

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

**CIVIL NO. HBC 409 of 2007**

**BETWEEN** : Narayan Shankar Lingham **PLAINTIFF**

**AND** : Nasinu Town Council **DEFENDANT**

**COUNSEL** : Mr. O'driscoll G for the Plaintiff  
Mr. Tinivata S for the Defendant

**Date of Judgment** : 15 November 2013

**JUDGMENT**

1. The issue that arises in this case is an application filed by the Defendant in terms of order 18 rule 18 of the High Court Rules to strike out the action of the Plaintiff.
2. The summons to strike out was filed on 27 June 2012 and served on the Plaintiff on 28 June 2012. There was no affidavit in support filed by the Defendant accompanying the summons.
3. By way of back ground, the Plaintiff by way of writ of summons filed on 5 September 2007, claimed damages in a sum of \$56,261.77 for breach of an employment contract. The Plaintiff was employed by the council as a Director of Works and Operation on a salary of \$42,000.00 per annum. The Plaintiff also seeks a declaration that the termination of his employment was unlawful.

4. The Defendant in its Statement of Defence denied the Plaintiff's cause of action and stated inter alia that the Plaintiff was properly terminated.
5. The Plaintiff filed the agreed bundle of documents and copy pleadings on 2 February 2009 and 11 February 2009 respectively. On 10 August 2009, when this matter was listed for mention before Pathik J, he has minuted that he was referring this matter to the registry to assign a judge.
6. This matter was thereafter listed before me on 17 February 2012 after a lapse of nearly three years. After notices were served on both parties, the Defendant filed summons on 27 June 2012 to strike out the Plaintiff's pleadings. On 28 June 2012, both counsel were given an opportunity to file affidavit in opposition and reply and fixed this matter for hearing on the strike out application.
7. On 9 August 2012, counsel for the Plaintiff informed court that there is no necessity to file an affidavit in opposition in the absence of affidavit in support and moved that the application to strike out should be dismissed as the affidavit in support is a mandatory requirement. Counsel for the Defendant submitted that an affidavit in support is not mandatory in an application to strike out and there is no impediment to maintain his application without an affidavit.
8. The issue lies in this court is to ascertain whether the affidavit is mandatory or not in an application to strike out and also whether the affidavit is required to support the grounds set out in the summons to strike out.

### **The Determination**

9. Order 18 rule 18 (1) states:

“(i) *The Court may at any stage of the proceedings order to be struck out or amended any pleadings or endorsement of any writ in the action or anything in any pleadings or in the endorsement on the ground that:*

- (a) *It discloses no reasonable cause of action or defence, as the case may be; or*
- (b) *It is scandalous frivolous or vexatious; or*
- (c) *It may prejudice embarrass or delay the fair trial of the action; or*
- (d) *It is otherwise an abuse of the process of the court and may order the action to be stayed or dismissed or judgments to be entered accordingly, as the case may be.”*

10. Grounds for striking in terms of summons as follows:

- (a) *“That the matter arose before the current Government changes the Administrators of the council after the issues of corruption such as this were discovered.*
- (b) *That the matter arose when the previous counselors were running the council who should be personally liable rather than the current Administrator’s set up by the current Government to clean up such corruption.*
- (c) *That the important files including the Plaintiff’s were destroyed somehow before the new Administrator’s were appointment to run the counsel and to clean up corruption.*
- (d) *That the current administrators should not be defending the very issue that contains elements of corruption of which they are supposed to clean up, an example is the Plaintiff’s case.*

*(e) That the matter should be reported to the FICAC first to determine the correct Defendant's, which should have been the previous counselor's who were involved.*

*(f) That if no step has been taken in any cause or matter for six months (O 25 r 9) 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."*

11. The following provisions of the High Court rules are relevant to ascertain the requirement of an affidavit in an application for striking out.

Order 28 rule 2 titled Affidavit Evidence states under Paragraph (1):

*"In any cause or matter begun by originating summons (not being an ex parte summons) the Plaintiff must, before the expiration of 14 days after the Defendant has acknowledged service, or if there are two or more Defendants, at least one of them has acknowledged service, file with the Registry the affidavit in evidence on which he or she relies."*

*Paragraph (3) states:*

*"Copies of the affidavit evidence filed in court under paragraph (1) must be served by the Plaintiff on the Defendant ... before the expiration of 14 days after service has been acknowledged by the Defendant."*

*Order 38 Rule 2 titled Evidence by Affidavit under Paragraph 3 states:*

*“In any cause or matter begun by originating summons... and on any application made by summons ..., evidence may be given in by affidavit.”*

*Order 41 Rule 5 titled Contents of Affidavit under Paragraph 2 states:*

*“An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.”*

12. In careful examination of the above provisions of High Court Rules, it is clear to this court that there could be instances where the affidavit in support is not required. The court may at any stage of the proceeding order to be struck out the pleading on the grounds set out in order 18 rule 18(1).
13. The following authorities provide some assistance and guidance to court in exercising discretionary power in striking our pleadings:

- [i] Footnote 18/9/3 of the 1988 Supreme Court Practice where the following is stated in relation to the exercise of the Court’s power under this rule:

*“It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the Plaintiff really has a cause of action (**Wenloci v Moloney (1965)** W.L.R. 1238: (1965) 2 All ER. 871, CA)”.*

- [ii] Footnote 18/19/4 of the 1988 Supreme Court Practice where the following is stated in relation to striking out applications:

*“On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits*

when the facts and issues are in dispute (**Wenlock v. Moloney** [1965] 1.W.L.R. 1238; [1965] 2 All E.R. 87, CA).

*“It has been said that the Court will not permit a Plaintiff to be driven from the judgment seat’ except where the cause of action is obviously bad and almost incontestably bad (per **Fletcher Mountlton L.J in Dyson v Att.-Gen. [1911]** 1 KB 410 p. 419).”*

[iii] In the case of **Electricity Corporation Ltd v Geotherm Energy Ltd** [1992] 2

NZLR 641, where the head note at kube 50 states as follows:

*“Held: 1 The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has all the requisite material to reach a definite and certain conclusion: the Plaintiff’s case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct (see p645 line 25).” (the underlining is ours).*

[iv] The Fiji Court of Appeal has applied similar principles in **National MBF Finance (Fiji) Ltd v Buli**, Fiji Court of Appeal Civil Appeal No . ABU 0057 of 1998S (6 July 2000) at page 2 of 4, second paragraph, where it stated as follows:

*“The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a*

*factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the court. In this case the Judge's task was made more difficult because a considerable amount of factual material was placed before him. We wish to point out that this is inappropriate and undesirable. The Judge's task was also made more difficult by the wording of both statements of claim and defence which do not raise the questions at issue with clarity."*

14. In view of the aforementioned reasons and authorities, I conclude that an affidavit in support is not a mandatory requirement in an application to strike out pleadings.
15. However, the court is tasked with the striking out application before this court to ascertain whether an affidavit is required in the given circumstances.
16. The basis for the striking out application has already been stated in the paragraph 10 of my judgment. It is my considered view that the matters set out in the summons of the Defendant necessarily require an affidavit as the evidence is based on facts and documents. This court is unable to rely on the grounds set out in summons in the absence of the affidavit.
17. The Defendant in its summons to strike out further takes up the position that the Plaintiff's action must be struck out on the basis of want of prosecution for a long period of time which amounts to an abuse of process. The Defendant relies on order 25 rule 9 and submitted that court should exercise its inherent power to strike out the Plaintiff's action.
18. I have perused the minutes of previous Judges in this matter prior to this case was listed before me. Pathik J in his last minute stated that "*I refer this case to the registry to assign a Judge*".

19. It appears on perusal of the case record that until 17 June 2012, no Judge was assigned to hear this matter.
20. The Defendant asserted in its summons and submissions that there is a failure on the part of the Plaintiff to prosecute his cause and dismiss the action on the premise of abuse of process.
21. The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by court on several occasions. In **Abdul Kadeer Kuddus Husein v Pacific Forum Line** 1ABU 0024/2000 FCA B/ v 03/382) the court, readopted the principles expounded in **Birkett v James [1978]** AC 297: [1977] 2 All ER 801 and explained that:

*“The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party.”*

22. In view of the guidelines set out in the above authority and taking into consideration of the chronology of events that has taken place, I am unable to agree with submissions of the counsel for the Defendant that the default has been intentional and contentious. The delay in prosecution of this matter cannot be solely attributed to the Plaintiff.

**Final Orders**

- a. The summons dated 27 June 2012 is struck out.
- b. The Plaintiff is granted a cost of \$750.00 assessed summarily to be paid by the Defendant within 21 days.
- c. Matter should take its normal cause.

Susantha N Balapatabendi

**JUDGE**