IN THE HIGH COURT OF FIJI

CIVIL JURISDICTION

WESTERN DIVISION

AT LAUTOKA

CIVIL ACTION NO. HBC 205 of 2012

BETWEEN : **PRASAD'S NATIONWIDE TRANSPORT EXPRESS COURIER LIMITED** a limited liability company having its registered office at 5 Mandarin Place, Drasa Vitogo, Lautoka

PLAINTIFF

AND : **VIPUL MANOJ DUTT SHARMA AND RAMESHWAR PRAKASH both trading as MISHRA PRAKASH & ASSOCIATES** of Ganga Singh Street, Ba, 16 Mana Street, Lautoka and 43 Bau Street, Suva, Barrister and Solicitor.

DEFENDANTS

TO : **VIPUL MANOJ DUTT MISHRA AND RAMESHWAR PRAKASH both trading as MISHRA PRAKASH & ASSOCIATES** of Ganga Singh Street, Ba, 16 Mana Street, Lautoka and 43 Bau Street, Suva, Barrister and Solicitor.

Mr. Pillai for the Plaintiff.
Mr. Nand for the Defendants.

Date of Hearing : - 26th January 2015
Date of Ruling : - 26th February 2015

EXTEMPORE RULING

(A) INTRODUCTION

The Court issued Notice of its own motion pursuant to Order 25, rule 9 of the High Court Rules for the Plaintiff to show cause as to why the action ought not to be struck out for want of prosecution or an abuse of process of the court.

(B) BACKGROUND

The chronology of events is as follows:

24.09.12	Writ of Summons and Acknowledgement of Service was filed by Suresh Maharaj & Associates
19.10.12	Statement of Defence filed
14.1.13	Reply to Statement of Defence filed Summons for Directions filed by Suresh Maharaj & Associates
11.2.13	Order on Summons for Directions filed and served
10.04.13	Affidavit Verifying Defendants List of Documents filed by Defendants.
11.04.13	Matter was called for mention to check on compliance on Summons for Directions. Following orders were made: 1. *14 days for Plaintiff to file and Serve Affidavit Verifying List of Document [Due 24th April 2013]* 2. ***The matter is adjourned to 10th May 2013 for mention*** to check Plaintiff has filed and serve Affidavit Verifying list of Document @ 8.30am before Master Anare Tuilevuka
1.05.13	Affidavit Verifying Plaintiff's List of Documents filed by Suresh Maharaj & Associates
10.05.13	This matter was for mention to check if PTC and Copy Pleadings have been filed. There was no appearance by the Plaintiff, **the matter has been adjourned to 5th day of June, 2013 to finalise PTC and Copy Pleadings.**
5.06.13	This matter was for mention to check if PTC and Copy Pleadings have been filed. There was no appearance by the Plaintiff; ***the matter has been adjourned to 17th day of July, 2013 for mention.***
17.07.13	Matter for mention. Master attending workshop therefore the ***Matter was adjourned to 21.08.13 for mention only.***
21.08.13	Matter for mention again. Court advised on last three occasions there was no appearance by the Plaintiff. The matter adjourned one last time due to Mr Suresh Maharaj's death for Plaintiff to appear. ***Adjourn to 23.10.13 for mention***

23.10.13 Matter for mention again to check on Plaintiff appearance. Again, no appearance by or for the Plaintiff. Plaintiffs name was called out. Mr. Mishra sought that the matter be struck off. Master ordered it be taken off cause list.

(C) THE LAW

(1) Order 25, rule 09 provides:

"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.
Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions".

(2) Order 25, rule 09 expressly gives power to the court on its own motion to list any cause or matter, where no step has been taken for at least six (06) months.

(3) The Court is allowed to strike out an action on the failure of taking of steps for six (06) months on two grounds. The first ground is for **want of prosecution** and the second is an **abuse of process of the Court.**

(4) The principles for striking out for **want of prosecution (first ground)** are well settled. Lord **"Diplock" in "Birkett v James" (1987), AC 297,** succinctly stated the principles at page 318 as follows:

"The power should be exercised only where the court is satisfied either (1) 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; (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will 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 it 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."

(5) The test in **"Birkett vs James"** (*supra*) has two limbs. The first limb is "**intentional and contumelious default"**. The second limb is "**inexcusable or inordinate delay and prejudice**."

(6) In, **Pratap v Chirstian Mission Fellowship, (2006) FJCA 41, and Abdul Kadeer Kuddus Hussein V Pacific Forum Line, IABU 0024/2000,** the Court of Appeal discussed the principles expounded in **Brikett v James** (Supra).

The Fiji Court of Appeal in **"Pratap V Chrisitian Mission Fellowship"-**(supra) held;

*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 this court on several occasions. Most recently, in **Abdul Kadeer Kuddus Hussein v Pacific Forum Line – ABU0024/2000 – FCA B/V 03/382)** the court, readopted the principles expounded in **Birkett v James [1978] A.C. 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'."

(7) The question that arises for consideration is what constitutes "**intentional and contumelious default"** (First Limb). The term **"Contumely"** is defined as follows by the Court of Appeal in **Chandar Deo v Ramendra Sharma and Anor, Civil Appeal No, ABU 0041/2006,**

"1. Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as tends to dishonour or humiliate.

2. Disgrace; reproach."

(8) In **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5, Lord Justice Parker succinctly stated,

"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the

question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."

Lord Justice Nourse in Choraria [Girdharimal] v Sethia (Nirmarl Kumar) Supreme Court of Judicature Case No. 96/1704/B, C.A. 15.1.98 said;

"However great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground."

It has been further stated by ***Nourse J:***

"That is the principle on which the court must now act. Whether it is identified as being comprehended within the first limb of ***Birkett v James*** *or as one having an independent existence appears to be a point of no importance. I have already said that it is clear that the relevant ground of decision in* ***Culbert*** *was based on the first limb of* ***Birkett v.James****. In other words, it was there effectively held that the plaintiff's conduct had been intentional and contumelious.*

In my view that conclusion was well justified on the facts of the case, which demonstrated not only the plaintiff's complete disregard of the rules but also his full awareness of the consequences. He had, at the least, been reckless as to the consequences of his conduct and, on general principles that was enough to establish that the defaults had been intentional and contumelious."

(9) Therefore, the failure to comply with peremptory orders and/or flagrant disregard of the High Court Rules amounts to contumaciousness.

(10) The next question is what constitutes **"inexcusable or inordinate delay and prejudice".**

In **Owen Clive Potter v Turtle Airways LTD**, Civil Appeal No, 49/1992, the Court of Appeal held,

"(Inordinate)....means so long that proper justice may not be able to be done between the parties. When it is analysed, 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."
And at page 4, their Lordships stated:

"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 pursing his action or perhaps any action against the defendant."

In **Tabeta v Hetherigton** (1983) The Times, 15-12-1983, the court observed;

"Inordinate delay means a delay which is materially longer that the time which is usually regarded by the courts and the profession as an acceptable period."

(11) The Court of Appeal, in **"New India Assurance Company Ltd, V Rajesh k. Singh and Anor, Civil Appeal No, ABU 0031/1996,** defined the term "prejudice" as follows,

"Prejudice can be of two kinds. It can be either specific that is arising from particular event that may or may not occur during the relevant period or general, and prejudice that is implied from the extent of delay."

(12) Lord "Woolf" in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** has discussed the principles for striking out for "Abuse of process" (Second ground in Order 25, rule 9) as follows,

*"This conduct on the part of the appellant constituted an abuse of process. The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

(13) The Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** affirmed the principle of **Grovit –v- Doctor** as ground for striking out a claim, in addition to, and independent of principle set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordships held:-

> *"It may be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in Grovit and Ors v Doctor [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in Birkett v James [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court"*

(14) It seems that under **"Grovit and Others v Doctor and Others"** (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice.

(D) ANALYSIS

(1) On 08th July 2014, the Court issued Notice of its own motion pursuant to Order 25, rule 9 of the High Court Rules for the Plaintiff to show cause as to why the action ought not to be struck out for want of prosecution or an abuse of the process of the Court.

(2) The Notice required the Plaintiff to appear in Court on 04th August 2014 to show cause as to why the action ought not to be struck-out for want of prosecution or an abuse of the process of the Court.

(3) However, instead of filing show cause on the notice returnable date, i.e. 04th of August 2014, the Plaintiff on 01st of August 2014, filed an affidavit sworn by "Shanon Shavneel Prasad" entitled **"Plaintiff's Affidavit to show cause and reinstate the Action."**

(4) The deponent "Shanon Shavneel Prasad" in his affidavit deposes as follows in paragraphs 15- 24 entitled **"Current Application"** and **"Order"**.

15. *The Plaintiff is still desirous of prosecuting this action.*

16. *The Order taking this action off the cause list and the court record will show that the only reason for taking this action off the cause list was not due to a substantive issue but solely due to the Plaintiff's failure to attend Court.*

17. *The Plaintiff has not intentionally disregarded the court process and not intentionally refused to attend to Court.*

18. *The Plaintiff has now attended with Messrs Gordon & Co and appointed Messrs Gordon & Co as their legal counsel to reinstate this action and move this action towards a speedy trial.*

19. *I state that at no point in time has the Plaintiff caused unreasonable, inexcusable, or inordinate delays to the Defendant's. The majority of pre-trial steps and issues are all complete and counsel for the Plaintiff is ready to take a hearing date as per the Honourable Courts fixture.*

20. *Furthermore, the Defendant's prior to this matter being taken off the cause list had filed a Statement of Defence. Therefore, the matter still requires further pre-trial pleadings and attendance and as such, there was no imminent delay as these steps would have taken further time.*

21. *This action was taken off the cause list due to the Plaintiff's non appearance and not on substantive grounds; I pray that this Court reinstate this action.*

22. *If this action remains off the cause list due to the non-attendance of the Plaintiff, the Plaintiff will suffer irreparable loss as the Plaintiff is seeking before this Court to recover monies held on account of the Plaintiff by the Defendants on Trust. If the Plaintiff is not allowed to proceed with his action, it will not have any other remedy or redress and will not be able to recover its money to which the Plaintiff has sole beneficial entitlement.*

23. *It would further cause prejudice to the Plaintiff as it stands to lose its money which the Defendant's hold in a fiduciary capacity and which the Defendants have no legal and/or equitable right to retain.*

Order

24. *I pray for an order in terms of the Summons filed herein for this action to be reinstated and that costs be costs in the cause.*

(5) As may be seen from paragraph 24 of the Affidavit, the Plaintiff seeks an order in terms of the Summons filed. This is an absurd state of affairs. The reality is that there is no summons or notice of motion filed by the Plaintiff to restore and re-instate the Plaintiff's claim. I am at a loss to understand the relevance of paragraph 24. I must stress here that the state of the proceedings is for the Plaintiff to show cause under Order 25, rule 9.

(6) Therefore, I must stress here that the Plaintiff has no standing to pray for order in terms of the summons.

(7) Be that as it may, the Court issued notice of its own motion pursuant to Order 25, rule 9. The Plaintiff is required pursuant to the Notice to show cause as to why the action ought not to be struck-out for want of prosecution or an abuse of the process of the court. It is paradoxical that the onus is upon the Plaintiff to provide cogent and credible explanation.

(8) The Plaintiff relies on the Affidavit of "Shanon Shavneel Prasad" sworn on 18th July 2014.

(9) Before I discuss the facts deposed in the affidavit, I am compelled to determine the acceptability of the Affidavit of "Shanon Shavneel Prasad". The Defendants in their Affidavit in reply did not make any reference to the acceptability of the Plaintiffs Affidavit. Nevertheless, this court is of the view that the court is bound to look into the acceptability of the Affidavit of "Shanon Shavneel Prasad" since it has been a long standing rule that affidavit is the normal method of proof where evidence is required at an interlocutory stage. Because there should be some evidential basis to exercise a judicial discretion.

(10) The deponent "Shanon Shavneel Prasad" in his Affidavit deposed as follows in paragraphs 1, 2 and 3;

1. *I am a Second Officer employed with Fiji Airways Limited*

2. *The Majority Shareholder and Director of the Plaintiff Company is my father, Mr. Vimal Deo Prasad ("Mr Deo") and I am duly authorised by the said Mr. Deo to depose evidence on behalf of the Plaintiff. Annexed and marked "A" is a copy of the Authority and Indemnity dated 30th June 2014.*
3. *I depose to the facts herein as within my own knowledge and that acquired by me in the course of administering the Plaintiff's affairs whilst being employed with the Plaintiff save and except where stated to be on information and belief and where so stated, I verily believe to be true.*

(11) The annexed copy of the Authority and Indemnity dated 30th June 2014 reads;

*I, **VIMAL DEO PRASAD** of 5 Mandarin Place, Lautoka, Fiji being the Majority shareholder and Director of Prasad's Nationwide Express Courier Limited hereby authorise and indemnify SHANON SHAVNEEL PRASAD to:*

i) Depose evidence on behalf of Prasad's Nationwide Express Courier Limited with respect to Lautoka High Court case No. 205 of 2012 – Prasad's Nationwide Express Courier Limited v Vipul M.D.M & Another.

ii) Depose evidence on my behalf.

iii) To swear all affidavits and sign all documents necessary for all Court proceedings on my behalf and on behalf of Prasad's Nationwide Express Courier Limited.

(12) **The annexed copy of the Authority and Indemnity does not make reference to Board resolution authorising "Shanon Shavneel Prasad" to depose to the facts stated therein. Since the Plaintiff is a Company, the authority can only be by Board resolution.** Therefore, I hold that the Plaintiff's affidavit is defective and a Nullity because there is no Board resolution authorising the deponent of the affidavit to swear it on behalf of the Plaintiff Company. Moreover, the deponent is employed with Fiji Airways Ltd.

(13) Therefore, the affidavit sworn by "Shanon Shavneel Prasad" cannot be used in evidence. **It is disregarded**. This may leave the court with no option but to dismiss the action, since there is no valid affidavit explaining the reasons for Plaintiff's inactivity for a period of 13 months to avoid the dismissal of the proceedings.

(14) Between 04th June 2013 and 08th July 2014, the proceedings remained stationary. No steps were taken by the Plaintiff to advance proceedings to trial. Moreover, on 23rd October 2013 the case was taken off from the cause list due to fourth consecutive non appearance by the Plaintiff. The matter went to sleep for 13 months. The action lay in abeyance until the registry on 08th July 2014 issued a notice pursuant to Order 25, rule 9. This must necessarily raise the question as to whether Plaintiff is serious about pursuing a claim for a substantial sum of money which he let it go to sleep for 13 months. After reviewing the history of the litigation, I interpose the view that there is either the inability to pursue these proceedings with reasonable diligence and expedition or lack of interest in doing so. Therefore, I must stress here that it is an abuse of Court process if actions are commenced or maintained without the intention to pursue them with reasonable diligence and expedition.

(15) **Certainly, this case falls within the category of "abuse of process" held in "Grovit and Others v Doctor and Others" (supra).** I echo the words of Lord "Woolf" " in **"Grovit and Others v Doctor and Others" (supra)**

"This conduct on the part of the appellant constituted an abuse of process. The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".

It has further stated by **Lord Woolf**:

"The Court had power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts, that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed."

Similar sentiment was raised in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006**

"It may be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in Grovit and Ors v Doctor [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in Birkett v James [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the

process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court"

(E) CONCLUSION

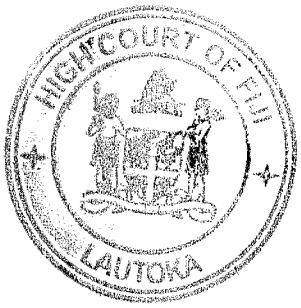
Having regard to the facts of this case, I apply the legal principles laid down in the case of **Grovit and Others v Doctor and others** (*Supra*). Accordingly, I conclude that the Plaintiff maintained the action in existence notwithstanding that it had no interest in having it heard.

This conduct on the part of the Plaintiff constituted an abuse of process.

(F) FINAL ORDERS

(1) The action is struck off.

(2) The Plaintiff is ordered to pay costs of $1000.00 (summarily assessed) to the Defendants which is to be paid within 14 days from the date hereof.



26/02/2015

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Jude Nanayakkara

Acting Master of the High Court

At Lautoka

26/02/2015