

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 368 OF 2004/L

BETWEEN : **BIRMATI WATI** also known as **VEERMATI** (d/o Hulasi) of Lovu, Lautoka, Domestic Duties, as Administratrix of the **ESTATE OF NETHRAM** alias **NETH RAM** son of Totta Ram of Lovu, Lautoka, Labourer, Deceased, Intestate.

Plaintiff

AND : **VIMALS CONSTRUCTION & JOINERY WORKS LIMITED** a limited liability company having its registered office at 6 Vitogo Parade, Lautoka

Defendants

R U L I N G

INTRODUCTION

1. On 14 December 2012, Sun Insurance Company Limited, through their then lawyers, Suresh Maharaj & Associates, filed a Notice of Motion pursuant to Order 25 Rule 9 of the High Court Rules 1988. The Notice required the plaintiff to attend court on 06 February 2013 to show cause why the claim should not be struck out for want of prosecution or an abuse of the process of the Court. On 06 February 2013, the plaintiff appeared before me. The first defendant did not appear but the second defendant made an appearance through their lawyers. I then granted 21 days to the plaintiff to file an affidavit to show cause and 14 days thereafter to the 2nd defendant to file and serve an affidavit in reply. The matter was then adjourned to 11 April 2013. On 11 April 2013, the plaintiff again appeared as well as the 2nd defendant. There was no appearance by the 1st defendant. I then extended the previous orders regarding the filing of affidavits and then adjourned the case for ruling on notice.

AFFIDAVIT FILED FOR PLAINTIFF'S CASE

2. The affidavit to show cause filed by the plaintiff details how her late husband, Nethram, was employed at all material times by the first defendant, Vimals Construction and Joinery Works Limited (“**VCJWL**”) as a carpenter. On 27 July 2003, Nethram died at the workplace as a result of an accident. Her previous lawyers had obtained leave from this court to withdraw as counsel and she seeks time to find another lawyer.

3. Her statement of claim was filed on 02 December 2004 wherein she alleges negligence against the first defendant for, *inter alia*, failing to provide a safe system of work, failing to take adequate precautions for the safety of the deceased, exposing the deceased to the risk of injury. She also pleads *res ipsa loquitur*. She claims damages under the Compensation to Relatives Act, the Law Reform (Miscellaneous Provisions)(Death & Interest) Act, loss of FNPF contributions, and alternatively under the Workmen's Compensation Act.
4. I note from the records that the plaintiff did obtain a default judgement against the first defendant on 03n February 2005.
5. There is nothing on record to indicate that the said default judgement was ever set aside formally (or informally for that matter). And yet, on 05 July 2007, Suresh Verma & Associates did file a summons to join Sun Insurance Company Limited as a defendant. The Order to join Sun Insurance Company Limited was made on 26 February 2008. On 18 August 2008, Sun Insurance Company Limited filed its statement of defence through their lawyers, Suresh Maharaj & Associates. The plaintiff filed their reply on 03 September 2008 through her lawyers, Messrs Law Naivalu. On 20 January 2009, Messrs Law Naivalu filed Summons for Directions. The plaintiff and the 2nd defendants have since filed their respective lists of documents. I note also from the records that the plaintiff has filed a bundle of documents in 2010.

THE LAW

6. Case authorities on **Order 25 Rule 9** are abound. The principles I extract from these cases are as follows:
 - (i) the High Court has the power to dismiss or permanently stay proceedings.
 - (ii) but this power is exercised only where the court is satisfied either:
 - (a) 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
 - (b) (i) that there has been a delay on the part of the plaintiff or his lawyers, and (ii) which delay is both **inordinate and inexcusable**, and (iii) 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 party¹.

¹ (**Abdul Kadeer Kuddus Hussein v. Pacific Forum Line** ABU 0024/2000 – FCA B/V 03/382) where the court, readopted the principles expounded in **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801; see also **New India Assurance Co. Ltd. V. Rajesh Kumar Singh** (ABU 0031/1996 – FCA B/V 99/946)).

(iii) once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process (as per Dixon J in Dey v. Victorian Railways Commissioners [1949] HCA 1;(1949) 78 CLR 62, 91.

7. In Lovie v. Medical Assurance Society Limited [1992] 2 NZLR 244, 248 (cited with approval by the Fiji Court of Appeal in Pratap v Christian Mission Fellowship [2006] FJCA 41; ABU0093J.2005 (14 July 2006)) Eichelbaum CJ said that while the above considerations are the necessary starting point, at the end of the day, one must always stand back and have regards to the interests of justice.
8. After considering the affidavit filed, and having stood back and considered the interests of justice, I am of the view that the plaintiff has shown cause why this case should not be struck out for the following reasons.
- (i) this matter is almost ready for trial. The parties need only complete discoveries and a pre-trial conference before I can set the matter down for trial. Alternatively, a trial date can be set down now whilst the parties complete the above pre-trial processes.
 - (ii) there is a default judgement in place against the 1st defendant, VCJWL, who was the employer of the deceased workman.
 - (iii) the deceased workman is alleged to have died in the workplace as a result of the negligence of VCJWL.
 - (iv) VCJWL has not seen fit to attempt to set aside the default judgement. Instead, it simply applied for, and obtained an Order from this Court, to join the 2nd defendant, Sun Insurance Company Limited.
 - (v) as such, and from documents filed, it appears that the liability of VCJWL is established.
 - (vi) the only issue in this case is whether or not the workmen's compensation indemnity cover that VCJWL took with Sun Insurance Company Limited, was in effect and in force at all material times so as to make Sun Insurance company Limited liable to indemnify VCJWL for its liability in this case. This could easily be determined through an Order 33 proceeding.
 - (vii) I believe that a fair trial is possible in this case for all the reasons stated above without great prejudice to the 2nd defendant.
9. The summons to show cause under Order 25 Rule 9 is dismissed. Costs in the cause. This case is adjourned to **13 February 2014 at 8.30 a.m** before Master Ajmeer.

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Anare Tuilevuka.
JUDGE
06 February 2014