 2009, for non-compliance with an 'unless order'.

Background Facts

[2] The plaintiff by his writ seeks damages for personal injuries sustained by him from an alleged collision of the taxi driven by the second defendant and the horse ridden by him- the plaintiff.

[3] The plaintiff's writ for damages was first fixed for hearing on 8 November 2004, after both parties completed all pre-trial steps.[1]. However, the minutes of the case record reveals that the matter was vacated on 8 November 2004, but does not set out the reasons. The documents filed by the parties thereafter reveal that the hearing was vacated, as a judge was not available on that date. From 2004 to 2007, the case was left dormant until the defendant by summons dated 10 August 2007, made an application to strike out the plaintiff's action for want of prosecution. However, Jiten Singh J. who heard that application dismissed it after giving detailed reasons in his ruling dated 18 September 2007.

[4] The case was thereafter mentioned on 11 April 2008 and it was again fixed for hearing on 28 and 29 of July 2008. The case record bears evidence that both parties had subpoenaed the witness and was therefore ready for hearing on 28 July 2008. Meanwhile, the defendant, by motion dated 18 June 2008, sought an amendment to the statement of defence. The case was then called two days before the trial date, ie, on 25 July 2008, and the defendant was ordered to file the amended statement of defence and the hearing date was vacated.

[5] The Master, by his order dated 13 August 2008, ordered the defendant to file the amended statement of defence by 29 August 2008 and the plaintiff to file a reply by 10 September 2008 and adjourned the case to 11 September 2008 for mention.

[6] When the matter was mentioned on 11 September 2008, both parties were represented by their respective legal counsel and the Master made a further order extending the time for the plaintiff to file his reply by 30 September 2009. The court record reveals that along with the above extension of time he also made certain other orders, which are illegible and adjourned the matter to 10 November 2008. On 10 November 2008, when the matter was called, there was no appearance for the plaintiff and Mr Maharaj appeared for the defendant and the matter was adjourned to 11 November 2008. The record does not set out reasons for the adjournment to the following day.

[7] The case record does not contain a minute sheet for 11 November 2008. I am therefore uncertain what transpired in court on 11 November 2008. But the next minute sheet maintained on 14 November 2008 sets out the following unless order. It is pertinent to mention that when the below stated unless order was made, both parties were not present in court and nor were they legally represented. I also do not see a NOAM (Notice of Adjournment of Mention), informing the parties of the next date. The unless order reads:

> ***'unless plaintiff proceeds with the action(illegible) by 15/12 it is Struck Out due to non compliance of direction. Adjourned to 19/01.***

[8] There is no minute sheet in the case record for 19 January 2009 and the next minute sheet dated 9 February 2009 carries the following minute:

> ***Non appearance for Plaintiff***
> ***Mr S Maharaj for defendant***
> ***No progress***
> ***Action Struck Out costs to be taxed.***

1. See copy pleadings filed on 10 January 2003

Summons to re-instate and the objections of the defendants

[9] The plaintiff's application for re-instatement was filed with the supporting affidavit of Jamir Samat dated 10 July 2010. The said Jamir Samat deposed that the plaintiff was unable to appear on the relevant dates as he was in the process of terminating the services of the solicitors, Messrs Gordon & Co by his letter dated 25 September 2008[2] and appointing Messrs Yash Law instead, but was unable to instruct the Messrs Yash Law as the plaintiff's solicitor Ms Khan was relocating to Suva. The plaintiff further deposed that he did not appreciate or realize that he had no counsel and therefore would be unrepresented in court and his action would be struck out for non-appearance. He also stated that since the defendant had amended the defence, and further pre-trial steps had to be taken due to such amendment, there was no inexcusable or inordinate delay on his part, which could prejudice the defendant at the trial.

[10] The defendants on the other hand strongly objects to re-instatement primarily on two grounds. Firstly, that the plaintiff has a slim chance of success as the Magistrate Court has already convicted the plaintiff for furious riding of his horse colliding with the second defendant. The defendants submit that without appealing against the said Order of the Magistrate, the plaintiff is attempting to have the case reheard by another court against Rules and common law principles. Secondly, the defendant states that the defendant would not have a fair trial as the defendants presently do not know the whereabouts of the defendant's witnesses and even if they are found, they would not have a fair recollection of the accident. The defendant also submits that Gordon & Co. had failed to obtain leave from court under O 67 r 6 of the High Court Rules to cease acting for the plaintiff nor a notice of change was filed by Yash Law. Currently Gordon & Co is acting for the plaintiff.

[11] Let me now consider the unless order in issue.

The unless order

[12] In the case of *Westmall Ltd v Cul (Fiji) Ltd* HBC 175 of 2001L, Inoke J set out the law relating to unless orders in detail. I fully agree with his Lordship's reasons relating to the law and would therefore do not wish to be repetitive by repeating them again, except to state the following matters.

[13] Fundamentally, courts are required to determine cases on merit rather than dismissing them summarily on procedural grounds. However, for better case management, the courts at times are required to exercise its inherent jurisdiction and make unless orders against parties who persistently default adhering to court orders. The court therefore makes unless orders requiring the defaulting party to comply with the order by a certain date and specify the consequence of the default.

[14] Clearly, unless orders can only be made by courts in exercising its inherent jurisdictions. Further, an unless order should only be made when the court determines that the defaulting party is breaching the court order made 'relating to procedural compliance' either intentionally or contumaciously or acting lethargically and dragging his feet - so to say, thereby causing delays in the conclusion of the case. When making an unless order, a court must act fairly and reasonably. Moreover, the consequence of the order should be proportionate to

2. Attached marked annexure 'A ' to his affidavit.

the non-compliance once the default has occurred.[3] In *Trade Air Engineering (West) Ltd v Taga* [2007] FJCA 9; ABU0062J.2006 (9 March 2007) their Lordships in fact favoured an unless order rather that striking out the cause when it was said:

> ".....While, as pointed out in *Grovit v Doctor* [1997] 2 All ER 417, it is an abuse of the court's process to commence proceedings without the intention of prosecuting them with reasonable diligence, so far as we have been able to establish, from the somewhat sparse materials before us, such an absence of intention was not made out and accordingly striking out the proceedings on such grounds was not justifies. The fact that the limitation period for the Appellants' cause of action had not expired at the time of the dismissal is a second consideration favouring the giving of directions, ***possibly taking the form of 'unless orders', rather than terminating the proceedings. (emphasis added)***

[15] In the case of *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 3 All ER 365 Moore- Bick LJ said, ' & a conditional order (unless orders) striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified'.

[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.

[17] Master Udit struck out the plaintiff's application on the basis that there was 'no progress'. It appears that what was meant by 'no progress' is that the plaintiff failed to file the reply as directed in the unless order dated 14 November 2008. As stated in paragraphs 7 and 8 above, none of the parties were present when the Master made the unless order on 14 November 2008. To make matters worse, there was no reason for the case to be called on 14 November 2008 as the matter was in fact fixed to be mentioned on 11 November 2008. It is apparent that since both parties were not present on 14 November 2008, neither party had knowledge of the case being mentioned on 14 November 2008. The registry did not issue a NOAM (Notice of Adjournment of Mention), informing the parties of the next date viz. 19 January 2009. However, the case was not mentioned on 19 January 2009 and the case record does not have a minute sheet for that day. The case was then mentioned on 19 February 2009. It is unclear how this case came about to be mentioned on 19 February 2009, as the minute sheet does not reflect reasons. The case record does not contain a NOAM. However, the defendant was present on that date and it is unclear whether it was by mere chance. It is in these circumstances that Master Udit struck out the case based on 'no progress'.

3. Adrian Zuckerman, 'How Seriously should unless Orders be taken? CJQ Vol 27 Issue 1 ©Sweet & Maxwell 2008

[18] I am mindful that it is the obligation of the parties and their legal representatives to follow up and keep a track on their cases. However, it was critical that the plaintiff was made aware of the unless order made on 14 November 2008, and permitted adequate time for the plaintiff to satisfy the order before it was struck out on a subsequent date. This becomes even more significant if the defaulting party- the plaintiff, was of the view that (i) it was necessary to move for further time to comply with the order as the time allotted for the performance in the unless order is insufficient (ii) should have an opportunity to raise objections relating to the unless order or (iii) if an application made under (i) and (ii) above are over ruled by the Master, then even appeal against such ruling. Moreover, the Master could also on his own motion disregard non-compliance and allow further opportunities for compliance. It is for these reasons that the defaulting party- the plaintiff should have had knowledge of the unless order.

[19] I am not satisfied that the unless order was known to the plaintiff and therefore the unless order made by Master Udit was sound or reasonable. Nor am I satisfied that the Master exercised his discretionary power to make the unless order with considerable caution considering the circumstances upon which he made the order. In my judgment, it is unjust and is made in unreasonable circumstances.

[20] Since I have already held that the unless order made by the Master is unfair and should not have been made in the first place, the subject to the following two objections, taken by the defendants others are irrelevant to this application and therefore I will not consider them.

Does the Master have jurisdiction to strike out a case on call over dates

[21] Primarily, the High Court Act (Chapter 13 A) and the High Court Rules, 1988 deals with the appointment, jurisdiction and powers of the Master.

[22] Section 21 of the High Court Act is important in this regard. Whilst s 21A stipulates that the jurisdiction of the court exercisable by the Master must be made in Rules of Court, s 21 B(2) of the High Court Act provides that a person dissatisfied with the Master's decision may appeal as prescribed by Rules of Court to a court constituted by a single judge unless otherwise determined by the Chief Justice. Currently the Rules of Court specified in the High Court Act are enunciated in the High Court Rules, 1988.

[23] Order 59 of the High Court Rules, 1988 sets out the powers and jurisdiction of the Master. Under O 59 r 2, the Master can exercise the same powers exercised by a judge relating to chamber applications on the matters itemized under O 59 r 2. Significantly, O 59 r 1 empowers the Master to exercise the same jurisdiction conferred on the Registrar under the High Court Rules. The powers and jurisdiction conferred on the Registrar are set out in O 32 r 9. Therefore, the Master can also exercise all the powers set out in O 32 r 9 paragraphs (a) to (r) apart from the powers stated under O 59 r 2.

[24] In the circumstances, the Master could exercise the powers, authority and jurisdiction exercised by the judge in all chamber applications relating to matters stipulated in O 32 r 9 and O 59 r 2. This includes all procedural matters usually arising out of summons for direction.

[25] In many jurisdictions including Fiji, judges make unless orders for better case management. For the reasons stated above, it is my opinion that the Master is also empowered to make unless orders when exercising his statutory powers on matters listed in O 32 r 9 and O 59 r 2.

Can the plaintiff file action to re-instate without appealing against the Master's ruling?

[26] It is common ground that the plaintiff filed action for re-instatement and not an appeal against the Master's order. The defendant argues that the plaintiff should appeal against the Master's order and not an application for re-instatement.

[27] It is well established principle of law that a Master, Magistrate or a Judge cannot revisit or amend its own orders unless such orders were made *per incuriam*. In my mind, there are at least three types of rulings, orders, or judgments in a case made by either a Master, Magistrate or a judge. ie, (i) unless orders for procedural compliance; (ii) interlocutory or final orders, which are made on merit; and (iii) orders which are made in the exercise of statutory powers where matters are dealt summarily and not on merit.

[28] No doubt that both High Court Act s 21 B and the High Court Rules O 59 r 2 clearly provides that a party aggrieved by the ruling of the Master must appeal from such ruling after obtaining leave from the Judge. However, in my mind, these appellate provisions only apply to situations where the Master had considered an application on merit, which in effect deems final in the hands of the Master.

[29] 'Unless orders' that are made in the exercise of inherent powers of the court and solely for the purpose of compelling parties on procedural compliance are not made on merits. Therefore in my mind, an unless order made either by a Master, a Magistrate or a Judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not *functus officio.* This however would be in contrast to a ruling made by the Master in exercising the statutory powers under O 25 r 9 where matters could be struck out for want of prosecution. A decision made by the Master considering the objections placed before him on a show cause notice under O 29 r 9, is final in nature although not considered on the merits of the cause. Therefore, an aggrieved party would be required to appeal against such an order vis a vis an application to re-instate.

[30] For the foregoing reasons, in my judgment a plaintiff aggrieved by an unless order, could make an application for re-instatement before the same Judge, Magistrate or the Master to set aside the unless order.

ORDERS

1. **Master' order dated 25 March 2009 is vacated.**
2. **This action is re-instated.**
3. **The plaintiff to file his reply within 14 days hereof.**
4. **Dispense with the requirement of pre-trial conference.**
5. **The matter to be mentioned before me on 10 February 2012, to fix for hearing for early disposal.**

Application allowed.