

**IN THE HIGH COURT OF THE REPUBLIC OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 59 OF 2013**

**BETWEEN** : **MADAN NAIDU** of Nawaicobe, Nadi.

***Plaintiff***

**AND** : **THE COMMISSIONER OF FIJI POLICE FORCE,** Vinod  
Patel building, Ratu Dovi Road, Suva

***Defendant***

**Appearances:**

Mr. R Singh for the plaintiff  
Mrs Lee for the defendant

**Date of Hearing** : 24 April 2014

**Date of Ruling** : 24 April 2014

**Date of Reasoning:** 7 May 2014

**INTERLOCUTORY RULING**

**[Reasons]**

**Introduction**

[1] Pursuant to Ord. 25, r. 9 of the High Court Rules 1988 (the HCR) the High Court Registry at the Lautoka High Court issued notice dated 9 December 2013 requiring the plaintiff to show cause why the court should not strike out the matter for want of prosecution or an abuse of the process of the court.

- [2] On 13 February 2014 the plaintiff filed and served affidavit of Punit Narayan, a litigant clerk employed at Messrs Patel & Sharma of Nadi, Solicitors for the plaintiff (show cause affidavit).
- [3] The defendant did not file any objection/affidavit to dispute the show cause affidavit filed by the plaintiff. Nevertheless, counsel for the defendant orally argued that the explanation given by the plaintiff was not good enough as such the plaintiff has failed to show cause.

### **Background**

- [4] The Plaintiff brought this action by Writ of Summons filed on 10 April 2013. He claims damages from the defendant for unlawful arrest and detention. The plaintiff was a police officer and worked under the direction of the defendant. He alleges that the police officers from Nadi Police Station without any lawful cause or excuse and unlawfully arrested him on 10 March 2013 and unlawfully imprisoned and/or unlawfully confined him till 11 March 2013.
- [5] On 24 April 2013 the defendant filed acknowledgement of service. But they failed to file and serve a statement of defence until the registry issued the notice. The defendant should have filed the statement of defence after filing the notice of acknowledgement of service. The plaintiff did not take any steps from the day the defendant filed the notice of acknowledgement till the court issued notice dated 9 December 2013.

### **The Law**

- [6] The High Court Rule **(O.25, r.9)** provides that:

*(1) If **no step** has been taken in any cause or matter **for six 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).

[7] The Fiji Court of Appeal in **Owen Clive Potter v Turtle Airways Limited** (CIV Appeal No. 49 of 1992 at p3 &4) explained the meaning of ‘**inordinate**’ and ‘**inexcusable**’ delay in prosecuting the claim as follows:

*“(Inordinate).....means so long that proper justice may not be able to be done between the parties. When it is analyzed, it seems to mean that the delay has made it more likely than not that the hearing and\or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties”.*

*...Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the judge to put into the scales the Plaintiff’s conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursuing the action or perhaps any action against the defendant”.*

[8] In **Grovit v Doctor and Others** (1997 1 WLR 640 at 641 H.L) it was held in a situation such as the present:

*“That for the plaintiff to commence and to continue litigation which he had no intention to bring to a conclusion could amount to an abuse of process; and that, accordingly, once the court was satisfied that the reason for the delay was one which involved an abuse of process in maintaining proceedings when there was no intention of carrying the case to trial it was entitled to dismiss the action”*

## **Dismissal on grounds of abuse of process**

- [9] Halsbury's Laws of England 4th Edition Volume 37 para 434 where it has been stated:-

***“An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court”.***

## **The Law and Analysis**

- [10] The court on its own motion issued the notice dated 9 December 2013 pursuant to Ord. 25, r. 9 to show cause why the action should not be struck out for want of prosecution or abuse of the process of the court as the plaintiff had failed to go on with the matter after the defendant filed the notice of acknowledgement of service on 24 April 2013. The defendant failed to file their statement of defence within the stipulated time, nor did apply for extension of time to file statement of defence. After two weeks of the defendant filed notice of acknowledgement the plaintiff should have done a search for defence, and if there were no

statement of defence filed then he should have entered default judgment vis a vis the defendant, which the plaintiff had failed to do.

- [11] Counsel for the plaintiff submitted that they cannot enter default judgment against the state for failure of filing the statement of defence. If that is the case, the plaintiff should have sought leave of the court to enter default judgment against the defendant pursuant to Ord. 77, r.6 of the High Court Rules. Of course, the plaintiff filed that application seeking leave to enter default judgment in default of defence after the court issued the show notice on the plaintiff.
- [12] Mrs Lee, counsel for the defendant argued that explanation given by the plaintiff for the delay was not good enough. In the result the plaintiff failed to show cause why the action should not be truck out for want of prosecution. Alternatively, she submitted, if the court minded to grant permission to proceed with the matter then the defendant would seek time to file the statement of defence.
- [13] The plaintiff had delayed some 6 months to take further steps in this case. The delay between the notice of acknowledgement of service filed on 24 April 2013 and the show cause notice dated 9 December 2013 is 7 ½ months. From that two weeks must be deducted because the plaintiff should have waited for the defendant to file a statement of defence. In fact, the delay cause by the plaintiff is about 7 months. It is to be noted that the sleeping period allowed by Ord.25, r.9 is six months.
- [14] In the show cause affidavit, the plaintiff indicates that default judgment could not be entered against the defendant. In that case the plaintiff should have filed an application to seek leave to enter default judgment against the defendant pursuant to Ord. 77, r.6. That rule states:

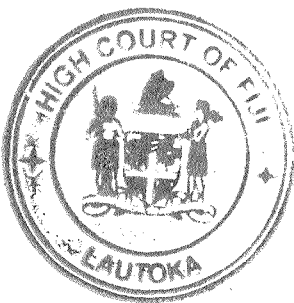
*“Except with the leave of the Court, no judgment in default of notice of intention to defend or of pleading shall be entered against the state in civil proceedings against the state or in third party proceedings against the state.”*

- [15] The plaintiff states that he was waiting for the defendant to file the statement of defence. He took step anyway under Ord.77, r. 6 to progress the matter by obtaining leave of the court to enter default judgment after the notice to show cause was issued by the registry at the Lautoka High Court. There has been 7 months delay on the part of the plaintiff to take step to progress the matter. The delay is not inordinate and justice in this case still possible. In the circumstance, I am unable to find the plaintiff guilty of culpable delay which would amount to abuse of process. The plaintiff was present in court at the hearing of this notice. His counsel indicated that he is present in court today (24 April 2014) to show that he has intention to proceed with the matter.
- [16] The plaintiff has convinced me that he has intention to progress with the matter and bring it to a conclusion.
- [17] Mrs Lee submitted that the defendant will be prejudiced if the plaintiff permitted to proceed with the matter after such delay. However, she did not specify the prejudice that would be caused to the defendant. In any event the prejudice can be compensated by way of costs.
- [18] For all these reasons, I proceed to permit the plaintiff to progress with the matter on the condition that hereafter he should prosecute the matter expeditiously with due diligence. Mrs Lee submitted that the defendant must be allowed to file statement of defence in the event that the court grants permission to proceed with the matter. To which, the counsel for the plaintiff did not object. I therefore grant leave to the defendant to file and serve a statement of defence within 21 days and 14 days thereafter to the plaintiff to file and serve a reply to the statement of defence.

[19] The plaintiff has filed on 13 February 2014 a summons pursuant to Ord. 77, r. 6 of the High Court Rules and to the inherent jurisdiction seeking leave of the court for the judgment in default to be entered against the defendant in default of defence. I would strike out that summons as I have granted leave to the defendant to file statement of defence.

**Final Orders:**

1. The plaintiff is permitted to progress with the case on the condition that he should prosecute the matter expeditiously with due diligence.
2. Leave is granted to the defendant to file and serve a statement of defence within 21 days.
3. The plaintiff to file and serve within 14 days thereafter a reply to the statement of defence, if need be.
4. The plaintiff's summons filed on 13 February 2014 is dismissed and struck out accordingly.
5. Costs shall be the cost in the cause.
6. Orders accordingly.



**At Lautoka**

**7 May 2014**

*M H Mohamed Ajmeer*

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**M H Mohamed Ajmeer**  
**Actg Master of the High Court**