

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

CIVIL JURISDICTION

Civil Action No. HBC 187 of 2011

BETWEEN : **SHAHIBA BIBI** of Martintar Nadi, Domestic Duties,
as the Administratrix of the Estate of Mohammed
Illas of Martintar Nadi, Fisherman, Deceased,
Intestate and in her personal capacity.

Plaintiff

AND : **JOSEPH NARAYAN** of Samabula, Suva, Tiling
Contractor.

1st Defendant

AND : **ART AND SOUL** a limited liability company having
its registered office at 21 Bhimji Street, Wailoku.

2nd Defendant

Before: Master M H Mohamed Ajmeer

Counsel: Mr Anil J Singh for the plaintiff
Mr K Narayan for the 2nd defendant

Date of Hearing: 29 April 2014

Date of Ruling: 05 August 2014

R U L I N G

[On reinstatement]

Introduction

[1] This is an application for an Order that this matter be reinstated. By notice of motion filed 11 February 2014 (the application) plaintiff seeks to

reinstate the matter back to the cause list. The application is supported by an affidavit of **UNAISI KANAKARAWAKOLAKEBA BALEILEVUKA** sworn and filed 11 February 2014.

[2] The application is made pursuant to the inherent jurisdiction of the court in law and equity.

[3] The supporting affidavit, inter alia, states that:

1. ***THAT*** *this file was in carriage of Ms Patricia Mataika, Solicitor.*
2. ***THAT*** *on the 23rd of January, 2014 Ms Mataika was engaged at the Rakiraki Magistrate Court and she had instructed Ms Laisani Tabuakoro to appear on our behalf.*
3. ***THAT*** *the matter was adjourned to the 7th February 2014. However, Ms Mataika who has left our legal firm did not enter the date in our Master Diary.*
4. ***THAT*** *regrettably we were unaware that the matter was listed at 8.30am and when solicitor attended Court at 11am he discovered that the matter had been struck out.'*

[4] Second defendant opposed the plaintiff's application to reinstate and filed legal submission based on the plaintiff's own affidavit and the case record. The second defendant did not file affidavit in opposition. The second defendant submits that the current application be struck out with costs on the following grounds:

- (i) The application is irregular and defective
- (ii) The supporting affidavit is defective and should therefore be dismissed;
- (iii) The supporting affidavit is devoid of vital facts and evidence
- (iv) The plaintiff has not shown any compelling reasons why this matter ought to be reinstated (such as merits of the case, prejudice, length of delay, reasons for delay and so forth)
- (v) The delay has been inordinate;
- (vi) The delay has been inexcusable;
- (vii) The Plaintiff's conduct is an abuse of this Honourable Court's process

Background

[5] The plaintiff, as the Administratrix of the Estate of Mohammed Illas of Martintar Nadi, Fisherman, Deceased, Intestate and in her personal capacity, instituted this action by writ issued on 21 November 2011 in respect of a motor vehicle third party claim for her husband's death who died in an accident on 21 November 2008 allegedly caused by the first defendant.

[6] On 31 January 2012 the second defendant filed acknowledgement of service and filed statement of defence on 23 February 2012. Thereafter the plaintiff did not take any step to progress the matter for 1 year and 7 months.

[07] Consequently, on 9 July 2013 the second defendant filed summons to dismiss for want of prosecution pursuant to Order 25, rule 9 of the High Court Rules 1988, as amended. The summons to strike out was served on the plaintiff which the plaintiff had accepted and acknowledged and affidavit of service of Mohammed Zahid Khan sworn on 16 July 2013 is filed of record. The summons was returnable on 6 August 2013. On 6 August 2013, being the summons returnable date the plaintiff failed to appear in court to show cause why the action should not be dismissed for want of prosecution. As a result, on 6 August 2013 Master Tuilevuka (as then he was) struck out the matter on the basis that no cause shown by the plaintiff.

[08] After the matter was struck out on 6 August 2013, the plaintiff through her current solicitors filed an inter parte motion (the motion states that this motion is being filed pursuant to the Order 25 rule 9 of the High Court Rules) on 23 October 2013 for the following orders:

1. *That the matter be reinstated.*
2. *That the service of this application be abridged.*
3. *That the costs of this application be cost in the cause.*

[09] That application for reinstatement was called in court few occasions for mention and finally it was called on 7 February 2014 when there was no

appearance by or for the plaintiff. As such the court struck out the plaintiff's inter parte motion filed on 23 October 2013.

[10] Now, the plaintiff has filed the current application for an order that this matter be reinstated. This is the second application for reinstatement.

Reinstatement or Appeal after striking out the claim for want of prosecution?

[11] In the current application the plaintiff seeks to reinstate the matter. It is not clear whether he seeks to reinstate the substantive matter which was struck out on 6 August 2013 by Master Tuilevuka (as he then was) following an application made by the second defendant pursuant to Ord. 25, r.9 of the High Court Rules or to reinstate the application for reinstatement that was struck out for want of prosecution on 7 February 2014 for default of appearance by or for the plaintiff. Since the plaintiff seeks through the current application to reinstate the matter I would deal his application on the basis that he is seeking to reinstate the substantive matter.

[12] Striking out of a claim for want of prosecution brings the matter to termination. Therefore the order that strikes out the matter for want of prosecution may be considered a final order. If anyone who feels aggrieved with that order must, in my judgment, appeal against that order or perhaps he may bring a fresh action on the same. I am fortified with case law authority to say this.

[13] In **Finnegan v Parkside Health Authority** [1998] 1 All ER 595, English Court Appeal (HIRST AND MANTELL LJ) stated that:

*'... so that the action cannot proceed unless some reviving order is made; and that a **striking out for want of prosecution was final** seeing that the action is dead unless the court revives it.'* (My emphasis).

[14] Fiji Court of Appeal, (Ward, P. Barker & Scott, JJA) in **Trade Air Engineering (West) Limited & Ors v Laisa Taga & Ors** [2007] ABU 62/06 (apf HBC 399/03S.9 March 2007, commenting on Ord. 25, r. 9 stated that

this rule confers on the court the power to act on its own motion. Such a power is rarely conferred. This power is to strike out or give direction of its motion. At para 13-16 the Court of Appeal further stated that:

*{13} Although the judge rejected the Appellants' submissions he did give leave to them to apply for the action to be reinstated. Mr Haniff was unable to refer us to any provision in the rules granting the court power to reinstate an action struck out in these circumstances. **Generally, a party's only remedy following the striking out of its action is appeal.** Exceptions to this general rule such as O 13 r 10, O 14 r 11, O 24 r 17 or O 32 r 6 have no application to Order 25.*

[14] In our opinion the rehearing by the same judge of substantially of the same issues is, as a matter of principle, to be avoided, if at all possible. The rationale for granting leave to apply for reinstatement after the decision to dismiss the action had already been taken is not easy to discern.

[15] A notable feature of the new Order 25 rule 9 is that it confers on the court the power to act on its on motion. Within our present High Court Rules such a power is only rarely conferred. One example is O 34 r 2 (6), another is O 52 r 4. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji.

[16] In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority.' (My emphasis)

[15] An order dismissing an action for want of prosecution is not a decision on the merits, and does not operate as *res judicata*, and accordingly, unless the relevant time limit has expired, the may bring a second action upon the same facts against the same defendant, see **Pople v Evans** [1969] 2 Ch 255, [1968] 2 All ER 743.

[16] Returning back to the case before me, on 21 November 2011 the plaintiff issued a writ against the defendant claiming damages for personal injury her husband sustained as a result of motor vehicle accident that befell on 21 November 2008. On 25 November 2011 she served a statement of claim, on 31 January 2012 the second defendant filed acknowledgement of service and on 23 February 2012 served a defence. Thereafter no further steps were taken in the action until 9 July 2013, when the second defendant applied to strike out the claim for want of prosecution, and on 6 August 2013 Master Tuilevuka granted the application.

[17] It is noteworthy that when the second defendant applied to strike out for want of prosecution, the plaintiff had failed to take step in the action over a year and 5 months. The Master made order striking out the claim for want of prosecution as there was no explanation of the delay.

[18] The plaintiff thereupon on 23 October 2013 through her present solicitors filed an inter parte motion to have the matter reinstated. In fact the plaintiff would have appeal against the striking out order. That application too was struck out for non-appearance of the plaintiff on 7 February 2014.

[19] The plaintiff's counsel was unable to refer to any provisions in the High Court Rules granting the court power to reinstate an action struck out for want of prosecution pursuant to Ord. 25, r. 9 of the High Court Rules.

[20] The plaintiff's claim was struck out for want of prosecution on an application filed by the second defendant. The order striking out an action for want of prosecution appears to be a final order. The proper remedy the

plaintiff had in those circumstances was to appeal against the striking out order, not the reinstatement application.

[21] For all these reasons, I would hold that the court has no power to reinstate an action struck out for want of prosecution under Ord. 25, r. 9 of the High Court Rules. The party's only remedy following striking out for want of prosecution is appeal.

Conclusion

[22] The court has no power to reinstate the plaintiff's claim which was struck out for want of prosecution on 6 August 2013. I would therefore dismiss and struck out, *in limine*, both applications filed by the plaintiff to reinstate the action namely applications filed on 23 October 2013 and on 11 February 2014.

Final outcome

The applications filed by the plaintiff on 23 October 2014 and on 11 February 2014 seeking to reinstate the action struck out for want of prosecution on 6 August 2013 are struck out and dismissed with summarily assessed cost of \$250.00 payable by the plaintiff to the second defendant in 21 days. Order accordingly.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer

Master of the High Court

At Lautoka

Solicitors:

For the plaintiff: Messrs Anil J Singh Lawyers, Barristers & Solicitors

For the first defendant: No appearance

For the second defendant: Messrs AK Lawyers, Barristers & Solicitors